

IN THE HIGH COURT OF FIJI  
AT LABASA  
CIVIL JURISDICTION

HBC 39 of 2019

BETWEEN:                      VIRENDRA PRASAD

PALINTIFF

AND:                                SUN INSURANCE COMPANY LIMITED

DEFENDANT

Before                                M. Javed Mansoor, J

Mr. A. Sen for the plaintiff

Mr A. Vulaono for the defendant

Date of Trial                        30 July 2020

Date of Judgment                21 July 2023

# JUDGMENT

INSURANCE                      *Contract of insurance – Recovery of damages – Consumption of alcohol – Breach of conditions of contract – Hearsay evidence – Civil Evidence Act 2002, sections 4 & 6 – High Court Rules 1988, Orders 35 rule 5 (6) & 38*

The following decision is referred to in this judgment:

a.        *Vidya Wati v Rasik Kumar and Island Buses Limited [2004] FJLawRp 10; [2004] FLR 52; HBC 214.2003 (26 March 2004)*

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1.        The plaintiff filed action claiming damages in the sum of \$71,949.00 from the defendant under a motor insurance policy. The plaintiff avers that the defendant is refusing to pay sums due under the insurance contract, which was in force at the time the plaintiff's vehicle met with an accident. The defendant in its statement of defence denied liability under the insurance policy. Liability was denied *inter alia* on the basis that the plaintiff consumed alcohol, and, thereby, acted in breach of a condition of the insurance policy.
2.        The parties are agreed on the following matters. The plaintiff is the owner of Ford Ranger Twin Cab motor vehicle bearing registration number IP 750. The vehicle was insured with the defendant under Policy No. OSICLI60MVPP015224. On 4 May 2018, the plaintiff's motor vehicle was severely damaged after it went off the road in Qila, Taveuni. The plaintiff was driving the vehicle when the accident occurred. The motor vehicle insurance policy was in force at the time of the accident.
3.        The parties raised the following issues:
  - i.        "Did the plaintiff suffer losses and damages to the vehicle in the sum of \$71,949.00 as the result of the said accident?"
  - ii.       Is the plaintiff entitled to be indemnified by the defendant under the policy of insurance for the sum of \$71,949.00 for the damages caused to Ford Ranger Twin Cab, registration number IP 750?
  - iii.      Was the plaintiff under the influence of alcohol at the time of the accident?
  - iv.      Did the plaintiff unlawfully flee the scene of the accident?

- v. Whether the plaintiff misrepresented or suppressed any information. If so, what was the information suppressed?"
4. As the main issue before court was whether the plaintiff was under the influence of alcohol at the time of the accident, it fell upon the defendant to begin the case in terms of Order 35 rule 5 (6) of the High Court Rules 1988.
5. When trial commenced, the parties agreed that the damages sustained by the vehicle was in the sum of \$71,949.00 though this was not stated as an agreed fact in pre-trial minutes. This is given as the sum insured in the insurance renewal certificate for the period ending 18 August 2018. Therefore, court need not answer the first issue raised by the parties.
6. The sole witness for the defendant was its claims manager, Mr. Vinay Dutt Singh. When the witness sought to produce certain police statements, the plaintiff objected and asked that a ruling be made on the matter. The objection was grounded on the rule of hearsay and the plaintiff complained that it had not been given notice of the statements sought to be adduced as hearsay evidence in terms of section 4 of the Civil Evidence Act 2002. By ruling dated 30 July 2020, the police statements were allowed to be admitted. The court ruled that it would take into consideration the weight of the statements as permitted by section 6 of the Civil Evidence Act. Court noted that a party may summon and cross examine the maker of a statement, and that this was sufficient safeguard.
7. After the court's ruling, Mr Sen objected to the admission of the police statements, saying that the documents are photocopies, and not the originals. He submitted that the statements said to have been issued by the Taveuni police station may have been subject to interference. The defendant's objection will be addressed below in dealing with the question of weight in terms of Section 6 of the Civil Evidence Act.

#### **Defendant's evidence**

8. The witness said that there were two others travelling in the plaintiff's car when the accident occurred. Those passengers, Shivneel Prasad (Shivneel) and Isoa Katudrau (Isoa) gave statements to the police. The witness said that the plaintiff had left the scene of the accident, although he was not supposed

to do so. He produced the statements given to the police by Shivneel and Isoa, together with a statement from another witness to the accident, Vikashni Naidu (Vikashni). He also tendered a report dated 7 June 2018 from the Taveuni police station.

9. Reading Vikashni's statement the witness said the vehicle landed by the side of her house. She saw the driver, Vijendra Prasad, coming out of the wrecked car. The vehicle had veered off the road. Seeing the driver's behaviour, she thought he was drunk.
10. Reading Shivneel's statement, Mr. Singh said that Shivneel had seen the vehicle veering off the road. The statement said that the plaintiff lost control of the vehicle. Vijendra Prasad alias Biju and others had brought 6 bottles of beer. Later, they brought another 6 bottles. They were drinking in the vehicle. Isoa insisted that he would drive as Biju – the plaintiff- was drunk.
11. According to the statement, Isoa told police that Biju and Shivneel brought 6 bottles of beer. He wanted to drive as they were drinking. Although he insisted on driving, Biju would not let him drive the vehicle. Biju and Shivneel were both drunk. Isoa carried Biju and placed him on the driver's seat. He sat behind the driver. Their vehicle almost bumped into his uncle's vehicle, which was parked within the compound of the house. Biju drove the vehicle at high speed.
12. The defendant's witness stated that the motor vehicle policy contained a condition that if any person consumed alcohol or drugs over the prescribed limit or refuses a blood test or a breathalyser test, commits a breach of the contract of insurance.
13. The witness said that the plaintiff was driving under the influence of liquor and made a false declaration. In the claim form submitted to the defendant, when asked about the amount of liquor consumed, the plaintiff stated "N/A". In response to the question whether there was a threat of police action, the witness said, the plaintiff left the question blank. The insurance company, the witness said, made its position known to the plaintiff by letter dated 20 July 2018, by which it declined to settle the claim, as their investigations revealed

that he was under the influence of liquor at the material time, and that he also fled from the scene of the accident.

14. In cross-examination, Mr. Singh said that he has not seen the originals of the police statements and that the documents presented to court were given by the investigator engaged by the company. He could not tell whether there was interference with those documents. He did not know what language was spoken by the witnesses though he declared that these documents were not fabricated. The witness said he was not present when statements were issued as true copies. He knew that there was no report of a breathalyser test or a blood test. He also admitted that he did not visit Taveuni or check the investigation file. He conceded that he did not make an effort to summon the makers of the police statements.

#### **Plaintiff's evidence**

15. The plaintiff is a yaqona farmer. He said he has been driving a motor vehicle for about 16 years. In that time, he has not been convicted of violating any road laws. He denied taking alcohol on the day of the accident. His testimony is that two weeks prior to the accident, he was diagnosed with dengue and was prescribed medication. He was advised by doctors not to consume alcohol. Therefore, he did not drink on the day of the accident.
16. The plaintiff explained that the road on which the accident took place was under repair. When he tried to turn near the roundabout, the vehicle slipped and went over the road. He said that there were no road signs indicating road repairs. The witness said that he had stayed over at the farm and was returning home to pick his wife when he met with the accident.
17. In cross examination, the plaintiff said that he went to a hospital as he was in pain. He had no documentation to confirm the hospital visit. He could also not corroborate that he had dengue two weeks prior to the accident, and was prescribed medication for the illness. After leaving hospital on the day of the accident, the plaintiff said he did not go home. He went to the residence of the person who took him away from the scene of the accident.
18. The plaintiff was questioned concerning the police statements given by the two passengers in his vehicle. He said Shivneel works for him. He also called

him a nephew. Shivneel was in the plaintiff's vehicle at the time of the accident. He said that Shivneel told him that he did not make a statement to the police. The plaintiff denied going to Isoa's house on that day. He denied the statements made by Shivneel and Isoa. He denied running away from the scene of the accident. He said he waited at the accident site. As the police did not arrive, he went to a nearby private hospital, accompanied by the person who arrived at the accident scene. The plaintiff said he has not been charged for any offence by the police even though two years have lapsed since the accident.

### **Evaluation of evidence**

19. The statements made to the police by Vikashni, Shivneel and Isoa along with a report from the Taveuni Police were admitted as evidence at the trial. The court has to assess the evidentiary value of those statements. Section 3 (1) of the Civil Evidence Act provides that in civil proceedings, evidence must not be excluded on the ground that it is hearsay. The Act requires a party proposing to lead hearsay evidence to give the other party notice of the fact.
  
20. Section 4 of the Act states:
  - “(1) A party proposing to adduce hearsay evidence in civil proceedings must, subject to the following provisions of this section, give to the other party or parties to the proceedings -
    - a. a notice of that fact; and
  
    - b. on request, the particulars of or relating to the evidence, as is reasonable and practicable in the circumstances for the purpose of enabling the other party or parties to deal with any matter arising from it being hearsay.
  
  - (2) The rules of court-
    - a. may specify classes of proceedings or evidence in relation to which subsection (1) does not apply; and
  
    - b. specify the manner in which (including the time within which) the duties imposed by subsection (1) are to be complied with in the cases where it does apply.
  
  - (3) Subsection (1) may also be excluded by agreement of the parties, and the compliance with the duty to give notice may be waived by the person to whom notice is required to be given.

(4) A failure to comply with subsection (1) or rules made under subsection (2)(b), does not affect the admissibility of the evidence but may be taken into account by the court-

- a. in considering the exercise of its powers with respect to the course of proceedings and costs; and
- b. as a matter adversely affecting the weight to be given to the evidence in accordance with section 6”.

21. The defendant stated that it gave notice of producing the police statements as hearsay evidence. The notice is said to have been sent by ordinary post and email. The plaintiff denied receiving notice. If notice was given, the defendant should have been in a position to provide proof of notice. It was not able to do so. However, section 4 (4) of the Act allows the admissibility of evidence, even where such notice is not given, with the possibility that the weight of evidence may be adversely affected.

22. Section 6 sets out the considerations relevant to the weighing of hearsay evidence.

“In estimating any weight to be given to hearsay evidence in civil proceedings, the court must have regard to any circumstances from which any inference can reasonably be drawn as to the reliability or otherwise of the evidence, and in particular to the following-

- a. whether it would have been reasonable and practicable for the party by whom the evidence was adduced to have produced the maker of the original statement as a witness;
- b. whether the original statement was made contemporaneously with the occurrence or existence of the matters stated;
- c. whether the evidence involves multiple hearsay;
- d. whether any person involved had any motive to conceal or misrepresent matters;
- e. whether the original statement was an edited account or was made in collaboration with another or for a particular purpose;

- f. whether the circumstances in which the evidence is adduced as hearsay are such as to suggest an attempt to prevent proper evaluation of its weights”.
23. The plaintiff submits that court ought to totally disregard the police statements adduced through the defendant’s witnesses. As the statements tendered by the defendant are photocopies, the plaintiff contended, the court has difficulty in deciding the authenticity of the documents. The plaintiff submitted that the statements produced by the defendant involves multiple hearsay, and that they cannot be given any weightage without summoning the makers of those statements. It was said that the statements given to the police by Shivneel and Isoa could have been tampered with, and that, therefore, they cannot be relied upon.
24. The makers of the statements given to the police reside in Taveuni. No evidence was given that the defendant made an attempt to obtain the presence of the witnesses to the accident whose statements were tendered to court. In fact, in cross examination, Mr. Singh admitted that he did not make an effort to contact the makers of the statements. Prior to the trial, the plaintiff did not seek any particulars of the statements sought to be led as hearsay evidence. Mr. Sen explained that this was because the plaintiff was not given notice that hearsay evidence would be led at the trial.
25. There is force in the plaintiff’s argument. The makers of the statements did not give evidence. The plaintiff is thus deprived of testing the veracity of those statements in cross examination. The police officer who recorded the statements did not give evidence. The witness, Singh, was provided the statements by the defendant’s investigator, who did not give evidence. The witness has not seen the investigation file. As conceded in his evidence, he could not say whether the statements were properly recorded. Clearly, the police statements were not the best evidence that could have been given.
26. The defendant’s casual attitude to trial preparation has made it hard for itself. Nevertheless, the court must come to findings on the basis of the evidence tendered by the parties and by deciding upon the respective weight to be given to the evidence. In doing so the court must take into consideration the overall circumstances of the case and make its findings on a balance of probability. The court is of the opinion that the approach taken by Winter, J



in *Vidya Wati v Rasik Kumar and Island Buses Limited*<sup>1</sup> - which both parties made reference to - can be justifiably applied in these proceedings. The plaintiff also referred to the decisions in *Digitaki v Mobil Australia Ltd*<sup>2</sup> and *Jagan Nath v Dennis Narayan and Nathan*<sup>3</sup>.

27. There is nothing to suggest that the police statements produced on behalf of the defendant were edited or that these have been produced in order to mislead court. The plaintiff did raise the possibility that the contents of the police statements are unreliable as the makers of the statements were not summoned and the documents are photocopies. However, the plaintiff did not point to any specific thing that raised suspicion regarding those statements. The fears expressed by the plaintiff are mainly speculative.
28. In his evidence, the plaintiff did not deny that Shivneel and Isoa travelled in his vehicle at the time of the accident. The statement by Vikashni was recorded by Cpl Josefa of the Taveuni Police Station. The statement was taken at 10.15 pm on 4 May 2018. Shivneel's statement was given to Cpl Josefa at 1.10 pm on the day after the accident. Isoa Katudrau's statement was given at 1.50 pm on the day after the accident to Cpl Josefa. The circumstances in which these statements were given are not before court. The plaintiff denies the contents of their statements. These statements, he said, are not true.
29. The plaintiff denied that he consumed alcohol on the day of the accident. He was down with dengue about two weeks prior to the accident, and was on medication. Therefore, he said, he did not consume alcohol. There was no independent evidence to back his claim.
30. There is no explanation as to why the two passengers who travelled in his vehicle, Shivneel and Isoa, would give false statements to police stating that the plaintiff had consumed alcohol. The plaintiff lives and runs his farm in Taveuni. Shivneel and Isoa reside in Qila road, Taveuni. Shivneel is said to work for him. He referred to him as a nephew. The plaintiff had the opportunity to summon Shivneel or Isoa to give evidence on his behalf. By doing so, the defendant's evidence could have been challenged. He did not do

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<sup>1</sup> HBC 214.2003 (26 March 2004)

<sup>2</sup> [2008] FJCA 109; ABU 100.2006 (2 May 2008)

<sup>3</sup> [2018] FJHC 356; HPP 09.2012 (27 April 2018)

so. Vikashni – also from Taveuni – said in her statement that the driver of the vehicle appeared to be drunk. What she says is not detailed as the statements given by Shivneel and Isoa. However, her statement adds to the likely scenario emerging from the evidence.

31. The plaintiff did not provide a medical report to corroborate his evidence of having gone to a hospital after the accident. He said he did not suffer any injuries from the accident. He was, however, in pain, he said. He did not mention his hospital visit to the defendant's investigator, the plaintiff explained, as he was not asked about it. There is no evidence whether the plaintiff saw a doctor or whether any tests were performed on him at the hospital. No mention was made of the name of the private hospital he claims to have visited.
32. The plaintiff was in the best position of having given some corroborative evidence to show he went to hospital after the accident. He did not do so. Vikashni's statement appears to have been recorded within a couple of hours of the accident. This suggests a police presence at the site of the accident within that time. The plaintiff left the place before the arrival of the police.
33. Regulation 63 (2) of the Land Transport (Traffic) Regulations 2000 promulgated under the Land Transport Act 1998 requires a driver involved in a motor vehicle accident on a public street to report the particulars and circumstances of the accident to the police as soon as practicable or, in any event, within 24 hours.
34. There is clear evidence that the plaintiff did not report the accident to the police. His explanation for not waiting for the police to arrive is that he was taken to hospital by a relative who arrived at the scene of the accident. This, he says, was after he waited at the scene for the police. He does not say that he informed the police. His omission to report the matter to police must be considered as not having been reasonably explained.
35. After the accident, the plaintiff says he did not go to his residence. Instead he was taken to the residence of the person who took him to hospital. The reason for this is not explained. In his testimony, he says that he met with the accident on his way home to pick up his wife. According to the police report

given by the Taveuni police, he was not at home when they visited his residence. The plaintiff does not explain why he changed his mind and went somewhere else, instead of his residence. By going to a place other than his residence, he avoided a meeting with the police. What resulted from not making himself available to the police was that a breathalyser test or blood test could not be performed to ascertain whether the plaintiff had consumed alcohol at the time of driving the vehicle. The plaintiff must have known that immediate police investigations, including a breathalyser test, would follow once the accident is reported to police.

36. In cross examination, the plaintiff was asked about his reply to the question in the motor vehicle claim form on alcohol consumption. The reply was "N/A". He said he did not know how to write. The form was filled by a representative of the insurance company. The plaintiff signed the claim. The defendant says his reply to the question on alcohol consumption is a misrepresentation. The form also queried whether there was a likelihood of the police charging him for breach of the law. His reply was in the negative. The defendant asserted this also to be a misrepresentation. The plaintiff's response is that no charges were filed by the police even after two years of the accident.
37. The report dated 7 June 2018 from the Taveuni police was also objected to by the plaintiff as hearsay. The report states that according to witnesses, the driver of the vehicle was driving dangerously, and he appeared to be drunk. The report is not helpfully detailed. It does not clearly state as to when the police visited the accident scene or recorded statements. The names of those who gave statements are not mentioned. The maker of the report was not summoned to court. The police report states that upon their arrival at the scene, the driver fled, and that a check made at his residence proved futile as he was not at home. Although the report does not state when police visited his home, the wording of the report can be taken as suggesting that the plaintiff's residence was visited on the day of the accident. His absence from home confirms what the plaintiff himself said, that he did not go to his residence after the accident. The report can be taken as confirming the police visit to the scene of the accident and to the plaintiff's residence, although in other respects the report's usefulness is limited.

38. The police report has little reliability in comparison to a breathalyser or blood test to determine alcohol consumption. As in the case of Vikashni's statement, the police report alone cannot be the basis of an adverse finding. Vikashni's statement and the police report, though, suggest that Shivneel and Isoa gave statements to the police. The court is of the view that the statements from Shivneel and Isoa are reliable and can be the basis of findings of fact. No prejudice is caused to the plaintiff by giving these statements necessary weight. Admitting the police statements without summoning their makers and giving them weight must not be seen as a general relaxation of the court's scrutiny when evaluating evidence. Weight has been attributed in the overall context of this case.
39. Consequently, on a preponderance of probability, the court finds that the plaintiff was drunk at the time the subject motor vehicle met with the accident. The insurance policy specifies the areas that are not covered. One such instance is, if at the time of the accident the vehicle is driven by a person who is under the influence of alcohol or any drug. The policy is vitiated where there is a violation of this condition.
40. Section 11 of the Insurance Law Reform Act 1996 describes a contract of insurance as a contract based on utmost good faith. The section states that there is implied in such a contract a provision requiring each party to the contract to act towards the other party, in respect of any matter arising under or in relation to it, with the utmost good faith. The obligations on the parties to observe utmost good faith runs through the validity of the contract. This includes any claims made under the contract. The plaintiff made a claim for \$71,949.00. The plaintiff, as an assured, was obliged to be transparent and not conceal material circumstances relating to the accident. The facts concerning the accident and its aftermath were best known to the plaintiff. The insurer was entitled to know the circumstances that led to the damage of the vehicle. The defendant claimed that the plaintiff did not make a truthful declaration in his claim form. The court concurs with the defendant.
41. By his conduct, the plaintiff has acted in breach of the insurance contract. He has also offended the requirements of utmost good faith required by the contract. If a contract, which calls for the observance of the utmost good faith

is not observed by either party, the other party may avoid the contract on that ground. In these circumstances, the court declines to hold with the plaintiff.

**ORDER**

- A. The action is dismissed
  
- B. The plaintiff is directed to pay the defendant costs summarily assessed in a sum of \$2,000.00.

Delivered at **Suva** this **21<sup>st</sup>** day of **July, 2023** via **Skype**



A handwritten signature in blue ink, appearing to read "M. Javed Mansoor".

M. Javed Mansoor  
Judge