

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. **HBC 434 of 2019**

BETWEEN: **KOROQAQA & VATUWAQA CARRIERS FIJI LIMITED** having its
registered office at 323 Fletcher Road, Vatuwaqa, Suva.

PLAINTIFF

AND: **PENI BUTUCAMA DELANA** of Waila Feeder Road, Nausori D/L 765020
GRP 2, 3, 4.

1ST DEFENDANT

AND: **ROVEENA SHAINAZ** of Lot 8, Sekoula Road, Laucala Beach, Nasinu.

2ND DEFENDANT

BEFORE **:** **Hon. Justice Vishwa Datt Sharma**

COUNSEL: **Mr. Kumar V.** for the Plaintiff

Mr. Naidu R. for the 1st and 2nd Defendants

DATE OF JUDGMENT: 24th January, 2025

JUDGMENT

[Action for Losses and of Income, Damages arising from collision]

A. Introduction

1. This is an Action filed by the Plaintiff claiming for losses and damages arising from the collision of Two (2) motor vehicles near Vesari bridge in Lami. The Plaintiff is the owner of a Mazda panel van registration number FP884 claims losses of income from the daily use of the vehicle on the basis that the Plaintiff's vehicle which was doing delivery for Fiji Times was damaged beyond repair in the collision. The Plaintiff alleged that the collision was caused solely by the negligence of the 1st Defendant, the driver of a minivan with registration number LM 246, owned by the 2nd Defendant.

(a) The First and Second Defendants filed their statement of Defence admitting that the 2nd Defendant is the registered proprietor of Motor Vehicle Registration Number LM 246 that was driven by the First Defendant, that there was a collision between Motor Vehicle Registration No. LM246 driven by the First Defendant and the Motor Vehicle Registration No. FP884 on the 15th March 2019. The Plaintiff's Vehicle Registration No. FP 884 came onto the path of the 1st Defendant. No admission are made as to the loss and/or damages suffered by the Plaintiff. The Defendants denied the claims for \$23,986 and does not accept the write off value of the vehicle FP884. The claim for loss of income is derived on the basis that the Plaintiff had an alternative transport to continue supply of the Fiji Times from Suva to Lautoka. It is also denied that Michael Rohit Randeer Prasad was injured due to the collision and are not liable to pay any damages since he is receiving compensation Pursuant to the Accident Commission Compensation Fund. It is alleged by the Plaintiff that the collision was caused solely by the negligence of the First Defendant, the driver of the Minivan, Registration No. LM 246 owned by the 2nd Defendant. Further, the Plaintiff has been compensated for the damages/loss by its insurer. Therefore, the Plaintiff is not entitled to the reliefs sought therein.

2. The Action proceeded to trial. The Plaintiff called five (5) witnesses and the Defence two (2) witnesses.

3. *[PW1] Jayant Pratap [summarized]:*

He has a carrier business, Koroqaqa and Vatuwaqa Carriers and a contract with Fiji Times to deliver Newspaper from Suva to Lautoka on a daily basis. On 19 March 2019, Alvin Atish Kumar was driving FP 884, belonging to the Plaintiff going on delivery of the Fiji Times to Western Division when the accident took place on Vesari Bridge. The driver of minivan LM 246 Peni Butucama Delana caused the accident.

At the time of the accident, Michael Rohit Randeer Prasad, delivery boy was with Alvin Atish Kumar the owner of the minivan LM 246 was Roveena Shainaz, the Second Defendant in this proceedings.

FP884 goes daily and 7 days a week trip from Suva to Lautoka to deliver the Fiji Times. Each trip was paid \$365 VEP. Michael got hurt in the accident and was admitted. The driver Alvin Kumar did not get hurt. Michael was a permanent worker but he never returned to work. However, he went to Labour department instead. The Plaintiff paid Michael \$102 per week for 32 weeks and thereafter stopped the payment of wages since Accident Compensation Commission Fiji had paid Michael.

The vehicle FP884 was insured to Capital Insurance [Exhibit-P3]. Quotation from Koroqaga and Vatuwaqa Carriers to Capital Insurance [Exhibit - P6] was in the sum of \$16,500. The memorandum of Agreement was entered between the Plaintiff and Capital Insurance and hence Capital Insurance paid the Plaintiff a sum of \$9,900 only, net off policy excess \$1,000 - write off settlement to the Vehicle Registration No. FP 884 dated 23 May 2019. The witness told Court that he did not have any report from an expert on the damage caused to the Plaintiff's vehicle FP 884 nor does he have a mechanical assessment report and the vehicle is a write off. Agreed that he has a duty to mitigate his loss. He relies on his own worker to carry out repair works on any damages to his vehicle and had second parts to replace and fix the damages.

4. [PW2] Alvin Atish Kumar told Court and confirmed that he was the driver of FP884 heading to Lautoka to deliver the Fiji Times on 15 March 2019 when the oncoming vehicle, LM 246 hit the right side of his vehicle and went to the opposite side facing Suva. Side glass of FP884 was broken and lay on the bridge, the door was opened since it was not dented. Michael got out. He and three others were in the van. In cross examination Alvin told Court that all glasses were broken, but front doors were not damaged. However, glass was broken.

5. [PW4] Michael Rohit Randeer Prasad
He was the delivery boy. Had an accident in Vesari at 1.00am in the morning. Seated in front beside the driver in the middle. He couldn't open the door and came out of the window. Vehicle was written off, all glass broken, vehicle damaged in the front, back, side, and everywhere was damaged. Admitted for 2 - 3 weeks and worked for the Plaintiff. Plaintiff Company paid him 2/3 wages weekly because he was not working. He earned \$165, net \$102 weekly. He received Accident Compensation Commission Fiji payment of \$19,000 and the Plaintiff stopped payment of his 2/3 wages. In **Cross Examination** he said he did not know the full sum paid by the Plaintiff. The Supervisor decided which vehicles out of five will go onto delivery to Lautoka.

6. [PW5] Ashika Narayan told Court that the First Defendant was charged for Dangerous Driving - Case No. 22/21 refers. He pleaded guilty and was convicted and fined \$200 and disqualified from driving.

Defence Case

7. [DW1] - Roveena Shainaz told Court that she was the proprietor of Minivan Registration No. LM246 which was involved in an accident on 15 March 2019 with motor vehicle FP884. Vilikesa Rinasau was the permanent driver. She did not authorize Peni Delana to drive LM246. However, she didn't know Peni Delana was driving LM246 on the day of the accident.

In cross examination she confirmed that Vilikesa Rinasau had LM246 with him on the day of the accident. He has since passed away.

8. [DW2] Taina Tamata a sales officer at Capital Insurance testified that she has been working for the company since 8 April 2008. The Plaintiff was a client in 2019 and to the current. The Plaintiff has taken out vehicle insurance policy for 25 vehicles including FP884. FP884 was insured for \$12,000, involved in an accident on 15 March 2019. She took photographs on 01 April 2019 of the vehicle. Insurance Company offered to pay the Plaintiff \$10,900 less excess of \$1,000. Parts were not readily available, so the accident vehicle was written off. In cross examination the witness told court that the pre-accident value was \$10,900. Capital insurance does not carry its own independent assessment on the value of the vehicles.

B. Determination

9. It is not in dispute that the Plaintiff is the registered proprietor of the Motor Vehicle Registration No. FP 884 and that the First Defendant was the driver of the Motor Vehicle Registration No. LM 246 on the 15 March 2019.
10. The Second Defendant is the registered proprietor of the Motor Vehicle No. LM 246.
11. There was a collision between Motor Vehicle Registration No. LM 246 and Motor Vehicle Registration No. FP 884 on 15 March 2019.
12. It is agreed that the First Defendant was charge for Dangerous Driving on 18 February 2021 and the Driver of Motor Vehicle registration No. FP884 was issued with a TIN for driving motor vehicle contravening Licence condition.

(i) Conviction

The First Defendant was convicted for Dangerous Driving on 31 March 2021.

(ii) Liability of Second Defendant

The second defendant is the registered proprietor of motor vehicle registration no. LM246.

The issue for this Court to determine is "**whether at the time of the accident on 15 March 2019, The First Defendant was driving for the Second Defendant as her servants and/or agent and "whether the Second Defendant is vicariously liable for the actions of the First Defendants?**

13. [DW1] - The second Defendant's evidence was that she had Vilikesa Rinasau as the fixed and permanent driver during the time of the accident. She refuted that she employed or engaged and/or authorized the First Defendant to drive her Motor Vehicle Registration No. LM246 on 15 March 2019. She only came to know that her motor vehicle LM246 at the time of the accident on 15 March 2019 was driven by the First Defendant, Peni Butucama Delana.
14. It is important to consider the Legal Principle which make an owner vicariously; liable for the negligent driving of his vehicle by another. Where the owner is not driving himself, proof of ownership of the vehicle is prima facie evidence that the vehicle at the material time was being driven by the owner's servant and/or agent.
15. Reference is made to the case of **Barnard v Sully** which provides:

"Where a Plaintiff in an action for negligence proves that damage has been caused by the Defendant's motor car, the fact of ownership of the motor car is prima facie evidence that the motor-car, at the material time, was being driven by the owner or by his servant and/or agent."

16. Lord Justice Scrutton said at pg. 558:

'But it was evidence which was liable to be rebutted by proof of the actual facts.'

17. In **Morgans v Launchbry** and others [1972] 2 ALL ER 606 (HL) it was held:

"In order to fix liability on the owner of a car for the negligence of its driver, it was necessary to show either that the driver was the owner's servant or that, at the material time, the driver was the owner's servant or that, at the material time, the driver was acting on the owner's behalf as his agent. To establish the existence of the agency relationship it was necessary to show that the driver was using the car at the owner's request, express or implied, or his instructions, and was doing so in performance of the task or duty thereby delegated to him by the owner, the fact that the director was using the car with the owner's permission and that the purpose for which the car was being used was one to which the owner has an interest or concern, was not sufficient to establish vicariously liability.

18. The evidence of fact was given by the second defendant, Roveena Shainaz to rebut the presumption that the first defendant, Peni Butucama Delana is not her servant and/or agent.
19. The second defendant confirmed that she did not employ the first defendant rather employed Vilikesa Rinasau who drove LM 246 for the second defendant. The second defendant's evidence was that she did not authorize the first defendant to drive LM246 and the First Defendant drove the minivan without second defendant's knowledge. The First defendant in his caution interview statement to the Police told that he was driving for Rajnil Naidu [Exhibit - P7].
20. Therefore, with above evidence of fact in mind together with the two (2) case authorities' hereinabove, the second defendant Roveena Shainaz cannot be held vicariously liable for the actions of the First Defendant of 15 March 2019.
21. The First Defendant, Peni Butucama Delana was charged by the Police for Dangerous Driving on 18 February 2021 and pleaded guilty. He was accordingly fined and disqualified from driving.

(iii) Repair Cost of Plaintiff's vehicle FP 884

22. The Plaintiff in his statement of claim is claiming for repair costs of Vehicle Registration No. FP884 which according to him was completely written off amounting to \$23,986 and that quotation will be produced at the discovery stage.
23. However, no quotation for repair works at \$23,986 was produced and for tendered into evidence at the trial.
24. To establish the Plaintiff's claim, he must prove the market value of the Motor Vehicle FP 844 at the time it was involved in the accident to allow the Court to determine the amount payable to the Plaintiff.
25. No evidence on pre-accident market value of the motor vehicle, FP884 was produced. However, PW1 said the pre accident value of FP884 was \$25,000. No valuation report was produced at the trial to substantiate the pre-accident value of the vehicle. Further, no evidence was produced on the parts that needed to be replaced as a result of the aftermath of the accident.
26. [PW1] - Jayant Pratap in cross examination told court that he was dismantling the vehicle FP884 and threw the vehicle parts which is evident of the fact that the Plaintiff had no interest in repairing his vehicle FP884 and put it back to the pre-accident condition.

27. The question that arises then is, how can the Plaintiff then claim for the repair costs of the vehicle FP884 when he has no interest in repairing his vehicle and putting it back to its pre-accident condition?"

28. The fundamental principle of the law on compensation is well settled and is that"-

"a person whose vehicle has been damaged is entitled to compensation for the loss caused, compensation that is restitution *integrum* which is said to mean that **"so as money can do it, the injured person should be put in the same position that he would have been if he had not sustained the wrong."** A person is entitled to the cost of repair to the damaged vehicle. In the case where the costs of repairs exceeds the value of the damaged vehicle to be repaired, then the measure of damage is the market value of the damaged vehicle: **Darbishire v Warran** [1963] 3 All ER 310, **Hall v Barclay** [1937] 3 ALL ER 620.

29. However, the **Basic Legal Principle's** in relation to the motor vehicle damage claims is that:

"the measure of damage in the case of damage caused to chattel by wrongful conduct is the reasonable cost of repairs. But, if it is unreasonable from a business point of view to repair the article, or if damaged beyond repair, then the basic measure is the cost of replacement in an available market. **Murphy v Brown** (1985) 1 NS WLR 131 and Halsbury's Laws of England 4th Edn. Vol 12: Damages.

30. The **onus** is on the **Plaintiff** of **proving** that a **write off** was the most **economical course**.

31. The object of the **award of damages** in a **TORT Action** is, so far as money can, to put the Plaintiff back in the position, it would have been had the loss not been inflicted. **Johnson v Perez** [1988] 166 CLR 351 at 355 (Mason CJ). More generally, the Court will award-

"that amount in damages which will most fairly compensate him for the wrong he has suffered?"

Johnson v Perez (supra) at 356 (Maron CJ).

32. [PW1] - Jayant Pratap in his evidence told Court that-

"the vehicle FP884 has not been repaired' and 'it is a complete wreck.'

33. The evidence does not show that some of the body parts of the van such as the '**Bornet, hood, radiator, engine, steering systems and chasis**' were damaged.

34. The photograph of the van, FP884 [Exhibit P1] does not support PW1's contention in terms of the damage that the van is a completely wrecked. Further, the only document tendered as Exhibit 'P6' by the Plaintiff in support of PW1's Testimony on write-off is the Plaintiff's own

letter headed '**Quotation**' to Capital Insurance dated 25 March 2019 stating that "**the vehicle FP884 is a write off. The cost of repair is more than the vehicle insured. The total cost would be around \$16,500 VIP**".

35. It is noted that since the vehicle FP884 was insured with Capital Insurance, under '**Memorandum of Agreement**' Capital Insurance paid the Plaintiff - Koroqaga & Vatuwaqa Carriers Fiji Ltd a total Agreed sum of \$9,900 net of Policy excess \$1,000 as 'Full and final settlement of all claims costs and disbursements - write off settlement to Vehicle Registration No. FP 884 dated 23 May 2019.'
36. The Plaintiff is claiming \$23,986 as repair costs. The onus of proving this loss lies on the Plaintiff. There is no quotation for \$23,986 produced at trial. The only evidence by PW1 is over quotation of \$16,500VIP. PW1 Jayant Pratap did not agree with his own quotation written to Capital Insurance, tendered into evidence as Exhibit - P6. None of the Plaintiff's witnesses including PW1 - Jayant Pratap gave any evidence that the repair costs of motor vehicle FP884 was \$23,986 as pleaded by the Plaintiff. PW1 did say how much it would cost to repair the vehicle FP884 and that how much he was seeking in terms of costs. The Plaintiff even failed to call any motor vehicle repairer or assessor and tender any independent quotations for damages and costs of the repair works.
37. It is for the Plaintiff to provide sufficient evidence of the damages that it claims. However, the Plaintiff has failed to do so and therefore it will not be entitled to review the amount it claims or a proper amount in damages and costs of repair works.
38. The Plaintiff has not proved the sum which will restore the van registration no. FP884 to the condition it was in before the collision of 15 March 2019 and hence in absence of such evidence before this court, the Plaintiff's case on repair costs of the vehicle FP884 is fatal.
39. The Plaintiff has failed to prove the reasonable costs of repairing the damaged van FP884 and as such the Plaintiff's claims for **repair costs as claimed 'stands dismissed**.

Loss of Income

40. The Plaintiff pleaded and claims a loss of income for the daily use of the vehicle FP884 to supply Fiji Times from Suva to Lautoka at the rate of \$360 daily for 7 days for the entire 14 weeks amounting to **\$35,280**.
41. Above claim is for special damages. It is trite law that he who asserts must prove the damages.
42. The Plaintiff's only evidence before Court for loss is PW1's assertion that '*I am claiming \$365 per day VEP*.'

43. The Plaintiff did not produce any concrete evidence such as books, records, Tax returns, income records, Bank Statements, business records, Contract with Fiji Times and/or any other reliable and convincing evidence to let the Court ascertain that it was in fact earning an income of \$365 per day prior to the accident on 15 March 2019.
44. Mere oral evidence given without any documentary proof as to the value without is rather not sufficient to determine the actual value of the loss claimed by the Plaintiff.
45. [PW3] - Michael Rohit Randeer Prasad's evidence on the above issue is in direct conflict with that evidence given by [PW1] Jayant Pratap and [PW3] Michael Rohit Randeer Prasad said in cross examination that the Plaintiff's Mazda and Hiace vehicles went to Lautoka from Suva to deliver Fiji Times. He was referred to Exhibit P4 which was the Plaintiff's Motor vehicle policy from Capital Insurance which listed 25 vehicle owned by the Plaintiff. He told Court motor vehicle registration No. FL187, FZ507, FP884, FP881 and FP883 went to Lautoka to deliver Fiji Times from Suva.

In re-examination PW3 - Michael Prasad told Court the supervisor decided which vehicles were to go to Lautoka. Altogether, 5 vehicles were going to Lautoka on various occasions.

46. The onus lies with the Plaintiff to adduce reliable, credible, supporting and convincing evidence that indeed and the fact of the matter was that **'it took the Plaintiff 14 weeks to find a suitable vehicle.'**
47. However, the evidence that PW1 gave in the matter with regards to the **'Loss of Income'** are just generalized and sweeping statements with no concrete and supporting documentary evidence to establish the fact that in fact it did take the Plaintiff 14 weeks to find a suitable vehicle and hence, the Plaintiff incurred a loss of income of \$35,280 for 14 weeks.
48. Hence, for the above reasons the Plaintiff has failed to discharge the burden of proving the loss and damages resulting in its failure to prove its claim on the balance of probabilities for the loss of income accordingly.

Mitigation of Damages

49. No Doubt, the Plaintiff has suffered loss when his Mazda Vehicle Registration No. FP884 was written off in a collision which took place on 15 March 2019 due to the negligence of the Defendant. In such a situation the ordinary principle, that **"Damages are compensatory applies and therefore the Plaintiff has an obligation to act reasonably and to take such steps as might be reasonable to mitigate his damages which he would otherwise suffer."** Case of **Macrae v Swindells** [1954] 2 ALL ER 260 at pg. 261 para E-F.

This means in a nutshell that the Plaintiff must act reasonably in all the circumstances to mitigate the damages.

50. However, the Defendant's pleaded to mitigation in their Statement of Defence.
51. Evidence of [PW3] - Michael Rohit Randeer Prasad was that the Plaintiff had 13 other alternative vehicles. Out of these, five (5) vehicles delivered Fiji Times to Lautoka. The damaged vehicle FP884 could have been replaced. Notably, [PW1] - Jayant Pratap's evidence contradicts PW3's evidence.
52. The Plaintiff [PW1] should have taken reasonable steps to mitigate the damage. However, the Plaintiff failed to do so because the evidence before this court reveals that:
- (i) PW1 had the money to buy a replacement vehicle but he waited for 14 weeks to buy the replacement vehicle.
 - (ii) PW1 had second hand parts for the Mazda vehicle FP884 - involved in the accident. However, whilst having all the parts, PW1 failed to repair the damaged vehicle FP884. On the contrary, PW1 started dismantling the damaged vehicle FP884 and threw the parts.
 - (iii) PW1 owns a garage with expert people and he could have therefore repaired the damaged vehicle FP884 in his own garage.

Accident Compensation Paid to (PW3) - Michael Rohit Randeer Prasad

53. PW1 claimed \$102 per week for 146 weeks [\$14,892] for the period 05 April 2019 until 27 June 2022. However, PW1 also confirmed that he stopped this payment because Accident Compensation Commission Fiji had paid compensation to PW3.
54. At paragraph 6 (c) of the Plaintiff's claim for wages the Plaintiff pleaded:
'Michael Rohit Randeer Prasad is being paid \$102 weekly and has to be paid for 260 weeks amounting to \$26,520.'
55. It is unclear what relief the Plaintiff is seeking herein and on what basis. The Plaintiff's claim is for negligence as appears from paragraph 4 of the Plaintiff's statement of claim. There is no specific allegation or complaint made against the Defendants under and paragraph 6 (c) of the claim and lacks a proper foundation. Hence, has absence of any cause of action against the defendants in respect of the claim for \$26,520.
56. The further, the Defendants have failed to plead even a claim for the Defendants to indemnify the Plaintiff for the sum the Plaintiff paid to PW3 on account of wages. Therefore, the Plaintiff's claim as it stands does not permit the Plaintiff to claim and prove damages for the sum of \$26,520. Reference is made to the case of:

"Yu Man v Chief Commodities Ltd, Miscellaneous proceedings no. 1170 of 2016
High Court of Hong Kong Special Administrative Region (26 July 2016):

"18. A statement of claim must state expressly the cause of action of the plaintiff and its factual basis. Even if the plaintiff has a factual and legal basis for his claim, where there is no point of substance whatsoever on the pleading that can outlie the cause of action, and there is a lack of necessary and substantive particulars, so that no reasonable cause of action can be established, the court is entitled to strike out the statement of claim and dismiss the action."

57. It is noted from the evidence before this court that the plaintiff failed to adduce any evidence as to how much Accident Compensation Commission was paid to [PW3] Michael Rohit Randeer Prasad. It would have been proper for the Plaintiff then to make a claim against [PW3] - Michael Rohit Randeer Prasad for a refund since [PW3] - Michael's entitlement was rightfully paid to him by the ACCF. The question arises whether the Plaintiff is barred from bringing any claim for damages in respect of the accident since Michael was receiving compensation pursuant to the Amended compensation regulations?"
58. The answer to above is of course the Plaintiff is then barred for bringing any claim for damages against the Defendants.
59. No record or documents pertaining to the payment from Accident Compensation Commission Fiji and nondisclosure of any documentary evidence with regards to the compensation payment received by [PW3] - Michael from Accident Compensation Commission Fiji is before this Court to determine otherwise.
60. The onus of proving such loss of damages remains on the Plaintiff.
61. After a careful deliberation of the evidences of the witness coupled with the pleadings and the respective written submissions furnished to this Court, I find that the case has not been proved by the Plaintiff on the Balance of probabilities against the defendants.
62. Therefore, I have no alternative but proceed to make the following findings:
 - (i) The Plaintiff's claims against both the First and second Defendants are dismissed in its entirety.
63. I will now proceed to deal with the costs issue in terms of order 62 Rule 7(4) of the High Court (Amendment) Rules, 1988 which provides for power to award a gross sum instead of taxed costs in order to avoid the expense, delay and aggravation involved in protracted litigation arising out of taxation together with order 62, Rule 13 of the High Court (Amendment) Rules, 1988 accordingly.

Costs

64. The award of costs is discretionary on the part of the Court determining the matter.
65. The discretion is absolute and unfettered whether or not to award costs. The discretion will always be exercised with reason and justice.
66. I find that the fixing of a gross sum will be just and appropriate in this case to avoid any continued litigation between the parties to the proceedings on the issue of costs.
67. The substantive matter proceeded to trial with the Plaintiff calling altogether five (5) witnesses and the Defence two (2) witnesses. No doubt it was a lengthy case and time consuming, the parties also furnished court with their respective written submissions.
68. It is only just and fair and appropriate that I order the Plaintiff to pay the Defendants a summary assessed costs of \$5,000 to be paid within 14 days timeframe.
69. I will now proceed to make and grant the following final orders.

C. Orders of the Court

- (i) The Plaintiff's substantive claim against the first Defendant is dismissed in its entirety.
- (ii) The Plaintiff's claim against the Second Defendant is also dismissed in its entirety.
- (iii) The Plaintiff to pay the Defendants a summarily assessed costs of \$5,000 to be paid within 14 days timeframe.

Dated at Suva this 24th day of January , 2025.

 
VISHWA DATT SHARMA
PUISNE JUDGE

CC: NAIDU LAWYERS, SUVA
SUNIL KUMAR ESQUIRE, NAUSORI