

IN THE SUPREME COURT OF FIJI  
[CIVIL APPELLATE JURISDICTION]

CIVIL PETITION No: CAV 0014.2017  
(On Appeal From Court of Appeal No: AAU 0078.2014)

BETWEEN : SAIFUD DIN

Petitioner

AND : 1. ABDUL IRSHAD KHAN  
2. AJESH VIKASH PRASAD  
3. ATTORNEY GENERAL OF FIJI  
4. DR. JAOJI VULIBECI OF LABASA  
HOSPITAL

Respondents

Coram Hon. Mr. Justice Saleem Marsoof, Judge of the Supreme Court  
Hon. Mr. Justice Sathya Hettige, Judge of the Supreme Court  
Hon. Mr. Justice Priyantha Jayawardana, Judge of the Supreme Court

Counsel : Mr. S. Kumar for the Petitioner  
Mr. S. Prasad for the 1st Respondent  
2<sup>nd</sup> Respondent absent and unrepresented  
Mr. J. Pickering and M. Ali for 3<sup>rd</sup> and 4<sup>th</sup> Respondents

Date of Hearing: 22<sup>nd</sup> August, 2018

Date of Judgment: 31<sup>st</sup> August, 2018

## JUDGMENT

### Marsoof, J

1. Despite the large number of grounds on which the Petitioner had based his application for leave to appeal from the unanimous judgment of the Court of Appeal dated 30<sup>th</sup> November 2017, the primary issue that was argued by learned Counsel before this Court related to the causal link between the Petitioner's alleged conduct and the act of his employee for which he was held vicariously liable by the lower courts, and the damages suffered.

#### *The Factual Matrix*

2. It may be useful to begin with an outline of the factual scenario setting out only the material facts which were not in dispute.
3. On 15<sup>th</sup> February 2008, the 1<sup>st</sup> Respondent (Plaintiff), was seriously injured when the 10 wheeler truck bearing No. EZ 950 owned by the Petitioner (2<sup>nd</sup> Defendant) and driven by the 2<sup>nd</sup> Respondent (1<sup>st</sup> Defendant) while in the employment of the Petitioner, when the said vehicle driven from Delaikoro towards Labasa went off the road and tumbled downhill.
4. The 1<sup>st</sup> Respondent was admitted to the Labasa Hospital on 15<sup>th</sup> February 2008 with severe injuries and a crushed left leg for treatment where a fasciotomy was performed on that leg.
5. On 29<sup>th</sup> February 2008, the 1<sup>st</sup> Respondent was taken to the Suva Private Hospital through which he was admitted to the Colonial War Memorial Hospital (CWM) on the same day.
6. On 6<sup>th</sup> March 2008 a below the knee amputation was performed at CWM on the 1<sup>st</sup> Respondent's left leg, and the stump was closed on 31<sup>st</sup> March 2008.

#### *Pleadings lodged in the High Court*

7. By way of Writ of Summons dated 25<sup>th</sup> October 2010, the 1<sup>st</sup> Respondent to these proceedings, instituted action at the High Court of Fiji at Labasa against the 2<sup>nd</sup> Respondent who drove the 10 wheeler truck at the time of the accident and the Petitioner as his employer, claiming general and special damages for personal injuries sustained by him due to the said accident.



8. In paragraph 6 of his Statement of Claim, the 1<sup>st</sup> Respondent alleged that the said accident was “caused solely due to the negligence of the Defendants”(namely the 2<sup>nd</sup> Respondent and the Petitioner).
9. By the Statement of Defence of the 2<sup>nd</sup> Respondent (1<sup>st</sup> Defendant) paragraph 6 of the Statement of Claim was denied and the 2<sup>nd</sup> Respondent claimed that he exercised due care and skill in driving the vehicle at the time the accident occurred.
10. In the said Statement of Claim, the 2<sup>nd</sup> Respondent also set up a counter claim against the Petitioner (2<sup>nd</sup> Defendant) on the basis that he had personally driven another 10 wheeler truck bearing No. EZ 959 owned by him on 14<sup>th</sup> February 2008 beyond permitted limits when it was prohibited to do so resulting in the said vehicle going off the road, and then coercing the 1<sup>st</sup> and 2<sup>nd</sup> Respondents to take the 10 wheeler truck bearing No. EZ 950 to recover the said truck EZ 959 with the use of a bulldozer, and failing to supervise the said recovery process, thereby causing serious injuries to the 2<sup>nd</sup> Respondent which resulted in his hospitalization and claimed general and special damages from the Petitioner.
11. The Petitioner (2<sup>nd</sup> Defendant) took out Third Party Notice dated 11<sup>th</sup> June 2011 against the Attorney-General for and on behalf of the Permanent Secretary for Health (1<sup>st</sup> named Third Party) and Dr. Jaoji Vuliveci (2<sup>nd</sup> named Third Party), on the basis that the said Third Parties were responsible for the 1<sup>st</sup> Respondent’s left leg amputation “by not administering proper treatment on time.”
12. By the joint Statement of Defence of the said Third Parties, the allegations set out in the said Third Party Notice against the said Third Parties were denied, and the said Third Parties further averred that the 2<sup>nd</sup> named Third Party had advised the 1<sup>st</sup> Respondent and his mother to consent to surgery but the latter “signed her denunciation on the medical folder.” It was further averred that if “the Plaintiff and the 2<sup>nd</sup> Defendant had listened to the professional advice of Dr. Jaoji, the Plaintiff will still be walking around with both his natural legs today.”

#### *The High Court Trial*

13. When the case was taken up for trial in the High Court of Fiji at Labasa, it was recorded based on the agreed facts that the accident in question occurred on 15<sup>th</sup> February 2008, and the said accident involved vehicle bearing No. EZ 950, which was at that time travelling from Delaikoro to Labasa, and that the 1<sup>st</sup> Respondent (original Plaintiff) was a passenger in the said vehicle and suffered serious injuries as a result.
14. The case went for trial before the High Court on the following issues:

- (1) Did the accident occur and cause injuries to the Plaintiff due to the negligence of the 2<sup>nd</sup> Respondent (1<sup>st</sup> Defendant) and the Petitioner (2<sup>nd</sup> Defendant)?
  - (2) Did the Petitioner (2<sup>nd</sup> Defendant) negligently use vehicle No. EZ 950 for cartage of fuel to Delaikoro?
  - (3) Was 2<sup>nd</sup> Defendant negligent in instructing the 2<sup>nd</sup> Respondent (1<sup>st</sup> Defendant) on 15 February 2008 to drive the vehicle back from the point he abandoned the Vehicle No. EZ 950 on 14 February 2008?
  - (4) Can the 1<sup>st</sup> Respondent (Plaintiff) rely on the doctrine of *res ipsa loquitur* to prove the negligence of the 2<sup>nd</sup> Respondent (1<sup>st</sup> Defendant) and the Petitioner (2<sup>nd</sup> Defendant)?
  - (5) Was 2<sup>nd</sup> Respondent (1<sup>st</sup> Defendant) injured due to the negligence of the 2<sup>nd</sup> Defendant?
  - (6) Are the Third Parties liable for the loss and damage suffered by the 1<sup>st</sup> Respondent (Plaintiff) due to the amputation of his left leg by reason of their failure to exercise reasonable care on the Plaintiff?
15. Four witnesses testified on behalf of the 1<sup>st</sup> Respondent (Plaintiff) at the trial, namely his mother Jaibul Nisha, Abdul Hasin, Information Technology Technician at the Fiji Electricity Authority, Dr. Emosi Tologa of the Colonial War Memorial Hospital, and the 1<sup>st</sup> Respondent himself. The 2<sup>nd</sup> Respondent (1<sup>st</sup> Defendant) testified on his own behalf. The Petitioner (2<sup>nd</sup> Defendant) testified on his own behalf, and also called two other witnesses, namely Pathik Prasad, a Namara Digger Operator and Sunil Kumar Nayar, a farmer who had been in the past a driver for Telecom, to give evidence on his behalf. by Dr. Jaoji Vuliveci, Medical Superintendent of the Labasa Hospital, was the only witness for the Third Parties.
16. At the conclusions of the trial, the learned High Court Judge entered judgment dated 11<sup>th</sup> November 2014 in favour of the 1<sup>st</sup> Respondent (Plaintiff) in the course of which he arrived at the following findings:-
- (i) Although the medical folder maintained by the Labasa Hospital was lost or misplaced, Dr. Jaoji Vuliveci was aware of the treatment pertaining to the 1<sup>st</sup> Respondent (Plaintiff);



- (ii) Dr. Vuliveci denied mentioning to the Petitioner (2<sup>nd</sup> Defendant) that the injury was a minor issue, and testified that the 1<sup>st</sup> Respondent was admitted to the hospital with crush fracture of the left leg and other injuries, for which he had recommended open fasciotomy within 2 or 3 days since the injury was limb threatening, but due to the 1<sup>st</sup> Respondent and his mother delayed consenting to surgery, the fasciotomy was performed too late, and made below the knee amputation of the affected leg of the 1<sup>st</sup> Respondent urgently necessary;
- (iii) Despite the advice for amputation given by Dr. Jaoji Vuliveci, the 1<sup>st</sup> Respondent was taken to Suva, and no referral letter was given to CWM;
- (iv) Answering questions put by learned Counsel for the Petitioner (2<sup>nd</sup> Defendant) in cross examination, Dr. Vuliveci had explained that fasciotomy was done only after swelling commenced with the consent of the patient and his mother;
- (v) The medical folder being unavailable did not affect the credibility of the testimony of Dr. Vuliveci as a witness;
- (vi) In so far as the “missing medical folder” was concerned, the learned Judge came to a strong finding that, the manner in which the Petitioner (2<sup>nd</sup> Defendant) had given evidence (taken together with his demeanor in the witness box) led him to the view that “the witness was untruthful”, and the Petitioner had not led any evidence independently of the reliance on the said “missing folder”;
- (vii) The decisions in *Suruj Narayan v. Ministry for Health et al*, (Civil Action No. 43 of 2004) and *Rogers v. Whitaker* [1992] HCA 58, were distinguishable from the facts of the present case, and the amputation of the Plaintiff’s leg was not due to the negligence in treatment or that the condition of the Plaintiff had deteriorated because of any breach of duty of care owed to the Plaintiff by the said named Third Parties (3<sup>rd</sup> and 4<sup>th</sup> Respondents);
- (viii) The said Third Parties (the 3<sup>rd</sup> and 4<sup>th</sup> Respondents) were not liable to indemnify the Petitioner in case the Plaintiff’s claim is decided against the original 1<sup>st</sup> and 2<sup>nd</sup> Defendants;
- (ix) As regards the 1<sup>st</sup> Respondent’s (Plaintiff’s) claim against the said original 1<sup>st</sup> and 2<sup>nd</sup> Defendants was concerned, the 1<sup>st</sup> Defendant’s negligence is proved based on the evidence led at the trial on a balance of probabilities, by reason of the 1<sup>st</sup> Defendant losing control of the vehicle which caused injuries to the Plaintiff; and

- (x) the 2nd defendant cannot disclaim his vicarious liability in terms of the decision of the Supreme Court in *Shell Fiji v. Sushil Chand*, CBV 003 of 2011, 4th May, 2012.

17. By his said Judgment, the learned High Court Judge awarded damages to the 1<sup>st</sup> Respondent (Plaintiff) against the Petitioner (the 2nd defendant) in a sum of \$164,028.70 together with interest at the rate of 4% per annum until full payment is made. The breakdown of the said award was as follows:

- (a) General damages \$75,000.00
- (b) Interest thereon \$18,142.50
- (c) Future care and treatment \$ 5,000.00
- (d) Special Damages \$11,286.20
- (e) Loss of future earnings \$ 54,600.00

18. The learned High Court Judge also dismissed the Petitioner's claim against the Third Parties (3<sup>rd</sup> and 4<sup>th</sup> Respondents) as well as the counter claim of the 2<sup>nd</sup> Respondent (1st Defendant) against the Petitioner. The Petitioner was ordered to pay as costs, summarily assessed, a sum of \$3,000.00 and a sum of \$2,500.00 to the 1st Respondent (Plaintiff) and the said Third Parties, respectively.

*Appeal to the Court of Appeal*

19. The Petitioner appealed against the said judgment of the High Court to the Court of Appeal on the following grounds:-

- (1) that the learned Judge of the High Court erred in law and in fact in not evaluating the evidence of Dr. Emori Taloga an expert witness called by the 1<sup>st</sup> Respondent (Plaintiff) when questioned by His Lordship on whether the leg could have been salvaged;
- (2) that the Learned Judge erred in law and in fact in coming to the conclusion that the Petitioner (2<sup>nd</sup> Defendant) should pay the damages when the leg amputation was due to the 1<sup>st</sup> Respondent (Plaintiff) not listening to doctors advice and / or the delay in treatment by the Third Parties;
- (3) that the Learned Judge erred in law and in fact in not coming to the conclusion that the delay in treatment by the second named Third Party caused the amputation of the Plaintiff's leg;



- (4) that the Learned Judge erred in law and in fact in not coming to the conclusion that the missing medical folder of the Labasa Hospital indicative of negligence as to the treatment that was administered on the 1<sup>st</sup> Respondent (Plaintiff), resulting in a miscarriage of justice;
  - (5) that the Learned Judge erred in law and in fact in accepting Dr. Jaoji Vuliveci's evidence which was not supported by documentary evidence of the treatment given on the 15<sup>th</sup> February, 2008, and the case was heard more than 5 years in absence of medical folder;
  - (6) that the Learned Judge erred in law and in fact in not giving any weight to the evidence tendered by the Petitioner (2<sup>nd</sup> Defendant) and his witnesses, hence there has been a substantial miscarriage of justice;
  - (7) that the Learned Judge erred in law and in fact in not finding as a fact that the claims made by the 1<sup>st</sup> Respondent (Plaintiff) should have been against the Third Parties rather than the Petitioner (2<sup>nd</sup> Defendant), hence there has been a substantial miscarriage of justice;
  - (8) that the Learned Judge's decision is unfair and unreasonable in all the circumstances and His Lordship failed to consider Workmen's Compensation Act as it is properly designed for injuries arising out of employment;
  - (9) that the Learned Judge erred in law in awarding far excessive amount of damages specially under the heading of future losses when the 1<sup>st</sup> Respondent's (Plaintiff's) earning had increased in employment he got after accident which is contrary to the evidence led hence there is no loss of earning and there has been a substantial miscarriage of justice;
  - (10) that such further and/or grounds as will be made out at the production of the Copy Record of the proceedings at the High Court."
20. The Court of Appeal in its judgment considered the above grounds relied upon by the Petitioner except for ground (8) involving the Workmen's Compensation Act, which his learned Counsel indicated at the outset of the hearing before the Court of Appeal that he would not pursue the said ground.
21. Before considering the other grounds of appeal, the Court of Appeal thought it appropriate to break down the injuries suffered by the 1<sup>st</sup> Respondent into (a) the initial injuries that he had suffered as a result of the accident at the point of time at which he had been admitted

to Labasa Hospital for treatment; and (b) the consequential amputation of his leg done at the CWM Hospital on the said 1<sup>st</sup> Respondent being removed to it.

22. Having done so, the Court of Appeal observed in paragraph [22] of its unanimous judgment, that since there had not been any challenge from the Petitioner to the correctness of the findings of the High Court with respect to the injuries the 1<sup>st</sup> Respondent had suffered initially as a result of the accident in question at the point of time when he had been admitted to Labasa Hospital for treatment, it is not necessary to deal with those injuries at length.
23. The Court of Appeal went on to point out in paragraph [23] of its impugned judgment that the Petitioner's Counsel, in his oral submissions as well as in his two skeletal submissions had not challenged the findings of the High Court in relation to the said initial injuries nor did he dispute the Petitioner's vicarious liability, since his submission had been that the Petitioner be held liable only to the amount stipulated by the Workmen's Compensation Act.
24. In paragraphs [28], [29] and [30] of the judgment of the Court of Appeal, the Court considered the testimony of the 1<sup>st</sup> Respondent's mother and of the two doctors involved, in the following manner:-

“[28] The plaintiff's mother in her evidence had stated that, when her son (the plaintiff) had been admitted to Labasa Hospital she had been told on the following day by Dr. Jaoji of the said hospital (the 4th Respondent) that, “the way ... was to amputate the leg ... After the operation after a week the Doctor said leg to be amputated. ... Doctor never told me first three days that leg is to be amputated ... I became aware leg to be amputated on 26th or 27th February ... I am happy with treatment no complaints ...” (vide: page 375 and 378 of the Copy Record).

[29] One (Dr.) Emoni Taloga who had been called to give evidence as an expert witness, on behalf of the plaintiff, when questioned, as to whether the plaintiff's leg could have been saved, had said that, “if the treatment was given properly at the earlier stage the leg would have early (sic) saved. If the proper treatment done limb would have been saved.” (vide: at pages 380 – 381 of the Copy Record).

[30] Dr. Jaoji Vulibeci (4th Respondent) in his evidence (in the absence of the medical folder for which no explanation had been forthcoming) said that, he “recommended amputation he (apparent reference to the plaintiff) was not very keen ... following the operation amputation was recommended. ... But mother and son (the plaintiff) refused to consent ...I knew that this leg ... should be



amputated ... No way leg would have been saved ... I did whatever (sic) possible treatments to the patient. Plaintiff refused ... amputation. It was after admission ... It was after the consent the operations were done ... I kept for three days because they had (sic) not consented (sic) ... The amputation was necessary the amputation to the patient. ...”(vide: pages 382 to 384 of the Copy Record)”

25. Then in paragraph [31] of its judgment, the Court of Appeal went on to consider what stood established on an analysis of the evidence led at the High Court, as follows:-

“[31] That, (a) the leg would have had to be amputated anyway (the evidence of the plaintiff’s mother herself when, within a day of the plaintiff being admitted to Labasa Hospital, Dr. Jaoji (4th Respondent) had said so, although she, in her evidence was seen making a play on the periods as to when such advice had been given by Dr. Jaoji; (b) she, (the plaintiff’s mother) had been happy with treatment, no complaints (that is, treatment administered by the 3rd and 4th Respondents); (c) As against that, (Dr) Taloga’s opinion that, “if the treatment was given properly at the earlier stage the leg would have been saved (etc). (*supra*, paragraph [29] above) remained to be questioned, in as much, he had seen the victim of the accident (the plaintiff) only after he has been brought to CWM Hospital from Labasa Hospital (an interval of as many as almost two weeks); and (d) Finally, on an analysis of the evidence, it appears that there had been the first operation that was performed on the plaintiff (3 to 4 days after being admitted to Labasa Hospital in regard to which the plaintiff, his mother and the Appellant had been vacillating bout) but, to which they had eventually agreed, that is, in regard to the injuries with which the plaintiff had been initially brought to Labasa Hospital; Then, in the second operation, after being removed to CWM Hospital, *the leg of the plaintiff was amputated (the very advice Dr Jaoji of Labasa Hospital had given to the plaintiff’s mother on that first day after the plaintiff had been admitted to the said Labasa Hospital).*”(emphasis added)

26. On the basis of the above quoted analysis of evidence, the Court of Appeal took the view in paragraphs [32] and [33] of its judgment that the said Court could see no reason to interfere with the said judgment of the High Court in so far as the Petitioner’s contention to transfer liability for the amputation of the original Plaintiff’s leg, separated from the initial injuries the Plaintiff had sustained as a result of the accident in question. In arriving at this conclusion, the Court of Appeal held that the “medical folder” that was missing in evidence could not have made any difference to the evidence that appeared on record as recounted above and analysed.

27. Having arrived at its decision on the facts, the Court of Appeal went on to consider what it described as “the impacting legal principles” in paragraphs [34] to [40] of its judgment. After advertng to Sir Francis Bacon’s rendering of the maxim – “*in jure non remota cause sed proxima spectator*” which meant that “It were infinite for the law to consider the causes of casuses, and their impulsions one of another : therefore it contenteth itself with the immediate cause, and judgeth of acts by that without looking to any further degree”, the Court of Appeal went on to apply that maxim to the facts at hand, and concluded that “the immediate cause of the accident was the negligent driving of the vehicle in question by the 1<sup>st</sup> Defendant whose negligence visited upon the Appellant for the initial injuries suffered by the passenger (the 1st Respondent / Plaintiff) on the basis of vicarious liability.”
28. In paragraph [36] of its judgment, the Court of Appeal went on to hold that “the amputation of the plaintiff’s leg being not on account of the negligence on the part of the Third Party (3rd and 4th Respondents) that further damage also stood visited upon the Appellant (present Petitioner)”.
29. In paragraph [37] and [38] of its judgment, the Court of Appeal, it went on to consider the twin concepts of *Causa Causans* (cause of causes) and *Causa Sine Qua Non* (the cause if not for which) and applying those principles as a corollary to the concept of the immediate cause, the Court concluded that “the said initial injuries suffered by the plaintiff as well the consequential amputation of the plaintiff’s leg were attributable to the Appellant” (present Petitioner).
30. In paragraph [39] of its judgment, the Court of Appeal went on to consider the applicability of the doctrine of remoteness of damage, and in that context, referred to the famous words of Lord Summer wherein His Lordship said:

“The object of a civil inquiry into cause and consequence is to fix liability on some responsible person and to give reparation for damage done. ... The trial of an action for damage is not a scientific inquest into a mixed sequence of phenomena, or an historical investigation of the chapter of events ... It is a practical inquiry (vide: *Weld-Blundell v Stephens* [1920] AC at p.986)”
31. The Court of Appeal observed that “the view expressed by Lord Summer has withstood the test of time reviving a view expressed as way back in the latter part of the 18<sup>th</sup> Century in *Scott v Shepherd* [1773] 2 WBL 892 foreshadowed in *Roswell v Prior* [1700] 12 Mod. 636, 639 which had held that, “*he that does the first wrong shall answer for all consequential damages.*”



32. The Court of Appeal then considered the submission made by learned Counsel for the Petitioner that the quantum of compensation awarded to the 1<sup>st</sup> Respondent by the High Court was excessive. Having examined the matter carefully, in paragraphs [45] to [51] of its judgment, the Court came to the conclusion that the sum of \$ 54,600.00 awarded with respect to loss of future earnings was too high since the High Court had used the wrong multiplier in computing the same, and for the reasons set out in the said paragraphs of its judgment, decided to reduce it to \$43,680.
33. Accordingly the Court of Appeal reduced the aggregate sum of \$164,028.70 awarded by the High Court to the 1<sup>st</sup> Respondent to \$ 153,108.70.
34. Subject to this variation of the quantum of damages awarded, the Court of Appeal affirmed the judgment of the High Court dated 11<sup>th</sup> November 2014. In The Court of Appeal also ordered the Petitioner to pay the 1<sup>st</sup> Respondent \$ 1,500,00 as costs of appeal in addition to costs amounting to \$3,000.00 awarded to the 1<sup>st</sup> Respondent in the High Court.

*Application for leave to appeal*

35. The Petitioner has sought leave to appeal from the judgment of the Court of Appeal dated 30<sup>th</sup> November 2017 in terms of sections 98(3)(b) and 98(4) of the Constitution of the Republic of Fiji, 2013. While section 98(3)(b) seeks to confer on this Court “exclusive jurisdiction, subject to such requirements as prescribed by written law, to hear and determine appeals from all final judgments of the Court of Appeal”, section 98(4) provides that “an appeal may not be brought to the Supreme Court from a final judgment of the Court of Appeal unless the Supreme Court grants leave to appeal.”
36. Section 7(3) of the Supreme Court Act No. 14 of 1998, sets out several criteria for the grant of leave to appeal in the following manner: -
- “In relation to a civil matter (including a matter involving a constitutional question), the Supreme Court must not grant special leave to appeal unless the case raises-
- (a) a far reaching question of law;
- (b) a matter of great general or public importance;
- (c) a matter that is otherwise of substantial general interest to the administration of civil justice.”
37. This provision has been applied by this Court in a large number of decisions which go to emphasise the stringent nature of these provisions. As this Court was constraint to observe

in paragraph 23 of its judgment in *New World Ltd v Vanualevu Hardware (Fiji) Ltd & Another* [2017] FJSC 10; CBV0004.2016 (21 April 2017)-

“It is clear from these decisions that special leave to appeal is *not granted as a matter of course*, and that for the grant of special leave, the case has to be one of *gravity involving a matter of public interest, or some important question of law*, or affecting property of considerable amount *or where the case is otherwise of some public importance or of a very substantial character*. Even so special leave would be refused if the judgment sought to be appealed from was plainly right, or not attended with sufficient doubt to justify the grant of special leave. (*emphasis added*)

38. The Petitioner has urged 21 grounds for seeking leave to appeal in this case. The principal grounds on which the Petitioner has sought leave to appeal, as formulated in paragraph 6 of his Petition dated 27<sup>th</sup> December 2017 are that the Court of Appeal erred in law and in fact in-

- a) Agreeing with the judgment entered in by the High Court which was in absence of medical folder and uncorroborated evidence of the doctor. The doctor who gave evidence five years later based on his recollection of the events and its resemblance to the *Suruj Narayan* case;
- b) Not assessing Labasa Hospital liability which was more than the Petitioner's in relation to the compensation of the victim;
- c) Agreeing with the decision of the High Court in disregarding the 1<sup>st</sup> Respondent's evidence that he had received the medical report and had handed it over to his counsel who failed to disclose it resulting in substantial miscarriage of Justice;
- d) Not evaluating the expert evidence of Dr. Emori Taloga which was supported by Dr. Jaoji Vuliveci who is the first named Third Party;
- e) Accepting and endorsing paragraph 11 of the Judgment of the High Court which is clearly wrong on the face of it;
- f) Agreeing with the decision of the High Court in completely ignoring the Workmen's Compensation Act without giving any reasons.
- g) Agreeing with the High Court in failing to take into account that the accident had not resulted by the fault of either party but it was an act of nature and or unavoidable.



- h) Agreeing with the decision of the High Court in failing to consider that both the Respondents action were of frolic's of their own as this was not instructed and not known by the Appellant.
- i) Agreeing with the decision of the High Court in failing to consider that the Appellant business is of such nature that he does this work daily to put food on his table.
- j) Agreeing with the decision of the High Court in failing to consider that the Appellant had been supplying fuel all around Vanua Levu on a daily basis in a similar manner and no accident of such nature had occurred previously.
- k) Failing to act judiciously.
- l) Failing to provide reasons as to why they do not wish to disturb the findings of the High Court when error of law and evidence was obvious as highlighted by the Counsel for the Appellant.
- m) Agreeing with the decision of the High Court in holding the Appellant to pay damages when the leg amputation was a result of the Respondent's ignorance to Doctor's Advice and or delay in treatment.
- n) Agreeing with the decision of the High Court in accepting Dr. Jaioji Vulibeci's evidence when his recollection was made on the basis of Suruj Narayan's case which was different from this case.
- o) Agreeing with the Judgment of the High Court in not holding that Labasa Hospital negligent of not keeping proper record of the patient.
- p) Agreeing with the High Court by not coming to a conclusion that the missing medical folder of the Respondent at Labasa Hospital itself is indicative of negligence and or failure to inform the Court of treatment administered hence there has been a miscarriage of justice.
- q) Not holding that the High Court had erred in law and in fact when he completely disregarded the evidence of Appellant and his eye witnesses who were present at the time of the incident without stating any reasons thereby causing substantial miscarriage of justice.

- r) Generally coming to conclusion against the weight of the evidence adduced by the Appellant and the statement made by the First and Second accident as per the Copy Record of Appeal.
  - s) Not holding that the High Court had taken into account irrelevant consideration whilst coming to its decision leaving aside relevant ones.
  - t) Agreeing with the High Court in awarding the Appellant to pay far-excessive amount of damages when the fault is equally and or more shared by the Third parties, Labasa Hospital.
  - u) By endorsing the Judgment of High Court which breaches the principle of *Restitutio ad integrum or restitution in integrum*.
39. Most of the above grounds, such as grounds c), e), f), g), h), i), j), k), o), p), q, r), s) and u), were never raised in the Court of Appeal, and in their very nature do not merit further consideration, being frivolous and vexatious. For instance, ground c) is altogether misleading in that it refers to the “*medical report*”, the same words being used when cross-examining the 1<sup>st</sup> Respondent (vide Record of the High Court top page 372 proceedings of 10<sup>th</sup> March 2014 bottom page 12 of 60), which is obviously not the missing “*medical folder*” referred to in ground (a). Ground (e) which refers to paragraph 11 of the Judgment of the High Court, is based on an obvious error apparent on the face of it, since it was the Petitioner (2<sup>nd</sup> Defendant), and not “the Plaintiff”, who had alleged that the Labasa Hospital is responsible for the left leg amputation. Similarly ground (f) dealing with the Workmen’s Compensation Act was the same ground the Petitioner had indicated to the Court of Appeal that he was not pursuing (vide paragraph 20 of the Judgment of the Court of Appeal), and ground h) dealt with *vicarious liability*, which the Court of Appeal had noted in paragraph [23] of its judgment as never having been raised or disputed in the submissions of the Petitioner’s learned Counsel before the Court of Appeal.
40. It is trite law that, as was observed by this Court in *Dip Chand v The State* CAV0014/2012, since “leave to appeal is not granted as a matter of course, the fact that the majority of the grounds relied upon by the petitioner for special leave have not been raised in the Court of Appeal, makes the task of the petitioner of crossing the threshold requirements for special leave even more difficult”. In *Josateki Solinakoroi v The State*, Criminal Appeal CAV0005 of 2005 and *Tuilagi v State* [2018] FJSC 3; CAV0013.2017 (26 April 2018) this Court took in to consideration the principles developed by the Privy Council in *Kawaku Mensah v The King* (1946) AC 83 in the exceptional circumstances of those cases, and permitted grounds that had not been argued in the Court of Appeal to be taken up for the first time on appeal on the basis that *a substantial and grave injustice might otherwise occur*. Having carefully



examined the grounds set out in paragraph 39 of this judgment in the light of all the circumstances of this case, I am of the view that the principle in *Kawaku Mensah v The King* cannot be availed of by the Petitioner to take up altogether new grounds of appeal since they do not even satisfy the stringent threshold criteria set out in section 7(3) of the Supreme Court Act.

41. This leaves us with grounds a), b), d), l), m), n) and t), which have all been raised and considered by the Court of Appeal in its impugned judgment. Ground a) was considered by the Court of Appeal under ground (4), and grounds b) and t) were considered by that Court under grounds (4) and (7). Ground d) was considered by the Court of Appeal under ground (1). Similarly, grounds l) and n) were considered by the Court of Appeal under ground (6) and ground m) was considered in the lower court under ground (2). The question is whether any of these grounds urged before this Court raise any far reaching question of law, a matter of great general or public importance or a matter that is otherwise of substantial general interest to the administration of civil justice, which is sufficiently grave and could give rise to a miscarriage of justice.

#### *The Missing Medical Folder*

42. In my view, ground a) relating to the missing medical folder has been well considered by the Court of Appeal in paragraphs [15] and [33] of its impugned judgment, wherein the Court had noted that although the said folder which might have shown that the 1<sup>st</sup> Respondent's mother had denounced the advice of Dr. Jaoji to operate on the plaintiff was missing in evidence, *that did not affect the credibility of Dr. Jaoji as a witness* as to what had taken place between the 1<sup>st</sup> Respondent and his mother on the one hand and Dr. Jaoji on the other. Court also observed that *the learned trial judge had concluded that the delay in operation caused at the Labasa Hospital was due to the 1<sup>st</sup> Respondent and his mother not agreeing to surgery*. The Court of Appeal also noted that the learned trial judge had come to a strong finding that *the manner in which the Petitioner gave evidence, taken together with his demeanor in the witness box, led him to the view that "the witness was untruthful"*. Court also stressed that the Petitioner having not led any evidence independently in regard to the "missing folder", the learned trial judge had believed the evidence of Dr. Jaoji "who explained the position convincingly."
43. It is also noteworthy that the Court of Appeal had adverted to the decisions in *Suruj Narayan v. Ministry for Health et al* (Civil Action No. 43 of 2004) and *Rogers v. Whitaker* [1992] HCA 58, which the learned trial judge had sought to distinguish from the facts of the case in hand in finding that the amputation of the plaintiff's leg was not due to the negligence in treatment or that the condition of the 1<sup>st</sup> Respondent had deteriorated because

of any breach of duty of care owed to him by the said named Third parties (3<sup>rd</sup> and 4<sup>th</sup> Respondents).

44. In this context it may be useful to mention that Mr. Sunil Kumar, in the course of his submissions before this Court posed the question as to how, when testifying in Court in 2014, Dr. Jaoji Vuliveci recollected what had happened in the Labasa Hospital in 2008, the year in which the accident happened and the 1<sup>st</sup> Respondent was admitted for treatment in that hospital, when most of his responses to interrogatories served on him in 2010 were responded to with the words “could not remember”. Mr. Kumar was superficially correct because a count done by me showed that of the 43 interrogatories, 18 had received that response, but that was quite natural considering the mundane nature of the matters put to Dr. Vuliveci in those interrogatories. But in regard to those matters which a professionally competent doctor would recollect about a patient he had treated, Dr. Vuliveci had given clear responses, as would be seen from the following responses to interrogatories 31 and 32, quoted below from the Record:

31: If the Third Parties were not negligent why did it take fourteen days (14) to tell the Plaintiff, his mother and the 2<sup>nd</sup> Defendant?

Answer: Everything was explained fully and documented from the beginning.

32: What proper treatment and or operation were required by the Plaintiff at the time of admission?

Answer: Open fasciectomy and possible amputation if not viable and external fixation if viable as discussed with the orthopedic surgeon too at CWM.

45. It is significant that when Dr. Vuliveci was cross-examined by learned Counsel for the Petitioner at the trial in the High Court, he was not confronted with his answers to interrogatories, particularly the ones where his response was “could not remember”. In my view, this aspect of the matter could easily have been clarified by asking Dr. Vuliveci at the time when he testified in Court, and the failure to do so, is telling.
46. In my considered opinion, ground a) does not satisfy the requirements of section 7(3) of the Supreme Court for the grant of leave to appeal.

#### *Causation and Remoteness of Damages*

47. Grounds b), m) and t) may be considered together as they raise the question of causation and remoteness of damages, which were in fact dealt with by the Court of Appeal under grounds (2), (4) and (7).



48. It may be useful to mention that ground b) raises the question as to whether the Court of Appeal erred in law and fact when it agreed with the decision of the High Court in holding the Petitioner solely liable in damages when “the leg amputation was a result of the Respondent’s ignorance to Doctor’s Advice and or delay in treatment” and grounds m) and t) were to the effect that the Court of Appeal erred in affirming the decision of the trial judge who allegedly had failed to assess the liability of Labasa Hospital which was more than the Petitioner’s in relation to the compensation of the victim.
49. Learned Counsel for the Petitioner Mr. Sunil Kumar, who argued these grounds before this Court with great force, took a two-pronged approach in his submissions, which may be described as (1) the *novus actus* approach, and (2) remoteness of damages approach.
50. Firstly, he submitted in paragraphs 5.1 to 5.3 of what he called his “Skeletal Submissions” and handed over to the Court on the date of hearing, that the factual cause of damage to the 1<sup>st</sup> Respondent is the crush injury which he had received from the negligent driving of the 2<sup>nd</sup> Respondent who was the employee of the Petitioner. He relied on the decision of *The Oropesa* [1943] 1 All ER 211 to contend that as expressed by Lord Wright in that case, “to break the chain of causation it must be shown that there is something which I will call ultraneous, something unwarrantable, a new cause which disturbs the sequence of events, something which can be described as either unreasonable or extraneous or extrinsic”, and further submitted that in this case the break in the chain of causation was the act of the Labasa Hospital and its doctors who failed to provide proper and timely operation to save the 1<sup>st</sup> Respondents leg.
51. Secondly, he submitted in paragraph 5.4 and 5.5 of his Skeletal Submissions that even if the Petitioner was liable, his liability is necessarily limited by the doctrine of remoteness of damages, which is delineated by the foreseeability test. His paragraph 5.5 is worthy of reproduction, and stated as follows:

“When applying the remoteness principle to this case, damage to the 1<sup>st</sup> Respondent was not foreseeable. This is because it was not foreseeable that the 1<sup>st</sup> Respondent would sit in the 10 wheeler truck despite; it was not foreseeable that Ajesh [2<sup>nd</sup> Respondent] would drive negligently given his 10 years experience; it was not foreseeable that the injury sustained would be to such an extent to that of crush injury even though both Respondents claim to be wearing seatbelts; *it was not foreseeable that the 1st Respondent would not consent for operation; it was not foreseeable that the Doctors would fail to tender proper advice, counsel the 1st Respondent in explaining him to consent for operation, do proper and necessary test; it was not foreseeable that the Labasa Hospital will lose a medical folder.*



However, what was foreseeable was that failure to operate would result in swelling that would lead to poisoning and later become life threatening.”(emphasis added)

52. As regards the *novus actus* submission it is necessary to observe that the Petitioner’s liability in the case was both direct and vicarious. His direct personal liability arose from his directions given to both 1<sup>st</sup> and 2<sup>nd</sup> Respondents to drive the heavy 10 wheeler trucks beyond the gate to which Telecom had the keys violating a road sign prohibiting 10 wheeler truck being taken beyond the said gate. His personal liability extended further when he caused the 1<sup>st</sup> Respondent and his mother not to consent to surgery when at Labasa Hospital. His vicarious liability arose from his ownership of the truck bearing No. EZ 950 and the control he exercised over the 2<sup>nd</sup> Respondent who drove the said vehicle within his course of employment in a negligent manner resulting in serious injury being sustained by both 1<sup>st</sup> and 2<sup>nd</sup> Respondents.
53. There is cogent evidence of both the 1<sup>st</sup> Respondent and his mother to the effect that they denounced consent for surgery at the Labasa Hospital, which is corroborated by the testimony of Dr. Jaoli Vuliveci himself. In fact, this fact is conceded by the Petitioner’s learned Counsel at paragraph 5.5 of his Skeletal Submissions quoted in full in paragraph 51 of this judgment. The 1<sup>st</sup> Respondent has testified in Court that he and his mother denounced consent for surgery at the instance of the Petitioner. Doctor Taloga also testified at the trial on behalf of the 1<sup>st</sup> Respondent, and was shown the Medical Report dated 3 April 2009 (P15) and identified his signature. He stated that there was a *fracture and with that fracture leg was not salvageable*. (Vide Volume 2 of the High Court Records, page 381 and page 551). It is stated in the said Report that the 1<sup>st</sup> Respondent was initially “managed at Labasa Hospital (records of which were not made available to our health facility)” Dr.Jaoji himself had stated in evidence that the 1<sup>st</sup> Respondent left Labasa Hospital without the knowledge of the Labasa Hospital Staff. Doctor Taloga stated that the below the knee amputation was done on 6<sup>th</sup> March 2008 and the stump was closed on 31<sup>st</sup> March 2008. Doctor Taloga had reviewed the 1<sup>st</sup> Respondents position on 7<sup>th</sup> October 2013 to assess the impairment. In this state of evidence, there can be no doubt that the chain of causation that originated with the accident that occurred on 15<sup>th</sup> February 2008, had not been severed by whatever that might have transpired at the Labasa Hospital.
54. The second aspect of Mr. Sunil Kumar’s submission is based on the doctrine of remoteness of damages. Mr Kumar has placed great emphasis on the foreseeability test, which has been adopted by Courts all over the world to reduce the rigours of the principle flowing from the ancient decision of *Roswell v Prior* [1700] 12 Mod. 636, 639 which had held, as the Court of Appeal had noted that, “*he that does the first wrong shall answer for all consequential damages*,” and was adopted by the Court of Appeal in its impugned judgment as noted in paragraph 31 of this judgment.



55. It is noteworthy that the direct consequences rule laid down in *Roswell v Prior* has been followed by the English Court of Appeal in *Re Polemis and Furness Withy & Co. Ltd.*, [1921] 3 K.B. 560, which held that a defendant is liable for all the direct consequences of his acts, *even though unforeseeable*. However, the decision of the Privy Council on appeal from New South Wales in *Overseas Tankship (U.K.) Ltd. v. Morts Dock & Engineering Co., Ltd.*, [1961] A.C. 38, also known as the “Wagon Mound case”, which held that a defendant is liable in negligence only for those consequences of his acts that a reasonable man could have foreseen, has repudiated the said direct liability rule, and has since then been followed in many well known decisions in England and elsewhere. Lord Atkin in *Donoghue v. Stevenson* (1932) AC 562 took the foreseeability test one step further when his Lordship observed at page 580 of his judgment that-

“You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be - persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.”(emphasis added)

56. The foreseeability test has been adopted in the United States in *Palsgraf v. Long Island Railroad Co.*, 248 N.Y. 339, 162 N.E. 99 (1928) in Malaysia in decision such as *Lo Foi v Lee Ah Hong @ Lee Lum Sow* [1997] MLJU310 and *Quill Construction Sdn Bhd v Tan Hor Teng @ Tan Tien Chi* [2003] 6 MLJ 279, in Singapore in *Ho Soo Fong v Standard Chartered Bank* [2007] 2 SLR(R)181 and in South Africa in *Yende v Passenger Rail Agency of South Africa* (39/2014) [2015] ZASCA 49 (27 March 2015), but in *Sullivan v Moody* (2001) 207 CLR 562, the High Court of Australia unanimously held that the ‘three-stage test’ for duty, comprising foreseeability, proximity and policy, no longer represented the law in Australia.

57. It is unnecessary to dwell deep into the niceties of the law as to which test should be applied to determine the length and width of a tortfeasor’s liability since there is cogent evidence in this case to establish that it was Mr. Kumar’s client, the original 2<sup>nd</sup> Defendant and the Petitioner before this Court, who had been reckless not only in the manner in which he directed the 1<sup>st</sup> and 2<sup>nd</sup> Respondents in their use of his heavy vehicles in the treacherous road to and from Delaikoro in wet weather, but was also instrumental in prevailing upon the 1<sup>st</sup> Respondent and his mother not to consent to surgery, both to the initial fasciectomy as well as to the below the knee amputation while he was at the Labasa Hospital.

58. Whatever test of remoteness that is adopted in a case such as this, where there is willful or at least reckless conduct on the part of a defendant to a claim based on negligence, it is obvious that if the occurrence of the loss was foreseeable to the defendant, he is answerable to the plaintiff for the damages suffered by him. How can the Petitioner, who put both 1<sup>st</sup> and 2<sup>nd</sup> Respondents at great peril by ordering them to drive the vehicles into forbidden territory beyond the gates of Telecom, and then dominated the 1<sup>st</sup> Respondent and his mother, who were dependent on his mercy if not his bounty, to the extent of refusing consent to obviously necessary surgery, claim that he did not foresee the consequences of his own conduct?
59. In my opinion, grounds b), m) and t) urged by the Petitioner do not satisfy the stringent criteria set out in section 7(3) of the Supreme Court Act for the grant of leave to appeal.

*The other Grounds of Appeal*

60. I am left with grounds (d), which was dealt with in the Court of Appeal under ground (1), and grounds (l) and (n) which to some extent have been dealt with in the Court of Appeal under grounds (1). The Court of Appeal has in fact evaluated the testimony of Dr. Emori Taloga in paragraphs [29] and [31] of its judgment, had provided enough and more reasons as to why it did not wish to disturb the findings of the High Court. The Court of Appeal clearly did not violate the principles of *restitutio ad integrum* by endorsing the judgment of the High Court.
61. The aforesaid grounds d), l) and n) also do not meet the stringent criteria for the grant of leave to appeal.
62. In the circumstances, I am of the opinion that the Petitioner's application for leave to appeal should be refused and his petition should be dismissed. In the result, the judgment of the Court of Appeal shall stand affirmed.
63. The Petitioner is directed to pay costs in a sum of \$ 2,500.00 to the 1st Respondent in addition to the costs awarded in his favour in the lower courts.

**Hettige, J**

64. I have read the judgment of Marsoof, J. in draft, and agree with its reasoning, conclusions and orders proposed.

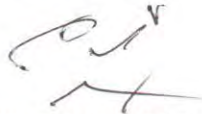


**Jayawardane, J**

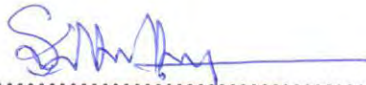
65. I have had the advantage of reading the judgment of Marsoof, J. in draft, and I agree with his reasoning and conclusions.

*Orders of Court:*

- (1) Application for leave to appeal is refused and the application of the Petitioner is dismissed.*
- (2) The judgment of the Court of Appeal is affirmed.*
- (3) The Petitioner is directed to pay costs in a sum of \$ 2,500.00 to the 1<sup>st</sup> Respondent in addition to the costs awarded in his favour in the lower courts.*



.....  
Hon. Mr. Justice Saleem Marsoof  
**Judge of the Supreme Court**



.....  
Hon. Mr. Justice Sathya Hettige  
**Judge of the Supreme Court**



.....  
Hon. Mr. Justice Priyantha Jayawardana  
**Judge of the Supreme Court**

**Solicitors:**

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Attorney General's Chambers for the 3<sup>rd</sup> and 4<sup>th</sup> Respondents