IN THE HIGH COURT OF FIJI

AT SUVA

CIVIL JURISDICTION Action No. 16 of 2009

Meryl Burfoot

Plaintiff

Fiji Resorts Limited trading as Shangri La's Fijian Resort

Defendant

Appearances: Mr Peter Knight for the plaintiff

Ms M.Rakai for the defendant

Dates of hearing: 2nd April and 15th June, 2012

JUDGMENT

1. ***The statement of claim***

1.1. Meryl Burfoot booked in to the Shangri La's Fijian Resort on 9th March, 2008, to attend her daughter's wedding at the resort.

1.2. The statement of claim states that on the afternoon of 10th March, 2008,she slipped and fell on the tiled floor of her room at the resort and was injured. She claims the injuries were caused due to the negligence and breach of the statutory duty of the defendant, its servants and agents under the Occupiers Liability Act(cap 33). She was a paying guest and a visitor of the hotel.

1.3. The particulars of negligence and breach of statutory duty pleaded are as follows:

i) Failing to ensure that the floor of the Hotel room was not wet and / or slippery.

ii) Failing to take any proper steps to prevent the floor of the Hotel room from being dangerous.

iii) Failing to warn the Plaintiff of the wet and / or slippery surface of the floor of the Hotel room.

iv) By reason of the foregoing, failing to discharge the common duty of care to the Plaintiff in breach of the said Act.

1.4. The particulars of injuries are described as follows:

> *Occipital skull fracture and subdural haematoma with subsequent burrhole surgery, resulting in vertigo, loss of balance, constant headaches, loss of taste and smell, loss of concentration and loss of memory which conditions are continuing.*

1.5 In these proceedings, Meryl Burfoot claims general and special damages for the pain and injury suffered. The particulars of special damages pleaded are singularly for medical expenses.

2. ***The statement of defence***

2.1 The defendant, in its statement of defence, pleads that any injuries sustained by Meryl Burfoot, which is denied was caused by her sole negligence and/or that she contributed to the same.

2.2 The particulars of contributory negligence are stated as follows:

i. *Failing to take due care and attention while walking on the floor.*

ii. *Failing to keep a proper look out.*

iii. *Failing to exercise reasonable care.*

iv. *Failing to wear proper footwear.*

3. ***The hearing***

3.1 ***The plaintiff***

Meryl Burfoot testified. She said she booked in to the resort on 9 March, 2008. On the next day, at 2.45 p.m, she left her room and went to the pool area, since the housekeeper/room attendant had wanted to clean the room. She returned after half an hour and lay on her bed. After a short while, she desired to go to the wash room. On her way, she slipped and fell on the tiled floor, injuring her head. Her head was hurting and her nose was bleeding. As she lay on the floor, she saw that the floor was wet. The room attendant had not left any signs to that effect. The tiles were smooth. After a while, she reported the incident to the reception. Three to four employees of the resort came to her room. The floor was wiped.

Marilyn Sivo, the guest relation supervisor of the resort had helped her to the washroom, where she brought out blood. A doctor came at 5p.m. He said she had to be taken to a hospital. She was taken to Sigatoka hospital. Then she was transported in an ambulance to Suva Private Hospital. She was sick all the way. She was told she had a fractured skull

and a brain clot .She underwent surgery. The blood was drained from her skull. She was in hospital for five days. The resort paid her hospital bills. She was also given a gift certificate for a complimentary stay at the resort for seven nights with breakfast.

She had to convalesce for twelve days at the resort, since she was not allowed to travel. She had observed how rooms were cleaned. A chemical and detergent were sprayed and then wiped with a wet mop. She left Fiji on 26 March,2008.

When she returned to Australia, she saw her general practitioner. He referred her to a neurosurgeon, Dr Kahler. He reviewed the cat scan taken in Fiji. He said it indicated a lot of blood in the brain, but a further operation was not necessary.

She said that in the aftermath of the fall, she suffered loss of balance when walking, extreme headaches for two weeks, concentration issues,short term memory loss resulting in her being unable to recall what she did the day before and got tired easily. It has had a great impact on her life. Mr Knight, counsel for the plaintiff referred the witness to two reports from Dr Terry Coyne of Queensland. She said she has loss of taste and smell. The problems she had with balancing was less severe, but the headache persists and lasts a week. Medications had no effect. Only rest did.

Meryl Burfoot said she was working with Lend Lease Management, Australia, collecting rents from tenants of a large shopping centre. Immediately after the accident, she was on sick leave for one month. Thereafter she worked for reduced hours, initially. Lend Lease Management was a compassionate employer and paid her on the basis that she worked full time. She had 225 sick days leave.She worked for 18 months and ceased working in November, 2010, as she was finding it difficult. At that time, she was being paid Aus $ 59,300 per annum. She was also entitled to annual profit share and superannuation. She had expected to work until retirement age of 66 years. At the time of the accident, she was 51 and ordinarily would have expected to work for another 15 years. She received a disability pension of $ 748 per fortnight. If successful, in her action for recovery of loss of future earnings, she would have to pay the entire amount to the Govt of Australia. She would also no longer be eligible for the disability pension.

In cross-examination, it transpired that she said she had no serious health condition, prior to the accident, except for high blood pressure .She said she was on two medications "*Zanidip*' and "*Nexium*".

Counsel for the defendant, Ms Rakai asked Meryl Burfoot why she did not automatically place her elbows to catch the fall. Her response was that it happened very swiftly. She was one and a half metres away from the bed and had nothing to hold. When she alighted from her bed, it was not evident that the floor was wet. It was then suggested to her that it was reasonable to expect that she should have looked where she was going. She denied that the medications she was on, caused her to be drowsy and resulted in her head falling first.

When Ms Rakai asked whether her decision to retire in November, 2010, was personal, she said it was on the advice of her medical doctors.

In re-examination, she said when she fell, her feet went forward and she struck her head. It happened suddenly and swiftly. She confirmed the two medications she takes did not cause her to be drowsy. She had not fallen prior to this accident.

3.2 ***The evidence for the defence***

3.2.1 *Siteri Dauvucu*

Siteri Dauvucu, a room attendant said that on the day of the accident, she had replaced the linen and cleaned the room occupied by Meryl Burfoot. She left the room in a clean dry state. She did not mop the floor and was unaware why the room was wet.

In cross-examination, Siteri Duavucu said that when she went to clean the room, Meryl Burfoot was not in, nor had she returned when she finished cleaning. She confirmed the floor was tiles. Floors are cleaned, when guests check out. Since Meryl Burfoot had checked in the night before, her room was clean and did not require to be mopped. Mr Knight elicited from this witness that it was the practice and policy of the resort, to clean the floors of the rooms daily with chemicals and then mop with water.

In re-examination, she reiterated that she had not mopped the room on that particular day, since Meryl Burfoot had checked in the night before. When she does mop the floor, she ensures that the floor is dry, when she finishes.She said that Meryl Burfoot may have opened the balcony door and as a result, the floor got wet. This door was closed, when she left the room.

3.2.2 *Marilyn Sivo*

Marilyn Sivo, the guest relations supervisor of the resort testified. She said that on 10th March, 2008, she received a call from Meryl Burfoot saying that she was hurt. Marilyn Sivo called a doctor from Sigatoka hospital. He referred her to Suva Private Hospital, where she underwent surgery.

Marilyn Sivo said that when she went to Meryl Burfoot's room, she noticed that there was moisture and condensation on the floor, with a bath mat placed under the air-conditioner. The balcony door was wide open. There was a sign on the balcony door to put off the air-conditioner, if this door was opened, as the air-conditioner would go off. The policy of the resort was to clean the floor of rooms, if unclean with a dry mop.

In cross-examination, she said it was the discretion of the cleaner to mop the floor, if it was unclean. The floor is ordinarily cleaned, when guests check out, and not on a daily basis. She said Meryl Burfoot had told her that she had put the bath mat on the floor, after her fall. Mr Knight elicited that it was not the normal practice for the resort to pay hospital bills of a guest who gets injured. Marilyn Sivo denied that this was done, since the resort felt responsible for the accident. It transpired in Marilyn Sivo's cross-examination, that the resort had a report on the incident.

3.2.3 *Dr D.Lal*

Dr D.Lal, a general practitioner of Sigatoka hospital said he was called by the resort to attend to Meryl Burfoot. He said Meryl Burfoot was on combined medication of several drugs, which have an addictive effect. The side effects of the drugs are generally dizziness and drowsiness. In respect of Nexicon, 3 % of users experience vertigo and dizziness.

In the cross-examination of Dr Lal, it emerged that when he went to Meryl Burfoot' s room, he noticed the floor was damp. He also said that if these drugs had serious side effects on a patient, a doctor would change the drugs. It was also possible that there could be no side effects .

4. ***The determination***

4.1. This case raises the point of law whether the defendant owed a duty to Meryl Burfoot, to ensure that the hotel room she was occupied, was reasonably safe.

4.2. It is not in dispute that the room occupied by Meryl Burfoot was cleaned shortly before she befell the accident. It is also not in dispute that the floor of the room was wet when the accident occurred, as confirmed by Marilyn Sivo, the guest relations supervisor and Dr Lal . The question of fact to be determined is whether the floor was left wet, after the room was cleaned.

4.3. The evidence of Siteri Dauvucu, the room attendant was that she cleaned the room on the afternoon of the 10th, but did not mop the floor. She said that the floor was clean, since Meryl Burfoot had checked in, the night before.

4.4. Marilyn Sivo, supported Siteri Dauvucu's evidence that floors are cleaned, after guests check out. She said it was the discretion of the room attendant.

4.5. Mr Knight elicited from Siteri Dauvucu that it was the practice and policy of the resort, to mop the floors of the rooms daily with chemicals and then with water. Siteri Dauvucu and Marilyn Sivo gave contradictory evidence as to how the floors of the rooms of the resort are usually cleaned. Siteri Dauvucu said it was mopped with a little water. Marilyn Sivo said that the floor was cleaned with a dry mop. I find this to be quite implausible.

4.6. I did not find Siteri Dauvucu and Marilyn Sivo to be credible witnesses. In my view, on a review of the totality of evidence, the strong probability is that Siteri Dauvucu mopped the floor of the room with chemicals and water on the afternoon of 10th March, 2008, and left it wet.

4.7. It transpired in Marilyn Sivo's cross-examination that in accordance with the usual practice of the resort, a report was prepared when Meryl Burfoot met with the accident. I agree with Mr Knight that it is reasonable to infer that this report was not produced, as it was prejudicial to the defendant.

4.8. In my judgment, Meryl Burfoot's fall and injuries was a result of the floor being left wet by Siteri Dauvucu.

4.9. The law with regard to invitor and invitee applies. Meryl Burfoot, being an invitee was entitled to expect that the defendants would take the *"common duty of care"* imposed on them by section 4 (2) of the Occupiers Liability Act ***"to take such care as in all the circumstances of the case is reasonable to see that*** (she**) *the visitor will be***

reasonably safe in using the premises for the purposes for which *he is invited or* ***permitted by the occupier*** *to be there".* (emphasis added).

4.10. Mr Knight, in his closing submissions has cited the case of ***Ward v Tesco Stores Ltd,*** (1976) 1 ALL ER 215, where Lawton LJ stated at page 222:

> *"**Some explanation should be forthcoming from the defendants to show that the accident did not arise from any want of care on their part; and in the absence of any explanation the judge may give judgment for the plaintiff**. Such burden of proof as there is on defendants in such circumstances is evidential, not probative".* (emphasis added)

4.11. The defendant has not provided any evidence that reasonable care had been taken by them to ensure that the floors of its rooms were safe for guests. It follows that in my judgment, the defendant was in breach of the duty of care it owed to Meryl Burfoot.

4.12. *A fortiori*, the resort had accepted responsibility and paid her hospital bill of $6847.67, albeit this was not the practice of the resort, as emerged in the cross-examination of Marilyn Sivo. Her accommodation and meals for twelve days, when she was recuperating in the resort, was also complimentary. Finally, she was given, as evidenced, a gift certificate for seven nights accommodation and breakfast, at the resort.

4.13 Before I conclude this part of my determination, I would refer to the contention of Ms Rakai that the moisture on the floor was a result of condensation from the air-conditioner arising from the balcony door being opened by Meryl Burfoot. This came up as something of an afterthought, for the defendant had not pleaded the contention in its statement of defence nor was this proposition put to the Meryl Burfoot, in cross-examination. In my opinion, in the time-honoured phrase, the (proposed) defence is worse than the offence. It was the duty of the defendant to take all steps to ensure that a guest in its resort was not prey to a "*trap*" to use the phraseology of Lord Wrenbury in ***Fairman v Perpetual Investment Building Society,***(1923) AC 74 at pg 96.

4.14General damages

Meryl Burfoot claims damages for pain and sufferings. Ms Rakai, in her closing submissions has suggested a sum of $ 25,000, in the event liability is established.

4.15 I refer to the medical reports of Dr Terry Coyne, Certified Independent Medical Examiner of Queensland, produced by Meryl Burfoot, under the provisions of the

Civil Evidence Act. Ms Rakai did not seek to cross- examine the author of these reports nor challenge it contents.

4.16. The first report of 6th May, 2010,provides that Meryl Burfoot had "*sustained a left occipital skull fracture, which in turn resulted in a moderately large extradural haematoma....**she did not sustain a significant primary brain injury. However she did sustain insults to her brain of reasonable significance***". The report states further that with time "***there was resolution of the residual haematoma"***(emphasis added).

In reviewing her symptoms two years later, the report states that her " *persisting symptoms of headache, cognitive impairment (including memory loss), loss of smell and taste, and balance disturbance are all consistent with the nature of the head injury she sustained....,* ***it is conceivable that the sequelae of her fall resulted in mild brain injury sufficient to result in the mild impairment of cognitive function she describes****".* (emphasis added).

The report adds that she is able to drive a motor vehicle and go for walks, but had not returned to dancing and going to the gymn. The conclusion that Dr Terry Coyne came to two years following Meryl Burfoot's head injury was that "*it* ***is likely her condition has reached maximum medical improvement.*** (emphasis added)

4.17 In my judgment, Meryl Burfoot is entitled to damages for pain and suffering. She suffered a closed head injury. Although, she was not rendered unconscious, the medical report provides that she was in "*a potentially life threatening condition*". She underwent surgery. She was in hospital for 5 days. She was assessed with 19% permanent impairment of the whole person,(though inadvertently stated in the report, as*"18%*") arising from 7%- memory impairment, 3% -loss of smell and taste and 9% -station and gait.

4.18. In determining damages for pain and suffering, it is necessary to consider general level of comparable awards. Mr Knight, in his closing submissions, has cited several precedents to support the claim for $70,000 for pain and suffering. In my view, the injuries are not comparable.

In the first case cited: ***Yanuca Island Limited v. Peter Elsworth***,(ABU 0085 of 2000S) the FCA, in a judgment delivered on 16th August,2002, awarded $50,000.00 for pain and suffering, before a reduction for contributory negligence. The plaintiff had suffered severe head injuries and was rendered deeply unconscious when he fell from a ledge of a window in the bar of the Fijian Hotel.

His body was badly bruised. He had neurological abnormalities and ongoing emotional distress, in respect of which he was treated by a clinical psychologist.

Likewise, in ***Frederick William Edward Markham v. Yanuca Island Limited,***(HBC 153 of 1997L) the plaintiff had suffered severe brain damage and other injuries. He was awarded $70,000.00 for pain and suffering.

In ***Brzoska v. Hide-a-Way Beach Resort Limited,*** (HBC347 of 2005L),as also relied on by Mr Knight , the plaintiff suffered head and neck injuries. The surgery had given 50 % partial pain relief and he was likely to suffer enduring pain for the rest of her life. He was awarded $50,000.00 for pain and suffering.

4.19. Returning to the present case, I assess the general damages that Meryl Burfoot is entitled to, for pain and suffering at $35,000.

4.20 ***Loss of future earnings***

The next claim is the loss of future earnings. Meryl Burfoot said she retired on medical advice, at the age of 54. If not for the injuries she sustained, she said she would have worked for another ten years, till she reached 65. She had returned to work, a month after the accident and worked reduced hours initially.

The first medical report Meryl Burfoot relies on, as referred to above, provides that it " ***is likely she will be able to continue with her current employment capacity in the future***". (emphasis added)

The second report of Dr Terry Coyne dated 11th May, 2011, states her lament of a "*general deterioration"* was "***unlikely***" to be due to an aggravation of the brain injury and it "***is more likely that other factors, for example adverse psychological factors, underlie*** (the)***deterioration in symptoms"***(emphasis added). He then states that it is likely she could not manage "*employment which requires a high level of memory skills or new learning* (or) *stressful of noisy conditions*..(or) *office employment of a high level of responsibility.* He added that she "*could potentially manage employment of a repetitive, structured nature in a non-stressful environment where* (she was). *not under pressure of time".* Dr Terry Coyne, in the penultimate paragraph of his report reiterates that:

> *It is possible that* ***adverse psychological factors may be contributing to your incapacity for employment beyond that related to purely physical factors related to your structural brain injury***. (emphasis added).

In my view, the medical evidence produced by Meryl Burfoot, establishes that she could have continued with her existing employment, as she did for eighteen months, in the aftermath of the accident, as submitted by Ms Rakai, in her closing submissions. I decline the claim for future earnings .

4.21 Special Damages

Meryl Burfoot claims the medical expenses expended by her. This was not disputed by the defence. The receipts produced in support, for doctor's fees and drugs total a sum of Aus $ 2673.05. In her evidence in chief, she stated that she incurred a further sum of Aus $1100 as payment to Dr Terry Coyne for his second report At an average rate of FJ$1.40 to an Aus $,as in March,2008, the total sum of Aus $ 3773.05 would be equivalent to FJD $ 5282.27.

She also claims her air fare and out of pocket expenses for travel to Fiji from Brisbane to give evidence. Although no receipts have been produced, in support, I am satisfied that she incurred these expenses. I award a ballpark figure of $ 3000 in respect of these expenses. In my judgment, she is entitled to special damages in a sum of $8282.27.

4.22 Contributory negligence

4.22.1 I now come to the defence of contributory negligence. Ms Rakai suggested to Meryl Burfoot, that had she taken steps to break the fall, the injuries to the head would have been avoided. Meryl Burfoot response was that it happened very swiftly, as I would have thought so. It was also suggested to her that it was reasonable to expect her to look where she was going, when she was proceeding to the washroom.

4.22.2 In ***Jones v Livox Quarries***,(1952) 2 QB 608 at pg 615 Denning L J said that the doctrine of contributory negligence is founded on the concept of foreseeability. He stated:

> ***A person is guilty of contributory negligence if he ought reasonably to have foreseen that, if he did not act as reasonable, prudent man, he might be hurt himself****; and in his reckonings he must take into account the possibility of others being careless."* (emphasis added)

4.22.3 Lord Wrenbury in ***Fairman v Perpetual Investment Building Society,***(*supra*) stated :

> ***There are some things which a reasonable person is entitled to assume, and as to which he is not blameworthy if he does not see***

> ***them when if he had been on the alert and had looked he could have seen them.*** (emphasis added)

His Lordship then instances the case of a staircase with a missing stair, or a ladder in which a rung has been removed, and goes on to say that no reasonable person would expect that a step or a rung had been removed and added pungently :

> *..he has nevertheless suffered from what has generally been called "a trap" although if had stopped and looked he would have seen that the step or rung had been removed.* ***He was not guilty of negligence, he was not bound to look out for such an unexpected danger as that, although if he had proceeded cautiously and looked out it would have been obvious to him.***(emphasis added)

4.22.4 In the words of Lynskey J in ***Stowell v Railway Executive,***(1949) 2 KB 519 at page 525 if " *one is walking along a dockside where one expects mooring ropes to be out and other obstructions about the dock or quayside, then one would have to walk gingerly and watch every step more or less but if one is walking down a railway platform, provided for the purpose of those who use the trains, one is entitled to expect that that platform will be free from any obstruction*".

4.22.5 The above dicta provide a complete answer to the defence that Meryl Burfoot failed to keep a proper look out and exercise reasonable care and attention.

4.22.6 It was also suggested that the medications Meryl Burfoot was on, caused her to be drowsy. Here again, this proposition was not pleaded, as a particular of contributory negligence. In any event, the doctor called by the defence stated that this was only a probability in some patients.

4.22.7 I am not satisfied that there was any contributory negligence on the part of Meryl Burfoot.

4.23 ***Interest***

The plaintiff has claimed interest pursuant to Section 3 of the Law Reform (Miscellaneous) (Interest) Act, (cap 27).

Interest on general damages is awarded to compensate a plaintiff for being kept out of the capital sum –***Pickett v British Rail Engineering Ltd*** (1980) AC 136 at 137.

In ***Jeffords and another v Gee*** (1970) 2 WLR 702 at 703, it was held that *"in general interest should be allowed on special damages from the date of accident to the date of trial at half the appropriate rate"*.

In the exercise of my discretion I award interest at 6% per annum on general damages of $ 35,000.00 from the date of accident to-date and 3 % per annum on special damages on the sum of $ $8282.27 from the date of accident to-date.

4.24 The total sum awarded to the plaintiff as damages is $55,558.64 made up as follows:

a.	General damages	35000.00
b.	Interest on General damages	10977.53
c.	Special damages	8282.27
d.	Interest on special damages	1298.84
	Total	$55,558.64

There will therefore be judgment for the plaintiff against the defendant in the sum of $55,558.64 together with a sum of $ 5500 payable by the defendant to the plaintiff as costs summarily assessed.

29 May,2013 **A.L.B.Brito-Mutunayagam**

Judge