IN THE HIGH COURT OF FIJIAT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 149 of 2009

BETWEEN : **PUSHPA WATI**

PLAINTIFF

AND : **THE PERMANENT SECRETARY FOR HEALTH**

1ST DEFENDANT

THE ATTORNEY-GENERAL OF FIJI

2ND DEFENDANT

BEFORE : **Hon. Justice Kamal Kumar**

COUNSEL : **Mr D. Singh for the Plaintiff**

Ms R. Mani, Ms S. Daunabuna and Ms L. Ramoce for the Defendants

DATE OF JUDGMENT : **15 July 2016**

JUDGMENT

Introduction

1. On 5 June 2009, Plaintiff filed Writ of Summons with Statement of Claim against the Defendants claiming special and general damages in respect to personal injuries allegedly suffered by her when on 27 June 2007, she stepped and fell on her left hip during her course of employment at Colonial War Memorial Hospital (**"CWMH"**).

2. On 1 July 2009, Defendants filed Statement of Defence.

3. Pursuant to Leave granted on 10 September 2009, Plaintiff on 11 September 2009 filed Amended Statement of Claim.

4. On 16 September 2009, Defendants filed Statement of Defence to Amended Statement of Claim.

5. On 16 July 2010, Plaintiff filed Affidavit Verifying List of Documents.

6. **Thereafter, no action was taken in this matter until 11 January 2013 (lapse of almost three (3) years), when Plaintiff filed Notice of Intention to Proceed.**

7. On 21 January 2013, this matter was called before the then Master of the Court who noted that Defendants have not filed Affidavit Verifying List of Documents and made following Orders:-

   (i) Defendants do file and serve their Affidavit Verifying List of Documents within fourteen (14) days and if not their Statement of Defence will be struck out;

   (ii) Fourteen (14) days from thereafter for Plaintiff to file and serve Minutes of Pre-Trial Conference;

(iii) Fourteen (14) days from thereafter for Plaintiff to file and serve Order 34 Summons and Copy Pleadings and if not then Plaintiff's action will be deemed struck out.

8. It appears, that when the then Learned Master made the above order he did not realize that this action involves personal injury claim and as such discovery of document is automatic and parties are not required to file Affidavit Verifying List of Documents. Order 25 Rule 8(1) of High Court Rules.

9. On 1 February 2013, Defendant in compliance with the then Masters Order filed Affidavit Verifying List of Documents.

10. On 13 February 2013, Plaintiff filed Minutes of Pre-Trial Conference.

11. On 28 February 2013, Plaintiff filed Copy Pleadings and Order 34 Summons which was called on 16 April 2013, and this action was referred to a Judge.

12. This matter was called in this Court on 30 May 2013, when it was adjourned for trial on 19 and 20 November 2013.

13. Trial was completed on 20 November 2013, and by consent parties were directed to file Submissions by 15 January 2014.

14. I note that the Defendants do not challenge the fact that Defendants owed Plaintiff a duty to provide safe system of work and to ensure that Plaintiff's health is not put in danger during the course of her employment.

15. The issues that need to be determined are as follows:-

(i) Whether Defendants breached any duty of care owed to the Plaintiff?

(ii) Whether Defendant's breach caused Plaintiff injuries which resulted in Plaintiff suffering pain, special and general damages?

(iii) Whether Plaintiff was contributory negligent?

(iv) What is the quantum of damages?

Documentary Evidence

16. By consent the following documents forming part of Agreed Bundle of Documents dated 19 November 2013 was tendered as Exhibit 1 to 6:-

1. Medical Report by Dr. Oten Bwabwa dated 22nd April, 2008;
2. Medical Report by Dr. Oten Bwabwa dated 20th May, 2009;
3. Wages Slips;
4. Medical Report by Dr. Sitiveni Traill dated 20th November, 2009;
5. Occupational Health and Safety Policy;
6. Photos.

Plaintiffs Case

17. Plaintiff gave evidence herself and did not call any other witness.

18. Plaintiff during her evidence in chief gave evidence that:-

(i) She was born on 19 November 1952;

(ii) The accident took place on 27 June 2007, at the washroom and the time of the accident she was working as Laundry Hand at CWMH Laundry Department and has been employed in the CWMH Laundry Department for fifteen (15) years prior to the accident;

(iii) The accident happened when she slipped and fell down as there was water on the smooth floor;

(iv) She did not see the water when she fell down;

(v) At the time of accident she was wearing massaging sandal which had proper grips as the sandal was new;

(vi) CWMH gave her safety boots which she returned to the Supervisor as it got old, was damaged and water could get in the boot;

(vii) She returned the safety boots to her Supervisor two months prior to the accident and the safety boots was two years old.

(viii) She asked the Supervisor for new pair of safety boots but was told that Ministry does not have the money;

(ix) There were no signs to caution that the floor was wet and the staffs' were rostered to clean the floor;

(x) The place she fell was not always wet;

(xi) Forty Four (44) staff worked at the Laundry Department out of which twenty two (22) ladies were rostered to clean the floor and the day of the accident, floor was mopped by Farida;

(xii) There was no door mat where she fell but was one (1) meter away;

(xiii) She worked nine (9) hours a day and the Laundry was busy;

(xiv) She fell at lunch time when she was going to tea room;

(xv) The floor is mopped three (3) times a day which is in the morning, after lunch and in the afternoon;

(xvi) When she fell, color of the floor was maroon;

(xvii) After she fell she could not get up, she was hurt, was in pain and was sweating;

(xviii) One lady, namely Roshni assisted her by lifting her up and making her sit on a chair in the tea room;

(xix) Roshni then called Ambulance and she was taken to the Accident and Emergency Unit (**"A&E"**) at which time she was in pain as her hip had broken;

(xx) At A&E an X-Ray was conducted after her blood pressure and level of diabetes was checked;

(xxi) On the day of accident she was admitted and was admitted for eight (8) days;

(xxii) Surgical operation was carried out on her when metal plate was inserted;

(xxiii) After being discharged from hospital she went for review for five or six times;

(xxiv) Metal is still fitted in her hips and she feels lot of pain during cold season;

(xxv) She walks with a limp, because after the accident both her legs are not of same length;

(xxvi) Because of her injuries, she finds it hard to stand for long, hard to sit, cannot lift heavy objects and she cannot attend functions where she has to sit and have difficulty in twisting her hips;

(xxvii) At time of accident her pay was $165.44 per week and she is claiming for loss of wages for twenty (20) days sick leave which she has not been paid with Fiji National Provident Fund contribution;

(xxviii) She is claiming $300.00 for travelling expenses and for medication (pain killer);

(xxix) She is taking panadol when she has pain;

(xxv) She finds it hard to go marketing, visit relatives and do shopping;

(xxxi) She returned to work after seven (7) months from date of accident at the same place;

(xxxii) For seven (7) months she found it had to go to washroom, eat and sleep and she was able to move about on walker;

(xxxiii) When she returned to work she was not doing same work but was folding gowns while sitting;

(xxxiv) She left employment in 2009, when she retired at the age of fifty five (55) years.

19. During Cross-Examination Plaintiff:-

(i) Confirmed that at time of accident she was working at the Laundry Department of CWMH and that she had been employed for fifteen (15) years;

(ii) The Laundry area would be more wet, then outside of the washroom which is mostly dry;

(iii) Agreed that she fell in the washroom and that washroom has basin and sink and there is water around the area;

(iv) Stated that, that area will be wet sometimes but not all the time

(v) She had been on the walker for four (4) months;

(vi) Agreed that safety boots were to be worn at all times and that she is aware that it is Occupational Health and Safety (**"OHS"**) requirement that uniform had to be worn during working hours;

(vii) She would attend OHS training sometimes but not always;

(viii) She was aware about the OHS Policy which was put on the notice board in the Laundry area;

(ix) She used to wear safety boots but, when she did not have it, she did not wear it;

(x) At time of accident she did not have the safety boots and when she asked the supervisor she was told that the Ministry had no money;

(xi) Agreed that correct description of footwear she was wearing at time of accident was flip flop and not sandals;

(xii) She could not recall if there was any staff to assist her and that she only saw Roshni and agreed that there could have been other people;

(xiii) Agreed that, there was system in place to clean floor at CWMH and twenty two (22) ladies were assigned to clean the floor;

20. During re-examination Plaintiff agreed that if water fell in morning session it will be mopped in the midday session.

Defendant's Case

21. Defendants called Alvin De Asa, Orthopedic Surgeon as their first witness (**"DW1"**).

22. DW1 during his evidence in chief gave evidence that:-

(i) He works at CWMH as an Orthopedic Surgeon on full time basis and also works at Nasese Medical Centre on part time basis;

(ii) He graduated with Bachelor of Science from Otago University; did Medicine in Manila, Philippines; did his Orthopedic study for four (4) years in Manila and graduated in 2010; and completed his Post Graduate Diploma in Sports Medicine from University of New South Wales;

(iii) On 12 November 2013, he examined the Plaintiff in respect to her injury on her left hip with regards to her range of motion and if there was a leg length discrepancy for which he requested Plaintiff to undergo x-ray of the affected area;

(iv) His findings revealed that:-

(a) There was no leg discrepancy;

(b) There was no muscle wasting;

(c) She had limited range of motion on the affected area;

(d) X-Ray showed healed fracture of proximal femur.

(v) Muscle wasting is a result of disuse of the affected limb, which means if you have any injury to affected limb, you will tend not to put pressure or weight on that limb, thus have muscle wasting or weakening of that muscle;

(vi) Healed fracture proximal femur means bone is united and fracture is healed;

(vii) The assessment he carried out on Plaintiff was the only assessment he did and he based his findings on physical examination of Plaintiff, her x-

ray report and Medical Report prepared by Dr. Oten Bwabwa on 20 May 2008 and Dr. Sitiveni Traill on 20 November 2009;

(viii) The above medical reports did not affect his finding as his findings were based on his own assessment;

(ix) In reference to Report by Dr. Bwabwa and Dr. Traill he stated that the Surgical Registrar is still a trainee in general surgery whilst Orthopedic Surgeon is specialist in the field of Orthopedics;

(x) In this final assessment he agrees to a four percent (4%) final impairment from his physical examination, clinical diagnosis, findings from history and x-ray.

23. During Cross-Examination DW1:-

(i) In reference to Intertrochanteric fracture mentioned under the heading "History" in Exhibit 2 he explained that such fracture occurs in the proximal part of the femur, the thigh bone which is trochanteric region;

(ii) The fracture stated in Exhibit 2 is closed (no open wound) and undisplaced (no major separation of fragment);

(iii) Stated that intertrochanteric means it is trochanteric region and is not in danger region;

(iv) Stated that the fracture below the neck (trochanteric region) which does not disturb flow of blood;

(v) In reference to "DHS" under the heading "History" in Exhibit 2 he explained that "DHS" means Dynamic Hip Compression Screw which allows patient to mobilize early and mechanically allow for compression of the fracture site as mentioned on page 1 of Exhibit 4 which were consistent with the injuries sustained by the Plaintiff because they are subjective finding on persons subjective complaints;

(vi) Stated that Plaintiff sustained severe fracture (paragraph 3, page 2, Exhibit 4) means that with the type of injuries there is recorded mortality

rate of twenty five percent (25%),whether within six (6) months surgery is done or not;

(vii) Agreed that his findings in respect to reduction in length of leg is same as that of Dr. Traill's findings;

(viii) Could not answer as to how Dr. Oten found shortening of left leg by two percent (2%) and stated it could probably be as a result of Dr. Oten using different tape and the test carried out;

(ix) Stated that Antalgic Gait (page 2 – Exhibit 4) means limp due to pain and the person who suffers from Antalgic Gait limps;

(x) Stated that whether person with one leg shorter will limp depends on amount of shortening and if it is less than two percent (2%) then person will not limp or it will not be noticed;

(xi) Stated that he did not observe Plaintiff walk a distance;

(xii) Agreed that Dr. Traill and his assessment of Plaintiff are same and stated that the assessment is subjective to the person doing the assessment;

(xiii) Agreed that there could be marked discrepancy in assessment of permanent disability amongst doctors and stated that it is because lot of factors are involved;

(xiv) He used AMA Guidelines to Evaluation of Permanent Impairment 6th edition, functional history of patient, physical examination, and diagnostic (clinical) studies done on the patient to assess the permanent disability;

(xv) Explained that MMI stated under the heading "Current Symptoms" in Exhibit 2 means Maximal Medical Improvement;

(xvi) Stated that from what is said by Dr. B. Oten under the heading "Clinical Studies" means that the screw is still in place and agreed that Dr. B. Oten's assessment on whole person impairment is 11%;

(xvii) Stated that when a surgical registrar prepares a report and signs for a consultant surgeon the report should be shown to the consultant surgeon;

(xviii) In reference to Exhibit 4 he agrees that the report states that fracture was to left neck of femur (paragraph 3) and Plaintiff was reviewed seven (7) times;

24. In Re-Examination DW1 stated that:-

(i) To observe patients walking a distance can be part of examination but is limited or restricted and he cannot see them walking for a long distance;

(ii) He observed Plaintiff walking in clinic but did not observe her walking for long distance.

25. Defendant's Second Witness was Makesi Muanitabua, an employee at Linen Store, Laundry Department, CWMH (DW2).

26. During her evidence in chief DW2 gave evidence that:-

(i) She has been working at CWMH for twelve (12) years;

(ii) She recalled that on 22 June 2007, Plaintiff was involved in an accident in the washroom which is located in the laundry department of CWMH;

(iii) The washroom has one hand basin, two wash tubs, two toilets and two changing room;

(iv) At the time of accident she was sitting at her table in the Linen room when she was notified by her staff about the accident;

(v) She then went to check out, and saw Pushpa Wati lying on the floor and few staff attending to her when she told the staff to take Plaintiff to Accident and Emergency Unit;

(vi) Plaintiff was in pain and could not move so they had to take her in a wheel chair;

(vii) When Plaintiff fell there was few drops of water on the floor and Plaintiff was wearing massaging flip flops and Plaintiff fell when she turned;

(viii) At the time of accident they had a uniform;

(ix) Uniform for male was khaki trousers, khaki shirt and safety boots with safety equipment such as face mask, hand gloves, and long sleeve gowns and for female it was green top, green shirt and safety boots;

(x) She knew about the uniform requirement because under OHS Rules and Regulations as awareness training is conducted by OHS Officers and Inspection officers to remind them about safety;

(xi) Laundry Department had two (2) OHS Representatives who attended training at CWMH headquarters monthly and they would move around to check if staff were wearing safety uniforms;

(xii) OHS Representative conducted training for all the staff and policy and guidelines were posted on the Notice Board inside the Laundry;

(xiii) Training is conducted three or four times a year for the Laundry staff;

(xiv) During her employment only accident that happened was the one involving Plaintiff.

27. During Cross-Examination DW2 stated that:

(i) At the time of accident she was sitting at her table and did not have direct view of the wash room where Plaintiff fell;

(ii) No sign saying "Danger Area Slippery When Wet" was placed;

(iii) There was a staff named Tina but was not aware if she fell one (1) week after the accident;

(iv) She was familiar with the procedure for returning old boots and requesting for new boots;

(v) Timeframe for getting new boots when old boots are returned will depend on the Domestic Stock Officer and whether boots are available;

(vi) In response to suggestion that if boots were not available immediately then it would take months to get it she responded that it is not that long and month is too long;

(vii) Timeframe to get new boots will also depend on size of boots;

(viii) Washroom did not have hand rails;

(ix) Tea girl is rostered to mop the floor and the roster is done on monthly basis;

(x) At time of accident there were forty staff (40) with twenty two (22) male staff and eighteen female staff;

(xi) Female staff were rostered to mop the floor and the floor was mopped three times a day;

(xii) When the supervisor goes on leave during month of December and January she acted as supervisor of Plaintiff;

(xiii) She was not the supervisor at the time of accident;

(xiv) She noticed Plaintiff wearing massage flip flops and when she asked her to wear boots, Plaintiff said to her that boot is heavy for her;

(xv) She informed the Lady Supervisor about Plaintiff wearing massage flippers just once;

(xvi) When asked if people working with her are expected to meet deadlines she said that whatever they could achieve during the day, they do, or else they do it the next day.

28. Defendants third witness was Aminiasi Koroi, Supervisor at Health Housekeeping Services Co-operative Ltd (**"HHSCL"**) (DW3).

29. During evidence in chief DW3 gave evidence that:-

(i) He has been employed as a supervisor of HHSCL for two (2) years and prior to that was employed at CWMH for fifteen (15) years and at Old Peoples' Home in Samabula for fifteen (15) years;

(ii) He was employed at CWMH and in 2007 was Chairman of OHS Committee;

(iii) He was OHS Committee Chairman in 2007 and his duties involved seeing all staff, contractors and visitors comply with OHS Standard;

(iv) In reference to OHS Policy (Exhibit 5) he stated that the document was to ensure all staff comply with OHS Standard and it was enforced in 2007;

(v) "Allocating Resources" in paragraph 4 of Exhibit 5 means training, meetings and other form of information and includes training by Ministry of Labour three (3) times a year;

(vi) In order to comply with OHS Policy, the Committee conducts meeting every month whereby issues from all units of CWMH are brought in by OHS Representatives so that they can see that all issues are urgently resolved;

(vii) Hospital Management or Employer is responsible to provide uniforms and in order to replace uniforms one has to go through the supervisor (who is to endorse the request);

(viii) He has to see that uniforms are replaced in two or three days;

(ix) Hard hats, goggles, safety glasses, safety shoes and clothes are included as uniform and same uniform is provided to Laundry staff;

(x) Workers are made aware of the policy by printing it and placing on the Notice Board;

(xi) OHS Policy has been in place in CWMH from 26 November 2003;

(xii) OHS Policy is renewed periodically (Refer to last paragraph – page 1 of Exhibit 5) and there is no timeframe;

(xiii) The OHS Policy was last reviewed in 2011 and implemented on 26 August 2011 (Page 2 – Exhibit 5);

(xiv) He retired from CWMH on 29 January 2013, and the 2011 OHS Policy was still in place at that time;

(xv) OHS Committee receives accident reports in respect to accident in CWMH (Form OHS F1-4) and he was not aware of any accident report from laundry department;

30. During Cross-Examination DW3:-

(i) Stated that he knows Plaintiff by face;

(ii) Confirmed that he was working at CWMH in June 2007 and he did not receive any accident report from laundry department;

(iii) Stated that he did not receive any complaints by anyone that a worker by the name of Pushpa Wati was not wearing safety boots in contravention of OHS policy;

(iv) Stated that in 2007,Makisi was the Supervisor in Landry section and was still working there and was at work a day before he gave evidence but was not sure if Makisi was at work on the day he was giving evidence;

(v) Stated that in June 2007, Mr. Ram was the store man but has retired;

(vi) Stated that he came in between the Supervisor and the Store-man when there was delay and there was an urgent need;

(vii) Agreed that if delay and urgent need is not communicated to him, then he would not know what goes wrong as he acted on complaints;

(viii) CWMH has a purchasing officer;

(ix) Agreed that procedure to request for replacement boot is as follows:-

(a) Request is made to the supervisor;

(b) Supervisor then informs the Store-man;

(c) If boot is not available then request is made to the Purchasing Officer.

(x) His role in the sequence of events is that if Supervisor finds that there is no boot then he has to speed up the process;

(xi) If Purchasing Officer does not have money to purchase, then his duty is to make sure that Employer looks for the money somehow;

(xii) Disagreed that 'somehow' could mean months and stated that all OHS Representatives go around to make sure that all staff comply with the standards and if they do not, they could not be allowed at the work place;

(xiii) In response to question as to when there is no budget he stated that, with OHS there is no excuses and the Employer has to look for money somehow;

(xiv) If Purchasing Officer says there is no money, then he went to management and if management said that there is no money then he as OHS Committee Chairman had to influence the Employer to make sure they get the money to buy the boots.

31. In Re-Examination DW3 gave evidence that:-

(i) Lot of cases of delay in providing footwear to staff was reported to him;

(ii) He did not receive any complaints about Pushpa Wati's footwear;

(iii) It is not possible for staff to go around without footwear for months;

Whether Defendants Owed Duty of Care to the Plaintiff

32. Even though the Defendants in their submissions have not challenged that they owe a duty of care to the Plaintiff I just want to state that employers owe duty of care to its employees to provide safe system of work and to protect its employees from foreseeable risk and dangers.

33. The common law duty has also become a statutory duty pursuant to Section 9 of Health and Safety at Work Act (1996).

34. The Plaintiff was an employee of CWMH and as such CWMH owed her a duty of care to provide safe system of work, free of danger and risk to the Plaintiff.

Whether Defendants Breached Their Duty of Care

35. Plaintiffs evidence was that she fell in the washroom; Laundry Department after the floor was mopped and was wet.

36. Defendants evidence was that they had OHS Policy in place and they provided uniform for staff which included safety boots.

37. DW2 gave evidence that Plaintiff was wearing massage flippers and Plaintiff did not want to wear safety boots because it was heavy.

38. DW2 also stated that Plaintiff was wearing massage flippers for "quite so long".

39. DW3 evidence was that he never received any complaint as OHS Committee Chairman about Plaintiff not wearing safety boots.

40. He also stated that if staff does not comply with OHS Policy then they will not be allowed to work.

41. Whilst I accept the evidence that there was OHS Policy in place at CWMH Laundry Department I have doubts so to whether such policy was strictly enforced.

42. Having OHS Policy and Safety Policy in place and pasting it on notice board is one thing and enforcing those policies is another.

43. No evidence has been produced to Court to show that Plaintiff was ever given any warning to not to wear massage flippers even though she have been wearing massage flippers.

44. Plaintiff also gave evidence that no sign was placed in the wash room to warn about the wet floor. In this regard I accept Plaintiffs evidence that the floor was wet after it was mopped.

45. I have not given any weight to the photos tendered as Exhibit 6 on the ground that no evidence was produced to say when the photos were taken and for what purpose.

46. After analyzing the evidence of Plaintiff and Defendants witnesses, I find that Defendants breached their duty of care owed to Plaintiff to provide safe system of work by failing to enforce the OHS Policy and putting signs to warn that the area is slippery when wet.

Whether Plaintiff Contributed to Her Injury

47. Defence relied on the case of **Staply v. Gypsum Mines Ltd** [1953] AC 663; **Barrett v. Ministry of Defence** [1994] 1 WLR 1217; **Jebson v. Ministry of Defence** [2001] 1 WLR 2055; **Rushton v. Turner Brothers Asbesto Co. Ltd** [1959] 1 WLR 96.

48. The principle in respect to issue on contributory negligence was stated in **Gani v. Chand & Ors.** [2006] Civil Appeal No. ABU0117 of 2005 (10 November 2006) by Fiji Court of Appeal as follows:-

"The basic principle of contributory negligence is that, when a court is awarding damages to the Plaintiff for injuries caused by the defendant, it may reduce the award if the plaintiff can be shown to have contributed to the injury by some negligence on his part. However, whilst the liability of the defendant arises from a duty towards the plaintiff, the assessment of contributing negligence is not based on a similar duty on the plaintiff towards the defendant. It was explained by Lord Simons in Nance v. British Columbia Electric Railway Co. Ltd [1951] Ac 601, 611: "The statement that, when negligence is alleged as the basis of an actionable wrong, a necessary ingredient in the conception is the existence of a duty owed by the defendant to the Plaintiff to take due care, is, of course, indubitably correct. But when contributory negligence is set up as a defence, its existence does not depend on any duty owed by the injured party to the party sued, and all that is necessary to establish such a defence is to prove to the satisfaction of the injury that the injured party did not in his own interest take reasonable care of himself and contributed, by this want of care, to his own injury. For when

contributory negligence is set up as a shield against the obligation to satisfy the whole of the plaintiff's claim, the principle involved is that, where a man is part author of his own injury, he cannot call on the other party to compensate him in full.

...this, however, is not to say that in all cases a plaintiff who is guilty of contributory negligence owes to the defendant no duty to act carefully."

49. The facts of **Staply** case are stated in the judgment of Lord Reid at pages 484 and 485 which is as follows:-

"Before the accident Staply and Dale were working together, Staply being a breaker. He was a steady workman with long experience, but rather slow. He had for a time been a borer but had reverted to being a breaker. A well-recognized danger in the mine is a fall of part of the roof. The roof is not generally shored up as any weakness in it can be detected by tapping it. If it is "drummy", giving a hollow sound, it is unsafe and must be taken down. There are three ways of doing this – with a pick, or with a pinch bar or crow bar, or by firing a shot. Whichever way is adopted, of course, men doing the necessary work must not stand immediately below the dangerous part of the roof. One morning when Stapley and Dale arrived at their stope they tested the roof and found it to be dummy. They saw the foreman, Church, about it and he ordered them to fetch it down. They all knew that meant that no one was to work under the roof before it had come down. Church did not say which method was to be adopted. Both men were accustomed to this work and the method was properly left to their discretion. They used picks, but after half an hour had made no impression. The work was awkwardly placed as a fault ran across the mouth of the stope, the floor and roof inside being about eighteen inches higher than outside. Probably they could not use a pinch bar, but they could easily have prepared the place for firing a shot and sent for the shot firer. Instead, according to dale whose evidence was accepted, they agreed that the roof was safe enough for them to resume their ordinary work, and did so.

There was a quantity of gypsum lying in the stope and if the roof had been safe their first task would have been to get to the haulage way. To do that, Stapley had to enter the stope and break the gypsum into smaller pieces and Dale had to make preparation in the twitten. So they separated, and when Dale came back half an hour later he found Stapley lying dead in the stope under a large piece of the roof which had fallen on him.

There is no doubt that if these men had obeyed their orders the accident would not have happened. Both acted in breach of orders and in breach of safety regulations and both ought to have known quite well that it was dangerous for Stapley to enter the stope."

50. The Trial Judge in **Stapley** found that accident occurred due to Dale's fault and as such held Respondent liable but reduced the award by fifty percent. The Respondent appealed to Court of Appeal and the Appellant cross appealed. The Court of Appeal allowed Respondent's appeal and dismissed the cross appeal.

51. The Appellant appealed to House of Lords which assessed contributory negligence at eighty percent (80%).

52. Lord Reid in agreeing with the assessment of contributory negligence stated as follows:-

"A Court must deal broadly with the problem of apportionment, and, on considering what is just and equitable, must have regard to the blameworthiness of each party, but 'the claimants share in the responsibility for the damage' cannot, I think, be assessed without considering the relative importance of his acts in causing the damage apart from his blameworthiness. It may be that in this case Dale was not much less to blame than Stapley, but Stapley's conduct in entering the stope contributed more immediately to the accident than anything that Dale did or failed to do."

53. In **Stapley's case,** both Stapley and Dale continued to work under the roof when they were ordered by their foreman to bring the roof down after they complained to him about the condition of the roof.

54. In this instance, no evidence was produced to show that the Plaintiff was given warning for not wearing safety boots or any other shoes which had proper grips.

55. In **Jebson** case the Claimant was a soldier and he travelled in a lorry for a night out organized by their Company Commander for relaxation purpose. It was not disputed that there would be a party and good deal of drinking. The lorry was only to be driven by the authorized driver who was on duty. Lance – Sergeant Myoh was appointed "senior passenger" and as such was:-

"Designated vehicle supervising officer and seated in the vehicle with the driver. He is in charge of all passengers and is to ensure that the vehicle is not overloaded ...[and]... he is to ensure that the vehicle is driven in a safe and proper manner".

56. On return journey the claimant and other soldiers except for driver and senior passenger were drunk. One of the Lance Corporal stood on his seat and climbed on the tailgate with intention of climbing on the canvas roof.

57. Claimant tried to persuade the Lance Corporal to come down and himself climbed on the tailgate.

58. Claimant then had change of heart and stood with the Lance Corporal on the tailgate. Claimant fell on the road and was injured.

59. Evidence of three young women who were following in a car driven by one of them was that the claimant, the Lance Corporal and another man were showing off by waving and shouting at occupants of the car. Driver of the car dropped back because of the fear that they may fall on the road.

60. Claimant then attempted to climb on the canvas roof and in the process lost his footing and fell on the road.

61. The trial Judge held the Defendant liable but assessed contributory negligence at 75% which was upheld on appeal. Lord Justice Porter at page 29 stated as follows:-

"Finally, on the basis of success under Issues 1 and 2, the claimant appeals against the judge's assessment of 75% contributory negligence upon his part. Mr. Braithwaite made short submissions in this respect. However, he failed to persuade me that the judge was other than right in regarding the claimant as largely the author of his own misfortune. On any view his actions were foolish and dangerous in the extreme. He had already sought to discourage Lance – Corporal Fear from pursuing a similar course. It is not known what led to a change of heart on the claimant's own part. However, no sensible (nor indeed any) reason has been advanced for that change of heart. In my view there are no grounds to interfere with the Judge's apportionment".

62. In **Barrett's** case, the Executrix of the Estate of Terence Barrett claimed for damages. The deceased was a naval officer and while on duty consumed liquor and became drunk and as a result he passed out on coma and became asphyxiated on his own vomit and later died.

63. The Trial Judge held the employer liable and held deceased guilty of contributory negligence and reduced damages by 25%. On Appeal the Court of Appeal held that the employer only became liable after the deceased collapsed because it assumed responsibility when deceased was no longer capable of looking after himself and that the measures taken by the employer fell short of the standard reasonably expected. The assessment on contributory negligence was increased from twenty five percent (25%) to two thirds.

64. Lord Justice Beldan at page 96 paragraphs D, E stated as follows:-

"The immediate cause of the deceased's death was suffocation due to inhalation of vomit. The amount of alcohol he had consumed not only caused him to vomit, it deprived him of the spontaneous ability to protect his air passages after he had vomited. His fault was therefore a continuing and direct cause of his death. Moreover, his lack of self-control in his own interest caused the appellant to have to assume responsibility for him".

65. In **Rushton's** case:-

Plaintiff was employed by the defendants to operate a fibre crushing machine, which consisted of a rotating pan within which were two rotating stones connected by a central pin. From time to time, in the course of the work, the crushed fibre tended to stick in the grooves along which slid a trap-door at the base of the machine. Through this trapdoor the crushed fibre was discharged into a chute periodically during the day. The machine could be cleaned from above by lifting the cover of the pan, and in that case the machine was stopped and the stones automatically stopped rotating; but the usual method of cleaning the grooves was from below the machine, by opening the trapdoor and putting one's hand in through the door having first stopped the rotation of the stones. The defendants knew that this was the method which their workmen normally used. There was no guard or barrier at this part of the machine, but it was the practice among the defendants' work men to stop the machine before attempting to clean the grooves. When the Plaintiff first started to operate a crushing machine, he received adequate training in regard to using and cleaning the machine and was instructed never to attempt to clean the grooves when the machine was in motion. He also received from the defendants a card with safety instructions and warning him not to touch any part of the machine when it was in motion expect those parts which formed part of his normal job and which he had been instructed to do the foreman or a teacher operative. After the plaintiff had been

employed on the machine for about six months, it was discovered one afternoon that a small piece of metal from the top edge of one of the grooves, separating the groove from the pan with the rotating stones, had broken away. It was decided that it would be safe to continue to use the machine for the remainder of that shift, and the Plaintiff continued to operate the machine, knowing its condition. Later in the afternoon, when the groove required cleaning, he put his left hand into the machine without stopping it and his fingers were crushed."

66. The Court held that the Plaintiff's action was quite deliberate despite all the training and instructions and the course of the accident was wholly attributed to him.

67. What transpired in this case is not same as to what happened in **Stapley** and in **Jenson, Barett** and **Ruston** case for following reason:-

(i) In **Stapley**, the employees told the foreman that the roof had some problem the foreman instructed them to "fetch" the roof down and instead of fetching the roof down the employees continued to work under the roof;

(ii) In **Jebson,** the claimant was drunk and was standing on the tailgate while the lorry was being driven. It was obvious that the claimant took the risk himself and if he would have remained at his place in the lorry then he would not be injured;

(iii) In **Barrett,** the deceased consumed liquor during the course of his employment which is not permitted at the work place such as the one the deceased was working for;

(iv) In **Rushton,** the Plaintiff was clearly told that he is to only clean the groove after the machine has stopped and had to do so with a knife that was provided to him by the employer. The Plaintiff was also given written instructions as to how to clean the groove. The Plaintiff by putting his

finger in the machine to clean the groove whilst the machine was in operation disobeyed the employer's instruction.

(v) In all the above cases the employers had no idea that the Plaintiffs were taking the risk and did not follow instructions, which is contrary to this case where Plaintiff's supervisor knew or ought to have known that Plaintiff was wearing flippers instead of safety shoes for almost two (2) months.

68. Defendants submitted that Plaintiff was contributory negligent for following reasons:-

"7.3 (a) Conduction of OHS training;

(b) A OHS Policy was and still is in place;

(c) The OHS Policy is displayed inside the laundry area;

(d) It is expected that the workers in the laundry area know the OHS Policy in place as training was conducted and workers were always reminded to wear the proper safety attire;

(e) A duty roster was enforced whereby the floor is mopped 3 times a day;

(f) The proper work and safety attire is distributed to the workers. For the laundry area workers these were uniforms and safety shoes;

(g) There is a fully functional OHS Committee which existed at the time of the Plaintiff's accident and still exists todate.

69. DW2's evidence was that Plaintiff wore massage flippers because Plaintiff stated to her that the safety boots were heavy.

70. If that was so, then I fail to understand why DW2 did not report this to the OHS Committee Chairman or CWMH Management.

71. It appears that the Supervisor and other senior staff in the Laundry Department of CWMH was well aware of the fact that Plaintiff was wearing massage flippers instead of safety boots for quite some time but did not enforce the OHS Policy.

72. There was no evidence of any written warning (memorandum or letter) given to the Plaintiff.

73. However, the Plaintiff was an experienced worker and should have known it is not safe to wear footwear which is not closed and had grips whilst working in a area such as laundry department. If she was not provided safety boots then she should reported it to OHS Representative.

74. As a result I assess contributory negligence at fifteen percent (15%).

Special Damages

Travelling Expenses/Medical Report

75. Plaintiff gave evidence that after being discharged she had to travel to hospital seven (7) times for review which was confirmed by Dr. Traill in his report. She claimed $60.00 for travelling expenses.

76. No documentary evidence has been produced to prove the amount claimed by Plaintiff. However:-

(i) In cases like this it is apparent that the person who incurs such expenses in a personal injury claim does not keep such documents because they do not appreciate its importance to any claim they may bring for the injuries sustained by them;

(ii) The court should not reject the claim only because the Plaintiff could not produce the documentary evidence for such expenses but must also consider the oral evidence of the Plaintiff as to whether it is credible or not and if the Court finds such evidence is credible then the Court

should not hesitate to award damages for claim such as travelling expenses, expenses for medication and expenses for obtaining report.

77. As such I accept Plaintiff's evidence that she incurred travelling expenses and medical report and allow her claim for $65.00.

78. Plaintiff gave evidence that after being discharged from hospital she bought pain killers as panadol to overcome pain but do not have any documentary evidence.

79. In view of what I said of Paragraph 77 of this Judgment, I will allow $200.00 for medication, as claimed in the statement of claim.

Loss of Earning and Fiji National Provident Fund

80. It was undisputed evidence of Plaintiff that Plaintiff's weekly gross wages was $165.44 and she was paid wages while she was admitted at the hospital.

81. Plaintiff retired in April at the age of fifty five (55) years.

82. Plaintiff's evidence is that after the accident she was not paid wages for twenty (20) days sick leave which means that she was paid normal wages until she retired. I therefore award Plaintiff loss of wages and FNPF contribution at $509.10 which is made up as follows:-

$165.44 x 52 weeks/365 x 20 days	$471.39
8% of $471.39 (FNPF)	37.71
	$509.10

83. Hence the total claim allowed for special damage is $774.10 which is made up as follows:-

Travelling expenses: $ 65.00

Medication expenses:	$200.00
Loss of wages and FNPF:	$509.10
	$774.10

General Damages

84. Plaintiff claim damage for pain and suffering, future economic loss and loss of future care;

Pain and Suffering

85. The Fiji Court of Appeal in **Chand & Anor. v. Amin** Civil Appeal No. ABU 0031 of 2012 (2 October 2015) stated as how damage is to be assessed for pain and suffering in very simple terms as follows:-

*"The assessment of damages under this dead depends upon the consequences to the individual plaintiff (**Bresatz v Przibilla** (1962) 108 CLR 541 at 548 cited in Law of Torts by Balkin& Davis 5th ed. at 11.28). In Hail v Rankin [20001] QB 272 the English Court of Appeal had acknowledged monetary inflation to be considered while making the awards. However the amounts decided on in previous cases can be considered no more than as a guide, and any particular determination must depend on such factors as the intensity of the pain felt by the plaintiff and its likely duration (Balkin& Davis (supra) at 11.28)."*

86. In **Chand & Anor. v. Amin**; Civil Appeal No. ABU 0031 of 2012 (2 October 2015 Respondent/Plaintiff suffered from disc injury as a result of lifting heavy objects during his employment. The Learned Trial Judge found that the Respondent/Plaintiff has suffered from pain and could not play soccer which was his interest and had problems with his sex life because of back pain. Respondent/Plaintiff was also using crutches and in terms of Medical Officer's evidence Respondent's/Plaintiff's situation would not get better.

87. The Learned Trial Judge awarded $85,000.00 for past and future pain and suffering and loss of amenities of life, which was upheld on appeal.

88. In **Asish Mudaliar v. Rajesh Rama & Anor**; Labasa High Court Civil Action No. 3 of 2012 (4 April 2014), Plaintiff suffered injuries as a result of being crushed between two buses.

The Plaintiff suffered from midshaft femur fracture (thigh bone) on 16 August 2011 when a rod was inserted. The rod was removed on 29 November 2012.

The Court found that Plaintiff suffered pain and suffering, lost amenities of life and injury suffered by Plaintiff was severe. Plaintiff at date of trial (4/4/2014) was 36 years old.

The Court awarded $60,000.00 for pain and suffering and loss of amenities of life.

89. In **Eta Naqelita v. Ram Kumar**; Labasa High Court Civil Action No. 19 of 2010, Plaintiff suffered following injuries:-

"1. Laceration upper lip and chin
2. Loose upper incision on the right side
3. Open fracture right radius and ulna, laceration over right forearm (measuring 15cm x 7mm x muscle deep and 10cm x 5xm muscle deep)
4. Close fracture left radius.

The blood investigation was normal limits. The X-ray findings were as follows:-

1. X-ray Skull - AP - Normal
2. X-ray right forearm - fracture radius and ulna
3. X-ray left forearm - fracture left radius
4. X-ray cervical spine - normal.

She was treated with antibiotics, analgesics, wound wash and back slab.

She was discharged on 12/9/09 with arrangements made for review in the surgical clinic".

The permanent disability was said to be nineteen per cent (19%). Court awarded Plaintiff $70,000.00 for pain and suffering and loss of amenities of life.

90. In **Nasese Bus Company Limited & Anor v. Muni Chand**, Civil Appeal No. 40 of 2011(8 February 2013) Respondent/Plaintiff suffered:-

(i) closed displaced comminuted intra-articular fracture of left ankle;
(ii) closed extensive degloving injury right thigh;
(iii) grade II anterious cruciate ligament injury right knee; and
(iv) multiple abrasions to both upper and lower limbs.

Respondent/Plaintiff was awarded $65,000.00 by the Honorable Trial Judge for pain and suffering which award was increased to $90,000.00 on appeal.

91. In **Tamanibuici v. Prasad & Anor.** Labasa High Court Civil Action No. HBC 34 of 2012 (29 September 2015) the Plaintiff suffered following injuries:-

"(i) Fracture of right femur;
(ii) Fracture of left forearm and ulna of left arm;
(iii) Fracture of right clavicle"

Plaintiff at time of accident was fourteen (14) years old. He had gone through surgery whereby rod was inserted in his right thigh and his leg was put on cast. Plaintiff was admitted on 5 June 2009.

The medical officer's evidence was that Plaintiff's skin and muscle was cut to release tension and ease flow of blood. After this swelling of Plaintiff's right leg increased that he had to go through open reduction surgery because the fracture of right femur was bad and had to be straightened. After this surgery Plaintiff's leg was put on plaster.

Plaintiff was discharged on 5 August 2009, but was re-admitted on 21 September 2009, because fracture had not united. On 29 September 2009, Plaintiff went through another open reduction and internal fixation surgery and was discharged on 1st October 2009.

In total Plaintiff was admitted for seventy one (71) days.

This Court awarded Plaintiff $70,000.00 for past pain and suffering and $10,000.00 for future pain and suffering.

92. In **Attorney General of Fiji v. Broadbridge** [2005] Civil Appeal No. CBV005 of 2003s (8 April 2005) the injuries suffered by the Plaintiff and treatment he received in brief are as follows:

(i) He suffered a fractured forearm and fracture hip joint.
(ii) At Colonial War Memorial Hospital (CWM) a plaster cast was fitted to his hip.
(iii) Court noted that his condition has not properly diagnosed by CWM as it was not discovered at that stage that his hip was dislocated with significant damage to the surrounding area.
(iv) Plaintiff had to undergo surgery in New Zealand.
(v) Plaintiff continued to suffer from chronic pain in the hip and knee joint.

93. The Trial Judge awarded Plaintiff $75,000.00 for pain and suffering which on appeal was reduced to $60,000.00 by Fiji Court of Appeal. The appellant did not challenge the Fiji Court of Appeal decision in this respect.

94. In **Dre v. Ministry of Health and Anor**. [2009] Civil Action No. 20 of 2007 (24 June 2009), the Plaintiff went to Nabouwalu Hospital for treatment of pain in her right ear. The doctor who attended to Plaintiff inserted the needle below the thumb of the right hand. After a short while Plaintiff was in extreme pain and started crying and subsequently it was discovered that the injection was wrongly inserted with into the artery which resulted in lack of blood and oxygen flow to that part of the body. There was no option but to amputate Plaintiff's

right hand. The Court awarded $75,000.00 for pain and suffering and loss of amenities of life.

95. I accept the evidence of Dr. Alvin De Asa in respect to the assessment carried out by him and his findings which is in conformity with Dr. Sitiveni Traill's assessment.

96. After analyzing the evidence produced in Court I asses the amount for pain suffering as follows:

(i)	Past pain and suffering	-	$30,000. 00
(ii)	Future pain and suffering	-	$5,0000.00

Future Economic Loss

97. Plaintiff worked at CWMH until she retired and as such he not suffered any future economic loss. Even if she did, no evidence was produced in Court in this regard.

98. Hence, Plaintiff's claim for future economic loss is dismissed.

Loss of Future Care

99. No evidence has been produced to show that Plaintiff needs future care.

100. Hence, Plaintiff's claim for future care is dismissed.

Interest

101. I think it is just and fair that interest on special damage be assessed at three percent (3%) and on general damage be awarded at four percent (4%). The reason for awarding four percent (4%) interest on general damage is that Plaintiff has been quite slow in prosecuting this action.

Costs

102. I have taken into consideration that the trial lasted for two (2) days and parties have filed submissions.

Conclusion

103. This Court holds that:

(i) Defendants owed a duty of care to the Plaintiff.
(ii) The Defendants breached their duty of care owed to the Plaintiff which was the cause of Plaintiff's injury.
(iii) Plaintiff contributed to her injury which is assessed at fifteen percent (15%).

104. Defendants are to pay the Plaintiff a sum of thirty seven thousand eight hundred nineteen dollars ($37,819.00) being special and general damages including interest up to the date of Judgment which said sum is made up as follows:

Special Damages [paragraph 84]	$774.10	
Less 15% - Contributory Negligence	116.10	
	$658.00	
Interest at less 3% percent from 27/06/2007 (date of Accident) to 15/07/2016 (date of Judgment)-(3307 days)	$179.00	$ 837.00

General Damages

Past Pain and Suffering	$30,000.00	
Less 15% - Contributory Negligence	4,500.00	
	$25,500.00	

Interest at 4% per annum from 05/06/2009 (date of

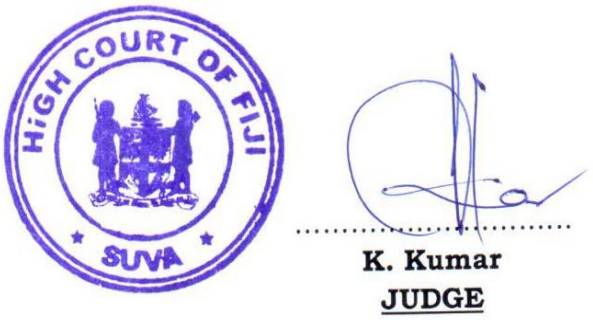
Writ) to 15/07/2016(date of Judgment)- (2588 days)	$ 7,232.00	$32,732.00
Future Pain and suffering	$5,000.00	
Less 15% - Contributory Negligence	750.00	$ 4,250.00
Total		**$37,819.00**

Orders

105. I make the following Orders:

(i) Defendant do pay Plaintiff the sum of $37,819.00 (thirty seven thousand eight hundred nineteen dollars) including interest;

(ii) Defendants do pay Plaintiff cost of this action assessed in the sum of $3,500.00.



K. Kumar
JUDGE

At Suva
15 July 2016

Daniel Singh Lawyers for the Plaintiff
Office of the Attorney General for the Defendants