

IN THE HIGH COURT OF FIJI AT SUVA
CIVIL JURISDICTION

Civil Action No. 171A of 2009

BETWEEN: **SANJEEV KUMAR**

PLAINTIFF

AND: **RAJEN BUILDERS LIMITED**

DEFENDANT

AND: **NEW INDIA ASSURANCE (FIJI) LIMITED**

FIRST 3RD PARTY

AND: **UNITY INSURANCE BROKERS (FIJI) LIMITED**

SECOND 3RD PARTY

Before: Hon. Justice Kamal Kumar

Counsel: Ms. S. Dewan for the Plaintiff
 Mr. S. Nandan for the Defendant
 Mr. O'Driscoll for the 1st Third Party
 Mr. R. P. Singh for the 2nd Third Party

Date of Hearing: 21, 22, 23, 24, 25 September 2015

Date of Judgment: 2 February 2017

JUDGMENT

Introduction

1. On 22 June 2009, Plaintiff caused Writ to be issued with Statement of Claim claiming for special damages, general damages, interest and costs arising out of injuries sustained by the Plaintiff in an accident during the course of his employment on or about 5 February 2009 (“**DOA**”).
2. On 13 June 2009, and 17 August 2009, Defendant filed Acknowledgement of Service and Statement of Defence respectively.
3. On 23 September 2009, Plaintiff filed Reply to Statement of Defence.
4. On 28 October 2009, Plaintiff filed Affidavit Verifying Plaintiff’s List of Documents.
5. On 11 November 2009, Sheik H. Shah, Esquire filed Notice of Change of Solicitors for the Plaintiff.
6. On 12 November 2010, Defendant filed Affidavit Verifying Defendant’s List of Documents.
7. On 23 August, 2011, Messrs. Neel Shivam Lawyers filed Notice of Change of Solicitors for the Plaintiff.
8. On 1 November 2011, Plaintiff filed application to amend Statement of Claim which application was granted by Court on 31 January 2012, with no Order as to costs.
9. On 31 January 2012, Plaintiff filed Amended Writ of Summons.
10. On 20 February 2012, Defendant filed Defence to Amended Claim and on 19 January 2012, Plaintiff filed Reply to Defendant’s Statement of Defence.
11. On 19 July 2012, Plaintiff filed Summons for Directions and on 7 August 2012, being the returnable date of the Summons, Order in terms of the Summons was made.
12. On 3 September 2012, Plaintiff filed Affidavit Verifying Plaintiff’s List of Documents.

13. On 1 November 2012, Plaintiff filed Notice Requesting for Pre-Trial Conference.
 14. On 17 January 2013, Defendant's Solicitors filed application by Summons seeking following Orders:-
 - “(i) That leave be granted to Messrs Sherani & Co. to withdraw as Solicitors for the Defendant.*
 - “(ii) That the New India Assurance Company Limited the insurer of the Defendant agrees to indemnify the Defendant under the Workmen's Compensation Insurance Policy and/or the Common Law liability to the sum of \$100,000.00 of which the sum of \$20,000.00 has already been paid and the balance sum is \$80,000.00.*
 - “(iii) That costs of this Application be Costs in the cause.”*
- (“the Summons”)**
15. On 22 February 2013, being returnable date of the Summons Order in terms of the Summons was made by his Lordship Justice Amaratunga and the Plaintiff was directed to file Order 34 Summons.
 16. On 26 February 2013, Plaintiff filed Application to dispense with Pre-Trial Conference and to enter this action for trial and on 27 March 2013, being returnable date of the Application Order in terms of the Application was made.
 17. This action was first called in this Court on 31 May 2013, when Mr Rajendra Prasad, Managing Director for Defendant appeared and was given time until 12 July 2013, to seek legal advice from his new Solicitors.
 18. On 4 July 2013, Messrs Reddy & Nandan filed Notice of Change of Solicitors for the Defendant.
 19. On 12 July 2013, Defendant's Counsel informed the Court that he is still waiting for documents from Defendant's previous Solicitors and this action was adjourned to 29 July 2013, and thereafter to 15 August 2013, 20 August 2013 and 6 September 2013, to enable Defendant's Solicitor to obtain documents.

20. On 2 September 2013, Defendant filed Ex-parte Notice of Motion for Leave to Issue Third Party Notice which Motion was withdrawn on 6 September 2013, and this action was adjourned to 13 September 2013.
21. On 13 September 2013, Defendant filed fresh Application for Leave to Issue Third Party Notice and on the same day leave was granted for Defendant to issue Third Party Notice and this action was adjourned to 22 November 2013.
22. On 1 October 2013, Defendant filed Third Party Notice.
23. On 28 October 2013, Messrs. Kohli & Singh filed Acknowledgement of Service on behalf of Second Third Party.
24. On 21 November 2013, Defendant filed Third Party Summons for Direction and on 22 November 2013 Order in terms of the Summons for Direction was made and this action was adjourned to 24 January 2014.
25. On 30 December 2013, Messrs. Sherani & Co. filed Acknowledgement of Service for 1st Third Party.
26. On 31 December 2013, Defendant filed Statement of Claim against the Third Parties.
27. On 24 January 2014, Counsel for the Defendant raised the issue that Messrs. Sherani & Co. had acted for the Defendant and is now acting for the Third Party. Counsel for Third Party being Solicitor from Messrs. Sherani & Co. sought time to consider their position. This matter was adjourned to 21 January 2016, and Third Parties and Defendant were directed to file Defence and Reply to Defence.
28. On 31 January 2014, Messrs. O'Driscoll & Co. filed Notice of Change of Solicitors on behalf of First Third Party.
29. On 14 February 2014, First Third Party filed Statement of Defence.
30. On 21 February 2014, Second Third Party was granted time until 14 March to file Statement of Defence and First Party's Statement of Defence was struck out for irregularity and Defendant was directed to serve its Statement of Claim on First Third Party. This action was adjourned to 21 March 2014.

31. On 3 March 2014, Second Third Party filed Statement of Defence.
32. On 11 March 2014, Defendant filed Reply to Defence of Second Third Party.
33. On 21 March 2014, this Court directed First Third Party and Defendant to file Statement of Defence and Reply to Defence; Defendant and Third Parties to attend to Pre-Trial Conference (PTC); and file Minutes of PTC. This action was adjourned to 16 May 2014.
34. On 16 May 2014, Defendant and Third Parties were granted time until 10 June 2014, to comply with direction and this action was adjourned to 11 June 2014.
35. On 3 June 2014, Defendant filed Affidavit Verifying Defendant's List of Documents.
36. On 11 June 2014, Defendant was directed to file Reply to Statement of Defence of First Third Party and parties were directed to file Minutes of PTC and this action was adjourned to 1 August 2014, to fix trial date.
37. On 3 July 2014, Defendant filed Reply to Statement of Defence of First Third Party.
38. On 4 July 2014, Affidavit Verifying First Third Party's List of Documents was filed.
39. On 1 August 2014, parties were granted further time to convene PTC and file Minutes of PTC. This action was adjourned to 12 September 2014.
40. On 12 September 2014, Counsel for Defendant informed Court that PTC has been convened and Minutes will be filed following week.
41. This matter was adjourned further to allow parties to finalise PTC Minutes and for Plaintiff to file Copy Pleadings.
42. On 8 January 2015, Plaintiff filed Minutes of PTC between Plaintiff's and Defendant's Solicitors.
43. On 21 January 2015, Plaintiff filed Copy Pleadings on Order 34 Summons.

44. This matter was called before this Court on 6 March 2015, when it was listed for trial from 21 to 25 September 2015.
45. On 14 September 2015, Plaintiff filed Application for evidence of Susan King aka Marie Ange Gouy be given by Affidavit and she be cross-examined by Defendant by audio visual link and on 17 September 2015, being returnable date of the Application Order in terms of the Application was made by consent.
46. The trial commenced on 21 September 2015 and completed on 25 September 2015, when parties were directed to file Submission and Reply to Submission by 13 November 2015, and thereafter Judgment was to be delivered on Notice.
47. On 15 December 2015, Plaintiff filed Submissions and list of Authorities.
48. On 7 November 2016, First Third party filed Application for extension of time for filing of Submissions and on 22 November 2015, being returnable date of Application Order in terms was made by consent.

Issues to be Determined

49. The issues that need to be determined are as follows:-
 - (i) Whether Defendant owed duty of care to the Plaintiff?
 - (ii) Whether Defendant breached any duty of care owed to the Plaintiff?
 - (iii) Whether Defendant's breach caused Plaintiff injuries which resulted in Plaintiff suffering pain, special and general damages?
 - (iv) What is the quantum of damages?
 - (v) Whether First Third Party or Second Third Party liable to indemnify the Defendant for the sum of \$250,000.00?
 - (vi) Whether Second Third Party acted as Agent of the First Third Party or the Defendant?

Documentary Evidence

50. The following documents have been put in evidence by the parties:-

Plaintiff's Exhibits

Exhibit No.	Document
P1	Medical Report dated January 2011 from Dr E. D. Taloga, Suva Private Hospital;
P2	Photocopy of Plaintiff's Birth Certificate;
P3	Photocopy of Fiji National Provident Fund (" FNPF ") Statement of Plaintiff for period 1 August 2006 to 31 January 2007;
P4	Photocopy of FNPF Statement of Plaintiff for the period 1 February 2009 to 31 July 2009;
P5	Photocopy of Notice of Accident Report dated 18 February 2009 by Defendant to Ministry of Labour;
P6	Photocopy of Invoice No. 420313 dated 1 September 2011 from Suva Private Hospital to the Plaintiff;
P7	Photocopy of Receipt No. 440732 from Suva Private Hospital for the sum of \$317.40;
P8	Photocopies of photograph of the walkway to the premises at 7 Damu Place, Tamavua, Suva;

Defendant's Exhibits

Exhibit No.	Document
D1	Photocopy of Defendant's Pay Register for pay week from 12 December 2008 to 13 February 2009;
D2	Pay record of Plaintiff with Defendant for the period 6 February 2009 to 8 January 2010;
D3	Facsimile Message (Quotation) dated 19 August 2005, from Second Third Party to Defendant.

First Third Party

Exhibit TP1(1)	Photocopy of letter dated 16 October 2006 regarding renewal terms of certain insureds including Defendant.
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Second Third Party

Exhibit No.	Document
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|--------|--|
| TP2(1) | Photocopy of Placing Slip dated 7 November 2005 for the period 7 November 2005 to 7 November 2006; |
| TP2(2) | Photocopy of Renewal/Premium Debit Note dated 7 November 2006 for the period 7 November 2006 to 7 November 2007; |
| TP2(3) | Photocopy of Renewal/Premium Debit Note dated 23 October 2007 for the period 7 November 2007 to 7 November 2008; |
| TP2(4) | Photocopy of Renewal/Premium Debit Note dated 4 November 2007 for the period 7 November 2008 to 7 November 2009. |

Witnesses

51. Plaintiff gave evidence himself and called two other Witnesses namely:-
- (i) Dr. Emosi Taloga of 17 Paul Sloan Street, Bayview Heights, Nabua, Orthopedic Surgeon (“PW1”);
 - (ii) Susan Kingston of 7 Damu Place, Tamavua, Suva (“PW3”).
52. Defendant called two witnesses namely:-
- (i) Josephine Sneh Lata of Koronivia Road, Nausori (“DW1”);
 - (ii) Rajendra Prasad of Suva, Managing Director of Defendant Company.
53. First Third Party called Mahesh Kumar of 7 Holland Street, Suva, Manager as its only witness (“1TPW”).
54. Second Third Party called Luisa Veibete of 28 Qauia St, Lami as its only witness (2TPW”).

Whether Defendant Owed Duty of Care to the Plaintiff

55. It is well settled 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.

56. The common law duty has also become a statutory duty pursuant to Section 9 of the Health and Safety at Work Act (1996) which provide as follows:-

“9.(1) Every employer shall ensure the health and safety at work of all his or her workers.

(2) Without prejudice to the generality of subsection (1) of this Section, an employer contravenes that subsection if he or she fails-

- (a) to provide and maintain plant and systems of work that are safe and without risks to health;**
- (b) to make arrangements for ensuring safety and absence of risks to health in connection with the use, handling, storage or transport of plant and substances;**
- (c) to provide, in appropriate languages, such information, Instruction, training and supervision as may be necessary to ensure the health and safety at work of his or her workers and to take such steps as are necessary to make available in connection with the use at work of any plant or substance adequate information in appropriate languages -
 - (i) about the use for which the plant is designed and about any conditions necessary to ensure that, when put to that use, the plant will be safe and without risks to health; or**
 - (ii) about any research, or the results of any relevant tests which have been carried out, on or in connection with the substance and about any conditions necessary to ensure that the substance will be safe and without risks to health when properly used.****
- (d) as regards any workplace under the employer's control -
 - (i) to maintain it in a condition that is safe and without risks to health; or**
 - (ii) to provide and maintain means of access to and egress from it that are safe and without any such risks;****
- (e) to provide and maintain a working environment for his or her workers that is safe and without risks to health and adequate as regards facilities for their welfare at work; or**
- (f) to develop, in consultation with workers of the employer, and with such other persons as the employer considers appropriate, a policy, relating to health and safety at work, that will -
 - (i) enable effective cooperation between the employer and the workers in promoting and developing measures to ensure the workers' health and safety at work; and**
 - (ii) provide adequate mechanisms for reviewing the effectiveness of the measures or the redesigning of the said policy whenever appropriate.”****

57. The Plaintiff was an employee of Defendant when Plaintiff was involved in an accident in the course of his employment and as such Defendant owed him a duty of care to provide safe system of work which is free of danger and risk to the Plaintiff.
58. I note that Plaintiff has relied on Factories Act Cap 99 and regulation made pursuant to the Factories Act. Factories Act has been repealed by virtue of s61 of Health and Safety At Work Act 1996.

Whether Defendant Breached Its Duty of Care

59. Plaintiff during evidence in chief gave evidence that:-
- (i) On DOA he was nineteen and half years old and his education level was upto class seven (7);
 - (ii) On DOA he was employed by Defendant as semi carpenter and his duties included mixing cement, cleaning tools and do work as directed by the foreman and his boss.
 - (iii) He worked for Defendant from 2005 to August 2006 when he joined Lomac Construction and in 2008, rejoined Defendant.
 - (iv) Mr Rajend Prasad is Managing Director of Defendant and he regarded Mr Prasad's son Vijendra Prasad as his boss because he was Mr Prasad's son.
 - (v) In 2009, Defendant's foreman's name was Ami Chand and he would generally tell him what work to do.
 - (vi) Mr Rajend Prasad and his son also gave instructions.
 - (vii) When he went to office in the morning of DOA he was instructed by Mr Rajend Prasad and Vijendra Prasad to go to Damu Place, Namadi Heights (**the Site**) to change five tins.
 - (viii) Vijendra Prasad then went with him to the site in the Company van and after they unloaded the "A" ladder and tools he went on the roof with Vijendra Prasad who instructed him to change five tins and that when it was done for him to inform him to be picked up.

- (ix) He was also accompanied by another employee by the name of Ritesh who was younger than him.
- (x) At the time of accident he did not know the owner of the premises.
- (xi) At the premises he had to change one line of roofing and the roof was of corrugated roofing iron and plastic.
- (xii) They took hammer, pinch bar, lead wire and drill to work at the site.
- (xiii) He did not receive any instructions from the foreman as he was not around on that day.
- (xiv) Vijendra Prasad gave instructions for him to change one line of roofing and left.
- (xv) Defendant did not provide any safety gear or equipment and on DOA he was wearing his own safety boot and helmet.
- (xvi) After Vijendra Prasad left no one else came on the job site.
- (xvii) At time of accident it was sunny and accident happened at 11.00am or 11.30am.
- (xviii) He changed roof only once before the DOA and that was done under the supervision of the foreman.
- (xix) The accident happened in the following manner:-
 - (a) After he removed first roofing iron (not plastic) he bent down to remove second roofing iron.
 - (b) He was pulling it backward and in order to apply more power and pull, thinking this way second tin will come out.
 - (c) The roofing cover he put his leg on at the back was plastic.
 - (d) When he put his leg on the roof cover it broke and he fell backwards.

60. During cross-examination Plaintiff:-

- (i) Maintained that Vijendra Prasad took him to the job site and not Rajendra Prasad.

- (ii) Stated that nature of work (to replace roofing iron) should have been done by Senior carpenter if foreman was not around.
- (iii) When it was put to him that the nature of work he did, did not require foreman and foreman or supervisor is to be provided when there is more than five workers he stated that he did not know.
- (iv) Stated that the roof he was working on had corrugated iron roof and sun roof and the sun roof was placed after two and three sheets of corrugated iron.
- (v) When it was put to him that the actual height of the place where he was working at time of accident was 2.4m or 2.5m he stated that he did not measure but the company could have measured after the accident.
- (vi) Stated that he was careful when he was doing the job but accidentally put his foot on the pan fan roof.

61. In re-examination Plaintiff stated that:-

- (i) Ritesh who was with him was a part time student and the reason there should have been a senior carpenter or foreman is that they could save anything from going wrong.
- (ii) He should have been provided with safety belt so that he could have secured himself.
- (iii) It was difficult for him to see the sun roof because it was at his back.

62. PW3, Susan Kingston of 7 Damu Place, Suva, Retired in her evidence in chief gave evidence that:-

- (i) On 5 February 2009, she was at her place at 7 Damu Place, which property they bought five (5) years ago.
- (ii) 5 February 2009, was a busy day as she had two sets of workers, one to do work on the roof and another set to do plumbing works.
- (iii) Work on the roof was being carried out by two (2) young boys whose names she did not know at that time.
- (iv) She came to know Sanjeev Kumar's name.

- (v) Shortly before 5 February 2009, her husband engaged Rajendra Builders (RBL) to change the roof at the back of their house.
- (vi) On 5 February 2009, two workers were dropped by Rajendra Prasad or the Manager of RBL and did not know if they came later.
- (vii) Workers started work on the roof at around 8.00am or 9.00am and at about 10.00am they came down to have tea, after which they went back on the roof.
- (viii) Soon after tea, when she was in master bedroom when she heard a loud noise and ran to the kitchen and saw someone fell from the roof and saw a young Indian man lying down, who looked very bad and she rushed back to call the Ambulance.
- (ix) Sanjeev Kumar's condition was very bad and she could not talk to him because he was in very heavy pain, and could not talk or move.
- (x) She did not know if he was conscious or not.
- (xi) The reason they wanted to change the roof was that they just bought the house, the back roof was not in good condition and some plastic and corrugated iron roof were broken.
- (xii) Height of the roof is about three (3) metres.
- (xiii) When photograph (Exhibit P8) were shown she stated that she believed the photographs to be of her house but did not know who had taken them or no permission was taken.

63. PW3 during cross-examination:-

- (i) Stated that RBL was to replace about twenty corrugated iron and plastic sheets.
- (ii) When it was put to her that they had to change only five (5) sheets, she disagreed and stated that it was more than that because she believed it was twenty-two (22) metres long and all plastic sheets and some corrugated iron were to be changed.

- (iii) Disagreed that five (5) corrugate iron and one (1) plastic sheet was damaged and stated that seven or eight (8) plastic sheets were changed and corrugated iron sheets and she knows that they did not change one (1) plastic sheet.
 - (iv) When it was put to her that driver who dropped workers was Rajendra Prasad, she stated that it could be him or the Manager and she could not recall.
 - (v) Stated the estimate height of the roof is three (3) meters and when it was put to her that it was 2.4 or 2.5 meters she stated that it seemed low but it could be.
 - (vi) She believed width of roof to be one and half (1½) meters and length to be twenty-two (22) meters and stated that roof was bit slopy.
 - (vii) Agreed that she called Colonial War Memorial Hospital twice, that is once she called straightaway and then she went back and called as she was panicking.
 - (viii) After a while she called RBL and believed Rajendra Prasad came when Ambulance arrived and she said to him your worker fell.
64. In re-examination PW3 stated she could not recall when Rajendra Prasad or his Manager dropped the workers at her place.
65. DW1 during evidence in chief gave evidence that:-
- (i) She has been employed by Defendant as Accounts/Administration Officer since 4 June 2005 and her duties included keeping records, attending to tax matters and general office work.
 - (ii) Plaintiff was employed by Defendant in 2008 and 2009 until his injury and confirmed the details in Exhibits D1 and D2.
 - (iii) Defendant paid wages to Plaintiff as per Exhibit D2 until 8 January 2010 when she was informed by Plaintiffs mother that Plaintiff's lawyers told them not to collect any more wages as matter is in Court.
66. During cross-examination by Plaintiff's Counsel DW1:

- (i) Stated that she had no idea Ritnesh's name does not appear on Exhibit D1.
 - (ii) When it was put to her that reason that his name does not appear on Exhibit D1 could be that he was part-time worker, a student and attachee she stated that she does not know.
 - (iii) Stated that Defendant did not ask Plaintiff or his mother to put in writing that Plaintiff does not want two third wages and that Defendant wrote to Unity Insurance asking them what to do.
 - (iv) Stated that she was informed by Mr Rajend.
 - (v) Stated that after she was told to stop paying two third wages to Plaintiff, Defendant did not seek any legal advice, or make arrangement to pay two third wages elsewhere or check with Plaintiff's former Solicitors if it could be paid into Solicitors trust account.
67. In re-examination DW1 gave evidence that Defendant wrote to Unity Insurance to inform that Plaintiff's Solicitors have told Defendant to not to pay and maybe asked what to do and she did not remember if Defendant got a response from Unity.
68. DW2 in his evidence in chief gave evidence that:-
- (i) He is Managing Director of Defendant Company which has been in the business of building construction, maintenance, renovation, joinery and plumbing works since 1973 and he personally has been in the building industry for forty-three (43) years.
 - (ii) Plaintiff has been RBL's employee from September 2008 and Plaintiff had been employed by RBL before that too.
 - (iii) When Plaintiff came to work at 8.00 am on 5 February 2009, at RBL's office at Ratu Mara Road he was asked to load his tools in RBL's van.
 - (iv) Plaintiff and Ritesh loaded the van with Plaintiff's tool box, ladder, drilling machine and cord wire.

- (v) After van was loaded, they left for job site at Damu Place where they had to change five (5) roofing sheets to a single storey building owned by a European lady.
- (vi) He was driving the van and Plaintiff and Ritesh was with him.
- (vii) When they arrived at the job site he got Plaintiff and Ritesh to unload the van and they set the ladder to climb on the roof.
- (viii) He climbed the ladder first and when he was climbing the ladder, Plaintiff and Ritesh were holding onto the ladder.
- (ix) After he climbed on the roof he held the ladder for Plaintiff and Ritesh to climb onto the roof.
- (x) After they climbed onto the roof he told Plaintiff and Ritesh that they have to change five (5) tins.
- (xi) The roofing was supplied by the lady and they moved the roofing iron onto the roof.
- (xii) After he explained to Plaintiff and Ritesh as to what they had to do he climbed down the roof and left for a site in Lami.
- (xiii) When he came down he met the owner of the house on his way out and that he met her before 5 February 2009 when he went to the property.
- (xiv) Lady rang and informed him that his employee fell off the roof, got injured and she called Ambulance and he was taken to hospital.
- (xv) He went to the hospital but could not see the Plaintiff.
- (xvi) Later on the day he went to job site with his son Vijay and Ritesh and picked Plaintiff's tool box, cord, ladder and drilling machine and the job was completed the next day.
- (xvii) Safety equipment used on 5 February 2009 at the job site was safety boots, helmet and ladder and only their safety gear was required for the job because roof was not slopy.

- (xviii) If it is "A" roof then they make scaffold and he was not aware of any OHS requirement as to types of safety equipment to be provided for the type of work.
- (xix) He did not measure height of the roof but according to him the maximum would be 2.5 meters.
- (xx) He did not remain to oversee the work because it was a small job.

69. During cross-examination DW2:-

- (i) At first stated that Plaintiff was employed as Carpenter but agreed that the pay register of Defendant (Exhibit D1) Plaintiff's occupation is written as Semi Carpenter.
- (ii) Agreed that the Accident Report Form (Exhibit P5) states Plaintiff's occupation as Semi Carpenter but stated that Form must have been completed by Josephine, Defendant's Administration Officer.
- (iii) Agreed that at no point in time Plaintiff's employment with Defendant is described as Carpenter.
- (iv) Agreed that Semi Carpenter may be able to do some carpentry work but needs direct supervision.
- (v) Disagreed that on 5 February 2009, apart from Plaintiff and Ritesh there was no supervisor at the job site and when asked who was the supervisor he stated that in the morning he told them what to do.
- (vi) Stated that Ritesh Kumar was his employee from November or December 2005.
- (vii) When shown Exhibit D1 in which Ritesh Kumar's name does not appear he stated that his name appears on the Master Time Sheet.
- (viii) Stated that he did not give Master Time Sheet to his lawyers.
- (ix) Disagreed that Ritesh Kumar was a part-time student and employed part-time by Defendant. Agreed that Ritesh Kumar could be younger than Plaintiff.

- (x) When it was put to him that Ritesh Kumar's skill for work to be done will not be more than that of Plaintiff he stated that they both knew the job.
- (xi) Stated that according to him the estimate height of roof would be 2.5 meters and when it was put to him that height could be 2.5 meters to 3 meters he stated "could be", "didn't measure" but "less than 3 meters".
- (xii) Agreed that roof had a fall but it was not a big fall.
- (xiii) When he was referred to photograph (Exhibit P8) he stated that there could have been a six (6) inches fall.
- (xiv) Stated that only five corrugated iron sheets were to be changed.
- (xv) Stated that he does not know how long it takes to finish that kind of job.
- (xvi) Stated that he did not give quotation for the job, did not raise any invoice and did not get paid for the job.
- (xvii) When asked if Defendant kept any record for the job he stated he was asked to replace five (5) or six (6) tins.
- (xviii) Stated that all jobs are recorded on job cards with details of work, materials and so on but Defendant did not have job card for work at Damu Place.
- (xix) Agreed that Defendant is not in the practice of providing safety boot and helmets but gives ladder, safety belt and scaffold.
- (xx) Agreed Plaintiff used his own safety boot and helmet.
- (xxi) When asked if safety belt or safety harness was given he stated "No" and stated that there was no need for that.
- (xxii) Agreed that there is risk that person can fall from a height even a drum.
- (xxiii) When asked what action was taken by Defendant to avoid the risk of falling he stated that roof was flat, no rope or safety belt could be tied, all other staff works like that, accidents happened, he cannot do anything and has no choice.
- (xxiv) Stated that nail will not hold safety belts.

- (xxv) When asked if he made any assessments to see if safety belt or safety harness could be tied he stated that it was small job and he checked but there was no place to tie it.
- (xxvi) Stated that Defendant did not consider providing crawling ladder.
- (xxvii) Stated that he does not know what crawling ladder is and when explained what crawling ladder is, he stated he did not come across one.
- (xxviii) Agreed that safety boots and helmet will not stop a person from falling down.
- (xxix) Stated that he knows about construction work, not the law and knows little bit about OHS Regulation.
- (xxx) Stated OHS Officers come and train his employees on safety requirements.
- (xxxi) Stated Plaintiff knew what he had to do, Plaintiff told him that he could do it and that is why he gave Plaintiff that job.
- (xxxii) When it was put to him that Plaintiff being a semi carpenter was not competent to do work on that roof he stated anybody could have done that job.
- (xxxiii) Stated that him and his son gave Statement to Investigators appointed by New India Assurance Co. Ltd but could not recall what he said at that time as it was long time ago.

70. In re-examination DW2 stated that:-

- (i) A semi carpenter can do foam work, pour concrete, fix rafters and purlin and fix roof.
- (ii) Full time supervision is not required when roof is replaced.
- (iii) Plaintiff did work on roof at one Vijay Sharma's residence when he worked for Defendant.
- (iv) Job card of Defendant would have information such as materials, labour costs, transport costs and tools supplied.

- (v) No safety belt or safety harness was provided because the work was not complicated.
- (vi) His son, Defendant's workers, foreman and estimators attend OHS training and he was not sure if Plaintiff and Ritesh attended OHS training.
- (vii) After the accident, assessor from New India Assurance came and spoke to him.
- (viii) The assessor was a European man who took notes.
- (ix) The assessor showed him what he wrote but he could not understand everything because the letters were small and in cursive.

Whether Defendant Breached Its Duty Of Care Owed To The Plaintiff

- 71. I accept Plaintiff's evidence that he was employed by Defendant as a semi carpenter. This is confirmed by Exhibits D1 and D2.
- 72. It is not disputed that at the time of accident Plaintiff was nineteen and half years old.
- 73. From the evidence produced in Court, I make following finding of facts:-
 - (i) The Plaintiff and Ritesh Kumar were taken to the job site at 7 Damu Place, Namadi Heights by Vijendra Prasad and not Rajendra Prasad.
 - (ii) After Plaintiff and Ritesh Kumar were dropped at the job site, the said Vijendra Prasad left the job site after directing the Plaintiff as to what is required to be done.
 - (iii) Only safety equipment Plaintiff had was his safety boot and safety helmet.
 - (iv) No safety harness or any rope was taken to the job by Plaintiff and/or Vijendra Prasad.
 - (v) I do not believe DW2's evidence that he took Plaintiff and Ritesh Kumar to the job site and instructed them what to do.
 - (vi) Since, I accept Plaintiff's evidence that Vijendra Prasad dropped them at job site, DW2's evidence that he assessed the situation and was of the view

that since roof was flat there was no need to tie rope or use safety harness is rejected.

- (vii) I fail to understand how he could give evidence that there was no provision for trying the rope or fixing safety harness when no rope or safety harness was taken to the job site at all.
- (viii) The Defendant took the job to be done by Plaintiff very lightly and failed to take into consideration that Plaintiff and Ritesh Kumar who was also nineteen years old at the time of accident were supposed to work at a height and remove corrugated iron roof which was quite old.
- (ix) DW1 admitted that he has seen people falling from drums when they work at a height.
- (x) Since DW1 had been in building industry for almost forty-three (43) years he should have been aware the risk he was putting the Plaintiff and Ritesh Kumar to when he left them to carry out job on the roof without proper supervision and without providing safety harness and rope.
- (xi) Based on the evidence of Plaintiff, PW3 and DW2 I find that Defendant breached its duty of care.

Whether Plaintiff's Injury Was Caused By Defendant's Breach Of Duty Of Care

74. It is not doubted and that Plaintiff suffered injuries as a result of the accident and as such this Court has no hesitation in the holding that Plaintiff suffered injuries, loss and damage as a result of the accident.

Damages

75. Plaintiff claimed for special and general damages.

Special Damages

76. Plaintiff claims for special damages is listed in the Schedule of Damages filed on 18 November 2015 which are as follows:-

<i>Purchase of Second Hand Special Elevated Bed</i>	\$ 400.00
<i>Purchase of medication and equipment from 5/2/09</i>	

<i>to 31/10/11</i>	<i>\$11,360.00</i>
<i>Travelling expenses for parents</i>	<i>\$ 1,008.00</i>
<i>Loss of 2/3 Wages from May 2009 (\$76.26 90 weeks)</i>	<i>\$ 6,863.40</i>
<i>Structural modification to premises</i>	<i>\$ 1,600.00</i>
<i>Medical report from Suva Private Hospital</i>	<i>\$ 263.10</i>
<i>Medical report from CWM Hospital</i>	<i>\$ <u>5.50</u></i>
<i>TOTAL</i>	<i><u>\$21,500.00</u></i>

Purchase of Second Hand Special Elevated Bed

77. It has been noted that in many instances, parties who are claiming for loss and damages suffered by them during an accident fail and/or neglect to keep evidence of such expenditure.
78. Whilst this Court has awarded special damages when no evidence was provided it should not be taken for granted that Courts will continue doing so when in particular special damage is claimed is for substantial sum.
79. Legal practitioners who are approached for advise by victims of accidents should inform the victims of their obligation to obtain receipts for expenses incurred by them for production in Court.
80. The documentary evidence will no doubt support the parties evidence for such expenditure.
81. In this instance I accept Plaintiff's evidence that he had to purchase the special elevated bed for \$400.00 as such I allow this claim.

Medication and Other Equipment

82. This Court accepts Plaintiff's evidence which of course is unchallenged that Plaintiff purchased rectal tube, catheter, suppositories, dulcolax tablets, hand gloves, dhani lotion, tinea cream and urine bags and Plaintiff's claim of \$80.00 for week for such medication appears to be quite reasonable.

83. Even though no documentary evidence has been supplied this Court is of the view that based on the medical evidence of PW2 and Plaintiff, the Plaintiffs claim of \$80.00 for week is justified.
84. Plaintiff's evidence is that he was admitted for sixteen (16) days and as such all his medication and equipment would have been supplied by the Hospital. It is only fair that damages under this head be assessed from March 2009.
85. This Court awards a sum of \$32,640.00 under this head which said sum made up as follows:-

$$\$80.00 \times 408 \text{ weeks (1/3/09 to 2/2/17)} = \$32,640.00$$

Travelling Expenses for Parents

86. This expenditure is incurred by parents who are not parties to this proceedings. A parent or family member of victims are morally obliged to visit other family members who are in hospital.
87. Since this expense is not incurred by the Plaintiff, this Court cannot allow it.

Loss of Wages

88. This Court accepts Plaintiff's evidence that his wages with Defendant Company was \$114.40 per week and that he has been unemployed from date of accident.
89. This Court also takes note of the fact that Defendant paid a sum of \$71.75 per week to the Plaintiff from 20 February 2009 to 13 November 2009.
90. Plaintiff is awarded a sum of \$48,053.00 for loss of wages and Fiji National Provident Fund contributions which paid sum is made up as follows:-

Loss of Wages:

20/2/09 to 3/2/17 (409 weeks) \$ 46,789.60

FNPF Contribution:

20/2/09 to 31/12/14 (301 weeks) - \$34,434.40 x 8% \$ 2,754.70

1/1/15 to 3/2/17 (108 weeks) - \$12,355.20 x 10% \$ 1,235.50

Less paid by Defendant	\$ 2,726.50
Total	<u>\$48,053.30</u>

Structural Modification to Premises

91. This Court accepts the evidence of Plaintiff that structural improvements had to be carried out to toilet, bathroom and cementing of the front yard to enable Plaintiff to access toilet, bathroom in the sum of \$1,600.00. As such this Court awards Plaintiff \$1,600.00 under this head.

Medical Reports - Suva Private Hospital and CWM Hospital

92. This Court has no hesitation in allowing \$268.10 under this head being \$263.10 for Suva Private Hospital Report (Exhibit P6 and P7) and \$5.00 for CWM Hospital Report.

Total Special Damages

93. This Court awards a sum of \$82,961.10 as total special damages incurred suffered by Plaintiff which said sum is made up as follows:-

Second-hand elevated bed	\$ 400.00
Medication and Other Equipment	\$ 32,640.00
Loss of Wages and FNPF	\$ 48,053.30
Structure Modification to Premises	\$ 1,600.00
Medical Report	<u>\$ 268.10</u>
	<u>\$82,961.40</u>

General Damages

Pain and Suffering

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

*“The assessment of damages under this head 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** [2001] 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).”*

95. It is noted that Plaintiff and Defendant in their Submissions relied on following cases:-

- (i) Rokobutabutaki v. Rokodovu [2000] FJCA 9; ABU0088U.98S (11 February 2000); High Court Civil Action No. 1 of 1997;
- (ii) Attorney-General of Fiji v. Tevita Waqabaca, Civil Appeal No. 18 of 1998 (13 November 1998);
- (iii) Permanent Secretary for Health v. Arvind Kumar & Kami Devi, Civil Appeal No. 84 of 2006 (20 June 2008);
- (iv) Manu v. McCaig [2011] FJHC 49; HBC344.2002L (16 February 2011);
- (v) Zahid Ali v. Patterson Brothers Shipping Company Limited & Ors, Civil Action No. 41 of 2008 (8 June 2012).

96. In **Rokobutabutaki’s** case, the Plaintiff after the “accident could not move her legs or feel any sensation from the level the breast down. Other injuries included bruising around the neck region, most of the left ear had been torn off, and there were numerous abrasions over other parts of her body. Examinations and investigations revealed a complete paraplegia at the T4 level due to a dislocation of T4 or T5 vertebrae.”

The evidence also established that she would remain without leg movement and without sensation from the mid chest downwards for the rest of her life and she would not have any control of bowel or bladder function. The trial judge assessed pain and suffering and loss of amenities of life at two hundred thousand dollars

(\$200,000.00) which was reduced to one hundred and fifty-thousand dollars (\$150,000.00) by the Fiji Court of Appeal.

97. In **Waqabaca's** case, the Plaintiff who was fifteen years old suffered from irreversible brain damage and was left with a condition known as spastic cerebral palsy which is permanent and which has had a shocking effect on him both physically and mentally. The Court assessed damages for pain and suffering at eighty-five thousand dollars which was upheld on appeal.
98. In **Arvind Kumar's** case, the child who soon after his birth became blind was awarded one hundred and ninety-thousand dollars (\$190,000.00) by the trial judge which was increased to two hundred thousand dollars (\$200,000.00) by the Fiji Court of Appeal. This also included for nervous shock and anguish suffered by the parents of the child.
99. In **Manu's** case, the Plaintiff after the operation suffered spinal cord damage which totally disabled him urinary, bowel and sexual operation. He also had a permanent catheter inserted and the tube was inserted into his penis and then into his bladder which resulted in him blowing into the tube so that it would not come out of the bladder and had no sensation. He could not feel when his bladder was full so they had to empty the bag every now and then. The Plaintiff got infection from the use of the catheter when he had to convince the doctors to stop using it. Plaintiff also could not pass faeces without assistance and had difficulty in having sex. The Plaintiff was awarded three hundred thousand dollars for pain and suffering and loss of amenities of life.
100. In **Zahid Ali's** case, the Plaintiff's both legs were crushed between the bus and the FEA post until a bulldozer came and pulled the bus. As a result Plaintiff's both legs were amputated and his total permanent incapacity was assessed at one hundred percent (100%). The Plaintiff was awarded a sum of one hundred thirty thousand dollars (\$130,000.00) for pain and suffering and loss of amenities of life.
101. In this instance, this Court accepts PW2's medical evidence that:-

- (i) Plaintiff suffered pain and suffering as a result of injuries sustained by him in the accident.
 - (ii) Plaintiff has complete paradigm of his lower limbs.
 - (iii) Plaintiff cannot stand without help;
 - (iv) Plaintiff had not reflex regulation or voluntary control of his bowel or bladder and has no sexual function.
 - (v) Plaintiff's paralysis is permanent and he is confined to wheelchair.
 - (vi) Plaintiff's total impairment is ninety-seven percent (97%).
102. PW3 also gave evidence that when she saw the Plaintiff for the first time, Plaintiff seemed to be in great pain and not being able to move or talk.
103. Plaintiff in his evidence which was not challenged stated that:-
- (i) When he fell he landed on his back on the concrete floor.
 - (ii) His head was covered in blood because of cut on his head.
 - (iii) His shoulder was fractured and he could not feel anything on his lower body parts.
 - (iv) He was in great pain and was crying.
 - (v) Ambulance arrived after ten to fifteen minutes and till then he was lying on the floor.
 - (vi) He was conscious at all times and when he arrived at the hospital he gave doctors his house number which apparently was not correct.
 - (vii) At the hospital he had stitches on his head and was put on drips.
 - (viii) He was admitted for sixteen (16) days at CWM Hospital and thereafter was at Tamavua Rehabilitation Centre for four (4) months to attend to physiotherapy.
 - (ix) He still feels pain.

104. It is not doubted that Plaintiff has endured great pain and suffering and continues to do so by being confined to wheelchair and not engaging in day to day activities his friends and peers could do.
105. It is noted that Defendant in its Submissions submitted that testimony relating to Plaintiff in **Manu's** case appeared to be more extensive than the present case.
106. **Rokobutabutaki's** case was decided in 2000 and the Courts have recently very clearly stated that when assessing damages the Court must take into account the inflation and no doubt the cost of living have increased over the last seventeen years. The same applies to **Waqabaca's** case.
107. This Court notes that the Plaintiff in his Submission stated that the sum of \$667,722.00 was awarded to **Zahid Ali** in general and special damages. It must be noted that in **Zahid Ali's** case the Plaintiff was awarded one hundred thirty thousand dollars (\$130,000.00) for pain and suffering, two hundred forty thousand dollars (\$240,000.00) for prosthesis and one hundred ten thousand dollars (\$110,000.00) for airfare, accommodation and meals.
108. Defendant's Counsel when submitting as above may have failed to take into account that the **Manu's** case Plaintiff continued working after he was treated and as such had to take care of himself when he was at work for almost seven years whereas in this instance Plaintiff did not go back to work and was cared for by his parents at all times. This could be the reason that the evidence in **Manu's** case on pain and suffering was more extensive than in this case.
109. However, one must not discount that the fact to do what a young person of Plaintiff's age has to go through when that person's lower limb is paralysed permanently.
110. PW3 also gave evidence that when she saw Plaintiff, soon after Plaintiff fell, Plaintiff was in extreme pain and could not speak.
111. It has been said by this Court time and again that when assessing damages for pain and suffering Court needs to take into account the inflation rate.

112. In considering the evidence before this Court and case authorities submitted by Plaintiff and Defendant it is just and fair to award Plaintiff a sum of \$180,000.00 for past pain and suffering and \$10,000.00 for future pain and suffering.

Loss of Earning Capacity

113. Plaintiff at the date of trial was twenty-eight (28) years old and prior to accident was a healthy person and as such I accept Plaintiffs Counsels submission that a multiplier of sixteen (16) be adopted.

114. A sum of \$117,644.80 is therefore awarded as loss of future income which said sum is made up as follows:-

$$\$141.40 \times 52 \text{ weeks} \times 16 = \$117,644.80$$

Loss of Future Income

115. Since Plaintiff is awarded loss of earning capacity no damages can be awarded under this head. To do so will be to duplicate Plaintiff's claim for loss of future earnings.

Loss of Amenities of Life

116. Plaintiff gave evidence that prior to accident he used to play soccer with his friends and also take part in religious ceremonies including taking part in hindu fire-walking ceremonies.

117. Obviously he is now deprived from doing the above and other activities.

118. This Court awards a sum of \$10,000.00 for loss of amenities of life.

Cost of Future Care

119. There is no doubt that Plaintiff had been cared for by his parents and family members after he was discharged from hospital and such care is still being provided to him.

120. Based on medical evidence this Court is of the firm view that Plaintiff will require care for rest of his life and I have no hesitation in awarding future care at the rate

of \$70.00 per week with a multiplier of sixteen (16) as submitted by Plaintiff's Counsel. The total amount awarded under this head is \$65,520.00.

Interest

121. It is just and fair that interest be awarded at the rate of six percent annum on both special and general damages (pain and suffering and loss of amenities of life).

Contributory Negligence

122. 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 jury 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.”

123. Lord Reid in Staply v. Gypsum Mines Ltd [1953] AC 663 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.”

124. Plaintiff’s evidence was that he was assigned to change roofing iron on date of accident and he was aware that certain roofing sheets were of plastic.

125. Plaintiff also gave evidence that he knew that if he stepped on the plastic roof it would break and he could fall.

126. Plaintiff by forcing to pull out the roofing iron by stepping on the plastic roof without paying much attention as to what sort of roof cover he was stepping on, no doubt contributed to his injury.

127. Given the fact Plaintiff was a semi carpenter and was working without any supervision and was not provided with any safety harness or rope this court assesses Plaintiff’s contributory negligence at thirty-percent (30%).

128. This Court finds that:-

- (i) Defendant owed duty of care to the Plaintiff.
- (ii) Defendant breached the duty of care owed by it to the Plaintiff.
- (iii) Defendant’s breach caused Plaintiff injury, special damages, pain and suffering, loss of amenities of life, loss of future income and loss of future care.
- (iv) Plaintiff was contributory negligent which is assessed at thirty percent (30%).

129. Judgment is entered against the Defendant in favour of the Plaintiff in the sum of \$414,976.00 which is made up as follows:-

Special Damages	\$82,961.40
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Less 30% - Contributory Negligence	<u>24,888.42</u>	
	58,072.98	
Interest at 6% per annum from 5/2/2009 (date of accident) to date of Judgment (2919 days)	<u>\$27,865.00</u>	\$85,937.98
<u>General Damages</u>		
Pain and Suffering	\$180,000.00	
Loss of Amenities of Life	<u>\$ 10,000.00</u>	
	\$190,000.00	
Less - 30% Contributory negligence	<u>\$ 57,000.00</u>	
	\$133,000.00	
Interest at 6% per annum from 22/6/2009 (date of <i>Writ of Summons</i> to date of <i>Judgment</i> - 2782 days)	<u>\$ 60,822.90</u>	\$193,822.90
Future pain and suffering	\$ 10,000.00	
Loss of Earning Capacity	\$117,644.80	
Future Care	<u>\$ 65,520.00</u>	
	\$193,164.80	
Less - 30% Contributory negligence	<u>\$ 57,949.44</u>	\$135,215.12
		<u>\$414,976.00</u>

Whether First Third Party or Second Third Party or both Third Parties are to Indemnify the Defendant

130. Counsel for the First Third Party raised a preliminary objection in the following terms and raised the issue of res-judicata:-

“The 1st Third Party objects to this matter proceeding against it by way of Third Party proceedings initiated by the Defendant on the basis that an Order was pronounced in this matter on 22nd February 2013 and dated 7th March 2013 in which the 1st Third Party’s liability was limited to \$100,000.00 being the limit of liability under the Workmen’s Compensation Policy held by the Defendant with the 1st Third Party.”

131. In Razak v. Fiji Sugar Corporation Ltd [2005] FJHC 720; HBC 208.1998L (23 February 2005) case his Lordship Justice Gates (current Chief Justice) stated as follows:-

“To raise the doctrine of res judicata the defendant must be able to show that the same parties have been before a court of competent jurisdiction and had a decision on the same issues, or at least had had an opportunity of raising related issues.”

132. His Lordship further went on to say that:-

“For operation of the doctrine of res judicata there must be also an identity of subject matter between the proceedings. The identity may arise from a cause of action or from issue estoppel: Green v Hampshire CC [1979] 1 CR 86 at p.864.”

133. With all due respect to Counsel for the First Third Party this Court rejects his Submission on the issue for following reasons:-

(i) On 17 January 2013, First Third Party who was defending Plaintiff's claim under right of subrogation until then filed the Application as appears at paragraph 13 of this Judgment;

(ii) His Lordship Justice Amaratunga when making Order in terms of the Application stated that:-

“There is no Order of Court to \$80,000.00 which under the Policy NIA is liable. They need not deposit this to Court as they have given an assurance to pay upto \$100,000.00”

(iii) The Court did not at anytime determine First Third Party total liability for common law as cover and as such this issue is not res-judicata;

(iv) If, however, First Third Party would have sought a declaration the cover for common law liability is \$100,000.00 and Court determines this issue, the issue would be res-judicata.

134. During evidence in chief, DW1 gave evidence that:-

(i) Prior to 2005, Defendant's insurers was Queensland Insurance.

- (ii) In 2005, Tiwari of Unity Insurance with his colleagues went to Defendant's office and introduced New India Assurance.
- (iii) In 2006, Unity was instructed to arrange cover for public liability (PLC) at five hundred thousand dollars (\$500,000.00) and common law liability cover at two hundred fifty thousand dollars (\$250,000.00).
- (iv) On 19 August 2005, Unity Insurance provided quotation to Defendant for PLC and Workmen's Compensation Cover (WC) which was signed by Mr P. I. Tiwari (Exhibit D3).
- (v) The quotation was accepted by Defendant and cover for PLC and WC was provided by New India Assurance.
- (vi) In 2006, PLC and WC was renewed.
- (vii) For renewal, Placing Slip is faxed to Defendant by Unity Insurance and after that Defendant signs it and faxes it back to Unit Insurance.
- (viii) After 2005, no fresh instructions were given to Unity Insurance by Defendant for insurance cover and if it would be given, it will be in writing and instructions will be given by Mr Rajend Prasad.
- (ix) Mr Rajend Prasad did not ask for any fresh instruction to be typed.
- (x) In 2009, when accident happened Defendant did not enquire about insurance cover because they knew Defendant was covered and they expected WC to be two hundred fifty thousand dollars (\$250,000.00).
- (xi) In 2011, after assessors and Ministry of Labour came into their office, she was advised on phone by Unity Insurance that Defendant's WC is for one hundred thousand dollars (\$100,000.00) and not two hundred fifty thousand dollars (\$250,000.00).
- (xii) Then Defendant checked 2006, 2007, 2008 Planning slips and saw WC was for one hundred thousand dollars (\$100,000.00) for 2007, 2008 and 2009.
- (xiii) Defendant was told about decrease in WC in 2011 and after that she went with Rajend Prasad to Unity Insurance and then Mr. Tiwari advised Mr Rajend Prasad that there was error in typing by his staff.

- (xiv) Mr Tiwari then advised Mr Rajend Prasad that he will need to see a lawyer and that was just time for Defendant to engage a lawyer.
- (xv) Premium for PLC and WC from 2005 to 2009 was same being \$1,291.00 and was paid to Unity Insurance.

135. During cross-examination by Counsel for First Third Party DW1:-

- (i) Stated that before 2005, Defendants did not have a broker and all insurance arrangement was done by Defendant directly and in 2005 Unity Insurance approached Defendant and Defendant agreed to be their client.
- (ii) Stated that when Policy is due to expire Defendant receives notice from Unity by fax, which is signed by Mr Rajend Prasad, stamped with company stamp and returned to Unity Insurance.
- (iii) When it was put to her that common law cover is extension of Workmen's Compensation cover she stated that she had no idea, she only knows.
- (iv) Stated that in 2007 and 2008 she was new and was not in charge of insurance cover and she became in charge in 2009.
- (v) Stated that in 2009, she did not check what common law liability was.
- (vi) Defendant only became aware of the common liability cover was \$100,000.00 and when he went to Court in 2012 or 2013.

136. During cross-examination by Counsel for the Second Third Party DW1:-

- (i) Agreed that quotation (Exhibit D3) was issued by Unity Insurance which showed common law cover at two hundred fifty thousand dollars (\$250,000.00).
- (ii) Stated that subsequently Policy was issued by New India Assurance for covers stated in the Exhibit D3.
- (iii) Stated that thereafter Policy was renewed and Defendant only received receipt which confirmed that Policy had been renewed.

- (iv) Confirmed that Unity Insurance sent notice of renewal of cover by fax which was signed by Defendant and sent back to Unity Insurance and that has been procedure until now.

137. DW2 during evidence in chief gave evidence that:-

- (i) Prior to 2005, Defendant had WC and PLC with Queensland Insurance.
- (ii) Sometimes in 2005 one Mr Vijay Sharma and Mr Tiwari from Second Third Party approached him and asked him to change insurer for WC and PLC to New India Assurance (1st Third Party).
- (iii) They brought all the forms with them and he signed the forms and arranged for \$250,000.00 of WC and \$150,000.00 for PLC.
- (iv) In 2006 or 2007 he arranged for insurance for PLC to \$500,000.00 on the advice of the Architect when Defendant was doing work for Courts (Fiji) Ltd.
- (v) He never gave instruction to change WC cover from \$250,000.00 to any other amount.
- (vi) After the accident he spoke to Mr Tiwari of Second Third Party and was advised that WC is one hundred thousand dollars and when asked why it had decreased he was told that it was a typing error and they did not know who made the error.

138. During cross-examination by Counsel for First Third Party DW2 stated that:-

- (i) Prior to the meeting with Mr Vijay Sharma of Colonial Insurance and Mr. Tiwari of Second Third Party he knew Mr Tiwari because Mr Tiwari's father was his "Guruj".
- (ii) Insurance forms were brought to him after the initial meeting.
- (iii) Upon receipt of claim in this case he gave the documents to Mr Tiwari of Second Third Party.

- (iv) Upon receipt of Application from Sherani & Co. for declaration that they have ceased acting for Defendant he gave the documents to Second Third Party and Mr Tiwari took him to Mr Nandan.
 - (v) There was no dealing between him and Sherani & Co.
 - (vi) First Third Party was fighting his case and they engaged Sherani & Co.
 - (vii) All dealings about Defendant's Insurance policy are handled by Defendant's brokers the Second Third Party.
 - (viii) The amount of \$100,000.00 stated in Renewal/Premium Debit Note (Exhibit TP2(2) and TP2(4) for common law cover was a mistake by Unity.
 - (ix) He did not check the Renewal/Debit Notes when it was received by Defendant and the office staff filed then away.
 - (x) He only came to know that common law cover stated in the Renewal/Premium Debit Note was \$100,000.00 after Plaintiff was involved in the accident.
 - (xi) Second Third Party was handling everything for Defendants and he always thought common law cover was for \$250,000.00.
 - (xii) Second Third Party handled everything regarding insurance cover for Defendant.
 - (xiii) Defendant paid premium to Second Third Party who then paid to First Third Party.
139. During cross-examination by Counsel for Second Third Party DW2 confirmed the detail in Exhibit TP2(2), (3) and (4) and stated that the amount of \$100,000.00 for common law cover was an error by Unity.
140. Due to unavailability of First Third Party's witness, Second Third Party called its witness.
141. 2TPW during her evidence in chief gave evidence that:-

- (i) She had been employed as Accounts Executive by Second Third Party from July 2015, and her duties include giving quotation, attending to renewal of policies for clients.
- (ii) Prior to joining Second Third Party she worked for First Third Party for four (4) years as claims officer.
- (iii) Second Third Party's file in respect to claim subject to this action is in her control.
- (iv) Cover for common law liability for Defendant with First Third Party was \$250,000.00.
- (v) Confirmed the details in Exhibits TP2(1), (2), (3) and (4).
- (vi) The current common law liability cover for Defendant is two hundred fifty thousand dollars (\$250,000.00).

142. During cross-examination by Counsel for the Defendant 2TPW:-

- (i) Agreed that Second Third Party continues to provide Defendant with insurance cover including WC cover and common law cover.
- (ii) Agreed First Third Party provided cover for common law liability to the extent of two hundred fifty thousand dollars (\$250,000.00) and that Defendant has not changed that instruction to Second Third Party.
- (iii) Agreed that common law cover of one hundred thousand dollars (\$100,000.00) stated in Exhibits TP2(1) to TP2(4) was to be an error and that common law cover for Defendant for all the period was two hundred and fifty thousand dollars (\$250,000.00).
- (iv) Agreed that even though common law cover is Exhibits TP2(1) to (4) is shown as one hundred thousand dollars (\$100,000.00) the premium paid by Defendant did not change.
- (v) When renewal notice is received from First Third Party by Second Third Party, it gives it to Defendant for instruction.

- (vi) When instructions is received Second Third Party it draws up Renewal/Premium Debit Notice which is signed by it and First Third Policy.
- (vii) Even though she was not with Second Third Party at material time she knew the amount of one hundred thousand dollars (\$100,00.00) for common law cover in Exhibits TP2(1) to (4) was a mistake because the premium remained same.

143. During cross-examination by Counsel for First Third Party 2TPW:-

- (i) Stated that she was working for First Third Party in 2011 and agreed that when the accident took place she was not employed by any of the Third Parties.
- (ii) Her evidence is based on documents held by Second Third Party.
- (iii) Stated that when renewal notice is received from First Third Party they write to Defendant and take instructions.
- (iv) Stated that they have copy of letter but did not have with her.
- (v) Stated that Renewal/Premium Debit Note is generated by Second Third Party and when Defendant accepts it they then send it to First Third Party.
- (vi) Stated that once renewal is accepted by Defendant they get it signed by First Third Party.
- (vii) Premium is calculated by First Third Party and Second Third Party verifies it.

144. 1TPW during examination in chief gave evidence that:-

- (i) He is Manager of First Third Party's Suva Branch and has overall charge of the branch including supervision, claims, underwriting and administration dispatches.
- (ii) He knows both Defendant and Second Third Party.

- (iii) Defendant is a client of First Third Party and was introduced to it by Second Third Party in 2005.
- (iv) Brokers represent insured and they are free to choose any insurer for their clients.
- (v) When broker introduces new client, they place quotation and if Insurer agrees they give it to insured, and when insured agrees then broker and insurer sign placing slip.
- (vi) Confirmed the detail in Exhibit TP2(1) and stated that common law cover is an extension of WC and is given if insured asks for that cover.
- (vii) Premium for common law cover is calculated by loading the premium on WC and in this instant it was thirty percent (30%) of premium on WC.
- (viii) Confirmed that for renewal they send notice to brokers who then sends it to insured and if they agree then broker sends Placing Slip or Renewal/Premium Debit Note to insurer.
- (ix) Confirmed that common law cover in Exhibit TP2(2) is stated \$100,000.00 (decreased).
- (x) Premium for common law cover remained same though cover is decreased because premium for common law cover is not depended on the common law cover but is based on loading on premium for WC.
- (xi) Premium can or cannot change if common law cover is increased.
- (xii) Decision to change premium is made by underwriters which depends on their experience.
- (xiii) Confined details in Exhibit TP2(3) and TP2(4).
- (xiv) Placing Slip is prepared by brokers and signed by broker and First Third Party.

- (xv) In general when Policy is amended, First Third Party passes an endorsement for change in cover and make three copies, one each for First Third Party, Broker and Insured.
- (xvi) When they receive any document from Unity Insurance they check the document against quotation or renewal letter.
- (xvii) Quotation Slip is sent by broker and renewal notice is sent by Insurer.
- (xviii) When sometimes there is any change broker places quotation slip before First Third Party sends renewal notice.
- (xix) Confirmed that renewal notice was sent to Second Third Party and generally renewal notice is sent one (1) month before the expiry date.
- (xx) Confirmed detail in Exhibit TP1(1).
- (xxi) After renewal notice is issued and if broker and insured accepts terms of renewal, broker sends placing slip.
- (xxii) If some error is noticed in the policy, underwriting department of First Third Party follows up with broker and if there is a mistake underwriter is responsible to do endorsement which is initiated by the broker.
- (xxiii) If mistake or error is noted the underwriting department cross checks against renewal notice or quotation slip and requests broker to send endorsement or revised placing slips.
- (xxiv) He would not expect a mistake to go by three (3) years without being noticed.
- (xv) When asked if could tell if there was a change in this case he stated that he was not sure.

145. During cross-examination by Counsel for Defendant 1TPW:-

- (i) Confirmed that details in Exhibit TP2(1) and other Renewal/Premium Debit Note are same except for date of renewal period.

- (ii) Stated Insurance premium for the term of policy and renewal was \$916.49 which was paid by Defendant to Second Third Party (broker) and broker pays the premium to First Third Party after deciding broker's fee.
- (iii) Agreed that Defendant's insurance policy was renewed for period of 7 November 2009 to 7 November 2010 and common law cover that period was listed as two hundred fifty thousand dollars (\$250,000.00).
- (iv) Agreed that if there was any change in cover underwriting department will issue endorsement.
- (v) Agreed that in terms of quotation and placing slip dated 7 November 2005, common law cover should have been two hundred fifty thousand dollars (\$250,000.00).
- (vi) Agreed that as per renewal letter (Exhibit TP1(1) cover for Defendant was to be renewed on same basis Exhibit TP2(1) (Planning Slip).
- (vii) Disagreed that change in common law cover as shown in placing slips from \$250,000.00 to \$100,000.00 was an error.
- (viii) Stated that it was Insured and Brokers responsibility to arrange endorsement.
- (ix) Agreed that in this case there was no endorsement for change in WC by First Third Party or Second Third Party.
- (x) Confirmed that common law cover in Exhibit TP2(3) and TP2(4) is noted as \$100,000.00 and no endorsement is issued by First or Second Third Party.
- (xi) Agreed that if the underwriting department of First Third Party would have verified the Placing Slips for renewal against the quotation slip they would have noted the difference in the amount of cover and raised it with the broker.
- (xii) When it was put to him that the reason change in cover was not discovered was because underwriting department failed to check renewal note against quotation slip he stated that he was not aware.
- (xiii) Did not agree to the proposition that common law cover for the period 7 November 2006 to 7 November 2009 was actually for two hundred fifty

thousand dollars (\$250,000.00) despite what is stated in Renewal/Premium Debit note dated 4 November 2008.

146. During cross-examination by Counsel for Second Third Party 1TPW:-

- (i) Stated that underwriting department of First Third Party works out premium for policy and recommends to Branch Manager or Chief Executive Officer who then determines the premium.
- (ii) Confirms that letter from Second Third Party (Exhibit D) is quotation for Defendant's cover.
- (iii) Agreed that Exhibit TP2(1) being Placing Slip was signed by First and Second Third Party which had common law cover at two hundred fifty thousand dollars (\$250,000.00) and with premium at \$916.49 which corresponds with Exhibit D3.
- (iv) Stated that no quotation was taken for reduced common law cover but renewal note was there.
- (v) When asked how common law cover in Exhibit TP2(2) is shown as \$100,000.00 he stated that First and Second Party signed it.
- (vi) Agreed that person entering the data on computer would have picked the difference.
- (vii) Agreed that premium for common law cover was same for all years.
- (viii) When asked of reduction on common law cover from \$250,000.00 to \$100,000.00 was a mistake he stated that he did not consider it as a mistake because common law cover is stated as \$100,000.00 for three (3) years.
- (ix) Stated that the reduction in amount as not a mistake.
- (x) Agreed that common law cover as shown is \$100,000.00 in 2006 to 2007 renewal and from thereafter continued as such.
- (xi) Agreed that First Third Party is relying on reduced cover to pay lesser amount to insured.

- (xii) When asked why premium for second year of policy was not reduced he stated that he was not there then and joined Fiji operation in September 2013.
- (xiii) Stated that Policy may have been given to broker and insured but he was not sure.
- (xiv) Stated First Third Party's stance is that common law cover is for \$100,000.00.
- (xv) Stated that endorsement is issued if there is a change in cover or error and in this case no request was made for any change or correction.
- (xvi) Agreed that Defendant is still a customer of First Third Party.

147. In re-examination 1TPW:-

- (i) When asked if endorsement should be issued if there is a reduction in cover he stated that when there is material change then you need endorsement.
- (ii) Stated that in this case there was no endorsement on First Third Party's file.
- (iii) Agreed that reduction in cover is a change.
- (iv) Stated that if there is any change in policy during policy period then endorsement is issued and if change in cover comes with renewal then no endorsement is issued.
- (v) Agreed that if any query was to be raised in three years about reduction in common law cover it should have been raised by underwriter and no query was raised in three years.
- (vi) When claim is raised, cover is determined by looking at the Policy.
- (vii) Stated that in this case First Third Party looked at Policy signed by it and Second Third Party.
- (viii) Stated that accident in this case happened during 2008 - 2009 period of the policy.

148. This Court accepts the evidence of DW1 and DW2 that Defendant did not have any idea that the common law cover had been decreased from two hundred fifty thousand dollars (\$250,000.00) to one hundred thousand dollars (\$100,000.00) until 2011 or 2012.
149. No evidence has been produced in Court to show that Defendant ever requested for a change in common law cover.
150. 1TPW in his evidence stated that when Renewal/Premium Debit Note is received it is verified against the quotation slip (Exhibit D3) and the Renewal Notice (Exhibit TP1(1)).
151. He also gave evidence that if any change in cover is noticed the underwriting department of First Third Party liaises with broker or insured and discuss the change.
152. It is apparent that the officer of First Third Party in 2006 either failed and/or neglected to verify the details in Exhibit TP2(2) (Renewal/Debit Note dated 7 November 2006 for the period 7 November 2006 to 7 November 2007) against the quotation slip (Exhibit D3).
153. This Court accepts 2TPW's evidence that the amount of one hundred thousand dollars (\$100,000.00) shown as common law cover in Placing Slip and Renewal/Premium Debit Note (Exhibit TP2(2) to TP2(4)) was due to typing error and the actual common law cover for the period 7 November 2006 to 7 November 2009 was two hundred fifty thousand dollars (\$250,000.00).
154. After careful analysis of the evidence of DW1, DW2, 1TPW and 2TPW this Court finds that the amount of one hundred thousand dollars (\$100,000.00) shown as common law cover in Placing Slip and Renewal/Premium Debit Notes for the period 7 November 2006 to 7 November 2009 was an honest mistake on the part of the officers of Second Third Party.
155. The mistake was not intentional or meant to mislead anyone or to cause anyone any harm or damage or injury.

156. The question that needs to be asked is that which insured or broker in his/her right mind would have the insurance cover reduced when the premium and other condition remains same.
157. The answer is very simple and that is “no one” in their right mind.
158. So, in this instance it would be absurd and ridiculous to even imagine that Defendant and Second Third Party would have the common law cover reduced to one hundred thousand dollars (\$100,000.00) when the insurance premium and conditions remained unchanged.
159. This Court takes note of the fact that the Renewal Notice (Exhibit TP2(1)) issued by First Third Party had various insureds name mentioned therein.
160. In respect the insured Imaging System on page 2 of Exhibit TPI(1). It is apparent that Defendant, First Third Party and Second Third Party were of the understanding that common law cover is for two hundred fifty thousand dollars and it was only in 2011 or 2012 that they became aware that the common law cover in Renewal/Premium Debit Note was stated as one hundred thousand dollars.
161. It is well settled that contract of insurance are “uberrimae fidei” contracts which requires the insurer and insured to act in utmost good faith toward each other.
162. For First Third Party to hide behind an honest and innocent mistake and refuse common law cover to its full extent (i.e. \$250,000.00) tantamounts to unconscionable conduct on its part and breaches well settled principle of good faith.
163. As stated earlier; the error made by Second Third Party was an innocent mistake and no malice is found against Second Third Party.
164. This Court finds that Second Third Party is not liable for its innocent mistake.
165. This Court holds that the First Third Party should indemnify the Defendant upto the sum of two hundred and fifty thousand dollars.

Whether Second Third Party acted as Agent of Defendant or First Third Party

166. From the evidence produced, this Court has not doubt at all that Second Third Party being broker acted for the Defendant and was Defendant's agent and not that of First Third Party.

Costs

167. The trial lasted for five days and all the parties filed Submissions.

Conclusion

168. In conclusion this Court determines the issues as follows:-


- (i) Defendant owed duty of care to Plaintiff;
- (ii) Defendant breached its duty of care owed to Plaintiff;
- (iii) Defendants breach caused Plaintiff personal injury, pain, suffering, special and general damages;
- (iv) Plaintiff was contributory negligent;
- (v) The amount of common law cover stated in Placing Slip, Renewal/Premium Debit Note for the period 7 November 2006 to 7 November 2009 was an honest mistake on part of Second Third Party;
- (vi) The actual common law cover at the time of accident was two hundred fifty thousand dollars (\$250,000.00);
- (vii) First Third Party is to indemnify the Defendant for common law cover upto two hundred fifty thousand dollars (\$250,000.00).

169. This Court makes following Orders:-

- (i) Defendant do pay Plaintiff the sum \$414,976.00;
- (ii) Defendant do pay Plaintiff's costs assessed in the sum of five thousand dollars (\$5,000.00);
- (iii) First Third Party indemnify the Defendant upto the sum of two hundred fifty thousand dollars (\$250,000.00) including the monies paid by First Third Party to Plaintiff and monies deposited in Court;

- (iv) First Third Party do pay Defendants costs assessed in the sum of two thousand dollars (\$2,000.00);
- (v) The High Court Civil Registry forthwith pay the sum of eighty thousand dollars (\$80,000.00) paid by First Third Party into Court together with accrued interest (if any) to the Plaintiff;
- (vi) Third Party proceedings against Second Third Party is dismissed and struck out with no order as to costs.




.....
K. Kumar
JUDGE

At Suva

2 February 2017

Neel Shivam Lawyers for the Plaintiff

Nandan Reddy Lawyer for the Defendant

O'Driscoll for First Third Party

Singh & Kohli for Second Third Party