IN THE HIGH COURT OF FIJI AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 418 of 2009

BETWEEN	:	**SEMITI VUSONIYASI** of Lot 35 Sangam Place, Navosai, Narere, Unemployed.
		PLAINTIFF
A N D	:	**RAGHWAN CONSTRUCTION LIMITED** a limited liability Company having its registered office at Lot 18 Bulei Road, Laucala Beach Estate Industrial Area.
		DEFENDANT
BEFORE	:	**Hon. Justice Kamal Kumar**
COUNSEL	:	**Mr D. Singh for the Plaintiff**
	:	**Ms S. Devan for the Defendant**
DATE OF JUDGMENT	:	**31 October 2017**

JUDGMENT

Introduction

1. On 1 December 2009, Plaintiff caused Writ to be issued with Statement of Claim claiming for special damages, general damages, past/future economic loss, cost of future care, interest and costs arising out of injuries sustained by the Plaintiff in an accident during the course of his employment on 21 May 2008.

2. On 18 and 28 January 2010, Defendant filed Acknowledgement of Service and Statement of Defence respectively.

3. On 17 September 2010, and 14 October 2010, Plaintiff and Defendant filed Affidavit Verifying List of Documents respectively.

4. On 2 August 2012, Plaintiff filed Minutes of PTC.

5. On 12 September 2012, Plaintiff filed Order 34 Summons and Copy Pleadings and this matter was fixed for trial on 2 and 3 October 2013.

6. The trial proceeded and concluded on 2 October 2013.

7. At conclusion of trial both parties were directed to file Submissions with Judgment to be delivered on notice.

Agreed Facts

8. At all material times the Plaintiff was employed by the Defendant as a gardener/cleaner at their construction site at Bulei Road, Laucala Beach Estate Industrial Area.

9. The Defendant was the occupier of the said premises for the purpose of the Occupier's Liability Act.

10. The Defendant owed the Plaintiff the usual duty of care as an employer.

Issues to be Determined

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

    (i) Whether Defendants breached 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

12. The following documents forming part of Agreed Bundle of Documents dated 26 September 2013, were put in evidence as Exhibits by the parties:-

Exhibit No.	**Document**
1	Wages slip from Raghwan Construction Company Ltd dated 14th May 2008.
2	Workmen's Compensation Act Cap 77 (Cap 94) LD Form/C/1 dated 21st May 2008.
3	Medical Report from CentEast Health Service by Dr. Devina Nand dated 18th July 2008.
4	Photographs.
5	Workmens Compensation Schedule.

13. Plaintiff gave evidence himself and called one (1) more witness.

14. Plaintiff called Ms Devina Nand of 4 Naqasima Place, Suva, Medical Officer as his first witness (**"PW1"**).

15. Ms Nand during examination in chief gave evidence that:-

(i) She is based at CWM Hospital and she has following qualification:-

(a) Bachelor in Medicine and Surgery;

(b) Masters in Public Health;

(c) Graduate Certificate in Tertiary Teaching;

(ii) She was employed at CWM Hospital, Naqali Health Center and various Health Centers (6 in total) and has been practicing as Medical Officer for eight (8) years;

(ii) She conducted examination on Plaintiff on 21 May 2008, completed Workmen's Compensation Form (Exhibit 2) and signed it;

(iii) Plaintiff suffered from lacerations to his left thumb and was treated at the outpatients department where laceration was treated by stitches and by giving antibiotics and pain relief;

(iv) Confirmed that she prepared Plaintiff's medical report (Exhibit 3) on 18 October 2008, two months after injury and she signed the report;

(v) She found that Plaintiff continued to have swelling on middle aspect of his thumb and was assessed at twelve percent (12%) permanent incapacity because even though he had not lost his thumb but lost opposition function of that thumb;

(vi) Opposition function is ability to help hand to grasp objects both for fine grip and course grip;

(vii) Fine grip is ability to hold pen, do stitching and course grip is ability to hold larger objects such as holding a ball or shaking hands;

(viii) Plaintiff's injury will:-

(a) affect his ability to grip things like a normal person;
(b) affect his ability to lift objects and one needs grip to lift objects;
(c) will severely affect flexion of his thumb;

(ix) She assessed twelve percent (12%) incapacity as per schedule attached to Workmens Compensation Act under heading loss of thumbs and sub-heading phelaux which relates to total incapacity;

(x) Agreed that in her report she stated that Plaintiff continues to have pain in movement and bending of his left thumb;

(xi) When she was asked if pain and suffering and loss of amenities of the thumb be suffered by Plaintiff for whole of his life she stated that assessment was given at the time report was done;

(xii) Thumb plays a very vital part in gripping so it plays a vital part in any person and injury will affect Plaintiff's earning capacity if Plaintiff requires his left hand and thumb to do manual work.

16. During cross-examination PW1:-

(i) Stated that she holds no qualification in orthopedic surgery;

(ii) Disagreed that she is not qualified to give opinion on permanent incapacity of a person and stated that streamlining of orthopedic came recently and at that time general practitioners were making assessment for Workmen's Compensation Schedule;

(iii) Disagreed that reason for streamlining is that orthopedic surgeons are better able and in better position to assess a bodily injury if there is one;

(iv) Agreed that in her note she stated laceration and stated that it does not involve amputation of thumb;

(v) Stated that laceration is discontinuity in normal architecture of the skin and surrounding tissue;

(vi) Stated that scratch involves top most layer called epidermis and laceration will involve top most layer and underneath dermal layer;

(vii) Agreed that laceration does not involve bone injury;

(viii) Disagreed to suggestion that treatment by giving antibiotics and pain relief and fact no bone injury it was not a severe injury because firstly Plaintiff was called one (1) month later to look at his incapacity and secondly any injury to thumb in orthopedic term is no mans land as it is significant to the severity of any trauma to the finger or hand;

(ix) Agreed that findings two (2) months down the line could be affected by various factors and for instance if one injures finger and do not look after it properly then down the line it would not heal properly;

(x) Disagreed with suggestion that in this case she saw Plaintiff two (2) months down the line, the findings are based on further findings and manner in which injury was present at date of accident was not severe at that time because Plaintiff was brought through outpatient emergency unit;

(xi) Agreed that because Plaintiff was brought through emergency department, she said his injury was serious;

(xii) When it was put to her that despite her saying injury was severe her notes on Part II (Exhibit 2) she said duration of being away from work is three (3) days, she stated that that was done at date of injury and he was reviewed in three (3) days and his sick sheet was extended;

(xiii) Stated that when she reviewed Plaintiff after three (3) days, she was at Valelevu Health Centre and was at time of giving evidence she was at Headquarters and so did not carry those reports;

(xiv) Plaintiff did not require surgery as he had lacerations and stitches were done;

(xv) Disagreed that when permanent incapacity is assessed, patient should be reviewed eighteen (18) months after the surgery and stated that it depended on extent of injury being size of tissues involved and in normal healing you have three (3) phases which are:-

Phase 1 - Inflammatory Period
Period 2 - Fibroblastic Period
Period 3 - Re-modelling;

(xvi) First period takes 0-5 days; Second period takes 5-28 days and Third period takes more than twenty-eight (28) days;

(xvii) Agreed that she decided to review Plaintiff when Phases 1 and 2 were completed;

(xviii) Stated that when she prepared the report she examined Plaintiff physically and she also did it at first instant;

(xix) Stated that in order to assess and do the report she took history by asking Plaintiff about functionality of this thumb and physical examination being flexion of his thumb and gripping ability;

(xx) Stated that she took down notes when Plaintiff was giving history which would be in the register at Valelevu Health Centre and is not with her;

(xxi) Stated that tests carried out for his loss of grip was him holding paper and objects and ability of thumb to flex;

(xxii) Stated that she was not informed by Plaintiff's lawyer that medical notes were crucial and she had to bring it with her;

(xxiii) Stated that she believed that evidence she was giving she would have done same on day of examination;

(xxiv) When it was put to her that the medical report does not refer to any tests carried out she stated that medical report encompassed outcome of that test;

(xxv) Stated that when report was prepared she was not aware if she asked Plaintiff what the report was for but understood it was for Workmens Compensation;

(xxvi) When it was put to her that had she been aware that Workmens Compensation then she should have put how she carried out the test to assess twelve percent (12%) incapacity she stated that she believed that the medical report contains that information;

(xxvii) When she was asked to show it in the medical report she stated that it is not in the report and she misinterpreted the earlier question about history being in the report;

(xxviii) Stated that she may have enquired about work carried out by Plaintiff but that is not reflected in the Report;

(xxix) Agreed that she did not specify the test she carried out to assess function of Plaintiff's thumb;

(xxx) In reference to last sentence in Exhibit 3 she stated that she reached that conclusion by asking and secondly by verifying if by active and passive movement of his left thumb;

(xxxi) Stated that she may have enquired if Plaintiff was on painkiller at time of review but it is not reflected in the report;

(xxxii) Stated that she enquired if Plaintiff's left hand was in dormant hand and it is not and Plaintiff is right-handed;

(xxxiii) In reference to the statement "opposition function of his thumb is hindered" she stated that she did not specify to what extent it is hindered;

(xxxiv) Stated that what Plaintiff could do or what he could not do is not specified in the report;

(xxxv) Agreed that when a person has loss of flexion, you are able to assess percentage loss of flexion which is based on guidelines;

(xxxvi) Agreed that in her report she made no finding on loss of flexion;

(xxxvii) When it was put to her that Plaintiff is severely affected and flexion of his thumb is not correct, she stated that it is not, but it is part of opposition function of the thumb;

(xxxviii) Agreed that if there was a loss it is important to note it in her report but stated that she was of the thought that twelve percent (12%) encompassed that;

(xxxix) Prior to coming to Court she did not review Plaintiff and did not prepare any report;

(xl) When it was put to her that given the report was prepared five (5) years ago she had no opportunity to see, there is likelihood that Plaintiff could be completely healed she stated that she cannot say so without examining Plaintiff.

17. In re-examination PW1:-

(i) Stated that laceration can affect tendon and nerves;

(ii) Stated that a small laceration can cause serious disability depending on depth of laceration and if it affects tendon and nerves;

(iii) Stated that her report did not go into detail because at that time they were not equipped with computer/printer and had increased patient load that inhibited time for reporting and documenting;

(iv) When it was put to her that once a patient is assessed and given a degree of permanent incapacity if there is a need to re-examine she stated that she did not believe so because incapacity is stated as permanent.

18. Plaintiff, who resides at Viria East, Vatuwaqa and is employed as Security Officer gave evidence next.

19. During examination in chief Plaintiff gave evidence that:-

(i) His date of birth is 15 August 1983, and his level of education is upto Form 5 level;

(ii) He suffered injury on 21 May 2008, at around 9.00 am when working for Defendant and at that time he has been working for Defendant for two (2) years and five (5) months;

(iii) On date of injury he was told to cut grass at the job site by Administration Officer, Kelera, when he put the brush cutter and went to joinery yard to ask for cutter to cut the trimline;

(iv) There was no trimline in the brush cutter and trimming line is kept in the office and was in charge of Administrative Officer, Kelera and it was her duty to give trimline to him;

(v) On date of injury he asked Kelera, Administrative Officer for trimline and she gave the whole trim line reel to him as she could not cut it because there was no knife in the office as some worker took it;

(vi) He then went to joinery yard to ask joiner for the cutter which he refused to give;

(vii) He did not ask anyone else for cutter or knife as only joiner had the cutter;

(viii) He did not go away and cut trim line later because if went to job site, no cutter or knife will be available;

(ix) When joiner refused to give cutter to him he switched on the electric saw to cut the trimline;

(x) He did that because driver was tooting the horn, he was in a rush and Kelera was growling at him to hurry up;

(xi) Electric saw was right next to him and when he started cutting trimline the saw pulled the trimline and his left hand thumb got cut (halfway from top);

(xii) Electric saw was not kept in an enclosed area, he had not seen blade of saw having cover, there was no notice or sign near the saw saying operation restricted or do not use unless authorised and any worker can enter;

(xiii) He used that saw before to cut trimline, and no authority was required to use that saw and he was never warned to not to touch that saw;

(xiv) After his thumb got cut Timoci and another worker saw blood, when Timoci brought cloth and tied at base of his thumb which did not stop the bleeding with his shirt and trousers soaked in blood;

(xv) He was in very bad pain which continued for four (4) days after the accident;

(xvi) He went to hospital ten (10) minutes after his thumb got cut in the company van;

(xvii) Later he stated that he went to hospital half an hour late as he waited for transport;

(xviii) He got injured at Bulei Road, Laucala Beach and he was taken to Valelevu Health Centre;

(xix) There was no first aid kit in the office or where machine was;

(xx) At Valelevu Health Centre he was given stitches, injection and tablets and was told to go home;

(xxi) He was at home for four (4) months before he started work and during his absence he was paid two thirds ($75) of his wages;

(xxii) When he returned to work he was given light duties and he worked for four (4) months after which his boss told him to resign;

(xxiii) His thumb is of no use and he cannot do gardening, labour work requiring his left thumb and he cannot grip or hold things well with his thumb;

(xxiv) He cannot lift anything heavy with his left hand and he cannot do washing or play rugby which is his favourite sport;

(xxv) In reference to Exhibit 1 he stated that his net pay per week was $105.25;

(xxvi) He is married with three (3) children and after his termination he found job as security officer with Guardforce which he got one (1) year after injury;

(xxvii) It took him so long to get a job because he could not find suitable job for himself;

(xxviii) He is claiming around $6,000.00 for loss of earning and around $1,000.00 for FNPF and he incurred fifty dollars as medical expenses.

20. During cross-examination Plaintiff:-

(i) Stated that when Joiner refused to give the cutter he did not go back and inform Kelera because he was in a rush, driver was tooting the horn and Kelera was growling at him;

(ii) Stated that when Kelera gave him instructions to cut the grass and gave him trimline he did not ask her for cutter but quickly rushed away to look for cutter elsewhere;

(iii) Stated that when he could not find the cutter and when joiner refused to give him cutter he did not tell Kelera about it because Kelera was not in the yard;

(iv) Stated that office is not far away from the yard and is upstairs;

(v) Confirmed that when he started cutting the trimline; machine pulled trimline and his thumb;

(vi) Stated the machine was electric bench saw which has a blade and has a platform with machine being on top of the platform;

(vii) Agreed that when you switch on the power the blade starts rotating but does not know at what speed the blade rotates as no instructions were given to him;

(viii) Agreed that bench saw machine operates at a very high speed which is used to cut wood and timber and blade on machine cannot be covered as it is exposed to allow timber to go through the blade;

(ix) Confirmed Exhibit 4 as photographs of the machine;

(x) When it was put to him that blade of machine operates at speed of 2,900 times per minute he stated that he did not know;

(xi) When it was put to him that given that blade was to cut timber and blade operates at such a high speed it was not proper to use the blade to cut trimline he stated "Yes, I thought I gonna cut it quickly and go to the van.";

(xii) When it was put to him that he did not care for his safety and in a rush decided to cut the trimline using the blade he answered "Because I was in a rush";

(xiii) Stated that he waited for almost half an hour after injury when boss's daughter came and arranged for transport to take him to the hospital;

(xiv) Agreed that when he returned to work on light duties he was getting full pay at that time;

(xv) Did not agree when it was put to him that the reason for him to resign from the Defendant Company was because he was stealing aluminium with other workers;

(xvi) When it was put to him that Company Director, Mr Vijay Raghwan wanted to report matter to Police he stated that he told him to resign because there was no job in the Company;

(xvii) When it was put to him that if what he is saying is correct then he was wrongfully terminated he stated that at end of year, plenty of them were sent home;

(xviii) When he asked that if it is correct, then did he lodge complain with Ministry of Labour that he was terminated wrongfully by the Company he answered "No";

(xix) When it was put to him that he resigned because he was caught stealing company property he stated that they were laid off because there was no work in the company;

(xx) When it was put to him even though he cannot lift heavy things, cannot play rugby or do gardening but is now employed as security officer he stated "Yes";

(xxi) When it was put to him that security officers' job is not a light job he stated that for him it is light job;

(xxii) Stated that as security officer he guards residential area and he does afternoon and night shift;

(xxiii) Stated that if there is an intrusion his job is to call Police for assistance and there is no need for him to interfere;

(xxiv) When it was put to him that if burglars see him in security guard uniform there is a possibility they would attack him, at first he did answer but when it was translated to him in itaukei language he stated he will call the Police;

(xxv) Stated that he has never been attacked and his company does not offer any training in self-defense course;

(xxvi) Stated that he does not have any appointment letter from Guardforce and cannot recall exact date he started work but was in 2010;

(xxvii) Stated that as security officer he earns $85.00 nett per week;

(xxviii) Stated that he did not have any medical receipt for $50 medical expenses claimed for;

(xxix) When it was put to him that in his claim there is no claim for medical expenses in the Statement of Claim he stated that he does not know.

21. Plaintiff's third witness was Timoci Ratuvua of Vunivaivai Village, Nakelo, Farmer (**"PW3"**).

22. During examination in chief PW3 gave evidence that:-

(i) He knows Plaintiff and he has been working with Plaintiff at Raghwan Construction in 2008 and three (3) years before that with him being employed as Carpenter and Plaintiff as Cleaner who used to cut grass;

(ii) He recalls Plaintiff got injured at work in 2008 and the time was after 9.00 in the morning when Plaintiff wanted to cut trimline using bench saw;

(iii) When Plaintiff got injured he was five meters away with his back turned towards Plaintiff and was gathering sawdust;

(iv) Him and Plaintiff were together when Plaintiff asked Kelera who is in Administration Section and always keep the trimline;

(v) Kelera did not cut the trimline because she did not have the knife to cut the line with;

(vi) Plaintiff asked Sada and Sada refused to give the cutter to Plaintiff because he said it belonged to him;

(vii) He thought Plaintiff used saw to cut the line because he was in a rush; people who were working with him were calling and he wanted to cut the trimline very quickly;

(viii) He took a piece of cloth and tied it to Plaintiff's wrist to stop the blood and there was no first aid kit in office or near the machine in which Plaintiff got injured;

(ix) Saw was in an open area; no sign or notice was posted to not to use machine without authority; workers were never given any warning to not to touch the machine; and workers would use the machine whenever they liked;

(x) Plaintiff was taken to Valelevu Health Centre half an hour after his thumb got cut in the company van by driver by the name of Avinesh;

(xi) He could see by expression on Plaintiff's face that Plaintiff was in pain; when his thumb got cut;

23. During cross-examination PW3:-

(i) Stated that after Plaintiff got injured, it was Plaintiff who told him that Plaintiff asked Kelera for trimline and Kelera could not cut the trimline because she did not have the knife;

(ii) Stated he was beside Plaintiff when Plaintiff asked Sada for cutter;

(iii) When asked if he knew whether Plaintiff told Kelera that Sada did not give the cutter he stated he did not know;

(iv) Stated that bench saw machine is kept in a big room with walls and a door that led to the room which was at times locked and that room is known as joinery room or joinery department;

(v) When it was put to him that machine was kept securely in a room where everybody could not have access to he stated that anybody could go to that room;

(vi) Agreed that bench saw machine was only to be operated by people who worked in joinery department and because Plaintiff was not part of joinery department he had no authority to start or operate the machine;

(vii) When it was put to him that if anyone wanted to use the machine they had to take permission from foreman who was Vinesh Nand at that time he stated that there was no need to ask and anybody whoever wanted to use could use;

(viii) When it was put to him that if a pay clerk wanted to use the bench saw the pay clerk could go to joinery department and use the machine could he do that; after thinking for a while stated that anybody can use as nothing written there;

(ix) When asked if that is what he has been told to say to Court he stated that he is telling the truth.

24. During re-examination PW3 stated that doors where machine was located was not locked during working hours.

Defendant's Case

25. Defendant's only witness was Kelera Koloraini of Lot 9, Laqio Road, Davuilevu, Purchasing Officer (**"DW"**).

26. During examination in DW gave evidence that:-

(i) She has been employed by Defendant Company for past thirteen (13) years and her duties included buying building materials, looking after the properties, punching time in and time out for workers, and operation of welding and joinery departments;

(ii) She knows Plaintiff because Plaintiff was employed by Defendant as gardener/labourer and his job was to cut grass, clean and water-blast company's properties located at 285 Princess Road, 134 Ragg Avenue, 79 Salato Road, 57 Mead Road, 2 & 3 Erick Place, Raghwan Construction Yard;

(iii) Office was also located in the yard and there was a three (3) storey building with office in the First Floor, Joinery/Welding Department on the ground floor and Second Floor being empty;

(iv) Plaintiff was under mechanical department whose duties were rostered by the Manager and Plaintiff was provided with brush cutter, coil of trimline, cane knife and rake;

(v) The brush cutter is kept at mechanical department and when Plaintiff returns after the department is closed the brush cutter is left in the office and her bosses stay around until 6 or 7pm;

(vi) They finish work at 5.00pm;

(vii) When trimline is purchased it is kept in the office after which the whole coil is given to the workers to use;

(viii) She was told by staff that Plaintiff got injured on 21 May 2008, and she did not know at what time the Plaintiff started work that day as she did not notice Plaintiff that morning;

(ix) Plaintiff never came to see her that morning;

(x) She knows Plaintiff got injured in the joinery department and did not know how he got injured;

(xi) Bench saw is kept in joinery department and joiners being only persons authorised to operate that machine with workers working in the joinery department;

(xii) People who were not working in joinery department could not operate the machine;

(xiii) If somebody wants something from joinery department, they need to send memo to joinery foreman who at that time was Vinesh;

(xiv) She knows that bench saw is used to rip timber;

(xv) When Plaintiff got injured she was going up from welding department to see the other side of building and she did not go and see Plaintiff when he got injured;

(xvi) When Plaintiff got injured, joinery foreman Vinesh was near to him and he took Plaintiff to hospital and she came to know about the incident when they came back from hospital;

(xvii) After the accident, Plaintiff came back to work after few months but she could not recall the date;

(xviii) Plaintiff does not work for the Defendant and he last worked on 18 July 2008;

(xix) The reason Plaintiff left company was that he was involved in stealing aluminium and selling it to scrap metal and as a result he was terminated and matter was reported to Valelevu Police Station;

(xx) Plaintiff came and asked Mr Raghwan to call Valelevu Police Station to clear that case because they had no one to support them and they brought material back to the office;

(xxi) They have first aid kit containing Dettol, eye wash, cotton wool/swabs which is in charge of Tokasa, the receptionist and is kept where pay clerk is sitting;

(xxii) She does not know if on date of accident Plaintiff was given first aid kit.

27. During cross-examination DW:-

(i) Stated that bench saw machine was in the yard when she started work, she sees it when she goes past it, is adjusted machine and the blade has no cover;

(ii) Stated that there was no sign on machine to say keep out, restricted area and do not use;

(iii) Stated that when in office on first floor she can hear machine operating but does not know what is happening there;

(iv) Stated that at time of injury there were few staff (including herself) and that morning when she arrived at work, there was no one when she came and opened the office;

(v) Stated that when trimline reels come they are kept in office and then given to the workers;

(vi) When new reel is purchased it is given to the workers who take it to site and if they need it they cut it;

(vii) When it was put to her that if it is not the practice for office staff to cut and give the trimline to them each morning she stated "No" and that the whole reel is given to them;

(viii) Stated that they do not keep cane knife, pliers or cutter in the office but keep scissors;

(ix) Stated Plaintiff had to look after eight (8) properties and had to go to site at 8 o'clock in the morning;

(x) Stated that Plaintiff was not being rushed to site on that day because it was 7.30 am and they had not started getting workers anywhere;

(xi) Stated that she did not see Plaintiff on that day;

(xii) When asked if bench saw had a master switch she stated that she does not know much about that machine.

28. During re-examination DW:-

(i) Stated that workers had pliers and cane knife with them to cut the trimline;

(ii) Stated that the reason she said Plaintiff was not being rushed is that it was 7.30 am and that he was not given schedule to start work that morning and the schedule was given to him at 7.35 am;

(iii) Stated that she does not know who gave schedule to Plaintiff that morning and does not know what time Plaintiff got injured.

Whether Defendant Owed Duty of Care to the Plaintiff

29. 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.

30. 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, inappropriate 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."

31. 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.

32. The parties have agreed that Defendant owed duty of care to Plaintiff.

Whether Defendant breached duty of care owed to Plaintiff

33. After analysing the evidence of Plaintiff, PW3 and DW and the Submissions filed, I have no hesitation in holding that Defendant breached its duty owed to Plaintiff by failing to provide Plaintiff safe place and safe system of work and reason for my finding are as follows:-

(i) Defendant failed and/or neglected to have the electric bench saw under cover when not in use;

(ii) Defendant failed and/or neglected to place notice or sign to state that only authorised persons are to use the saw;

(iii) Defendant did not provide any cover for the machine and the place when it was not in use;

(iv) No steps were taken to ensure that no unauthorized person could turn on the switch for the electric bench saw;

(v) No senior employee of joinery department was present to stop any worker from using the electric bench saw;

(vi) Defendant could have easily provided protective cover for the switch to turn on the bench saw and that switch should have been turned off with cover in place when bench saw was not in use.

Whether Plaintiff Contributed to His Injury

34. 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 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.

35. This Court accepts DW's evidence that Plaintiff was given the trimline reel, brush cutter, cane knife and pliers for Plaintiff to cut grass.

36. This Court also does not accept Plaintiff's evidence that on 21 May 2008, he was being rushed by Kelera as Kelera's evidence was that she was on her way to

other side of the building when accident happened and she did not see anything which evidence seems credible.

37. It is apparent that PW3 gave evidence to support Plaintiff's claim and his evidence cannot be totally reliable for following reasons:-

(i) In examination in chief he stated that he went with Plaintiff when Plaintiff went and saw Kelera for brush cutter and trimline but in cross-examination agreed that he did not go with Plaintiff to see Kelera;

(ii) He stated that Plaintiff was taken to hospital after half an hour of Plaintiff being injured when Plaintiff himself gave evidence that he was taken ten (10) minutes after the accident and later changed to half an hour.

38. Plaintiff was fully aware that the electric bench saw was used to rip wood and timber and it is not used to cut trimline and this Court does not accept Plaintiff's evidence that he used the electric bench saw any time before the date of accident.

39. This Court also makes finding that when Plaintiff could not get the cutter from Sada he did not go back to Kelera or any other senior employee of Defendant to ask for assistance to cut the trimline.

40. The facts of this case are almost similar to facts in **Buinimasi v. Food Processors (Fiji) Ltd** [2005] HBC 0522J.2003S (17 August 2005).

41. In **Buinimasi's** case Plaintiff, one Salesh and one or two other workers were instructed to remove two metal roller shutters to get more light to a building. On Friday, 10 May 2002, they removed one metal roller shutter. On Monday, 13 May 2002, Salesh did not come to work. Plaintiff with other worker started to complete removal of the roller shutters. On Friday, when that roller shutter was cut Salesh used gas cutting machine. On 13 May 2002, Plaintiff used grinding machine to cut the metal of the second roller shutter and while he was doing so, the blade of grinding machine broke and a piece hit his neck.

The Court made finding that Plaintiff knew gas cutting machine was used on Friday and in respect to Plaintiff's evidence that no gas had been available for a week the Court found it to be incorrect in that the gas cutting equipment had been used on that Friday and there was no evidence that Plaintiff went out looking or asking for such equipment before he started the job.

42. His Lordship Justice Coventary (as he then was) stated as follows:-

"Whilst the Plaintiff accepts that the machine he used was not a cutting machine, I do accept that he did not believe for a moment that its use would have the catastrophic results that occurred or that he thought there was a real risk of that happening. Nevertheless he knew it was the wrong kind of machine and went ahead and used it." (page 5)

43. The Court in **Buinimasi** case held Plaintiff was fifty percent (50%) negligent.

44. In view of what has been said paragraph 33 to 39 of this Judgment this Court has no alternative but find Plaintiff to be fifty percent (50%) negligent in using the electric bench saw to cut trimline when it was not safe to do so.

Special Damages

Medical Expenses

45. Plaintiff when asked during examination in chief, if he claims for medical expenses stated that he is claiming fifty dollars ($50.00) without providing any receipt for any such expense.

46. Even though this Court has allowed for medical expenses and travelling expenses where amount claimed is not unreasonable without documentary evidence it cannot be allowed in this instant for the simple fact and as rightly pointed by Defendant's Counsel, that medical expense does not form part of Plaintiff's claim in the Statement of Claim.

Loss of Earning and Fiji National Provident Fund - (Three Weeks)

47. It is not disputed that:-

(i) At time of accident Plaintiff was paid $105.25 net per week;

(ii) From 21 May 2008, until Plaintiff resumed employment he was paid two third of his wages;

(iii) Plaintiff resumed duty at same wage rate;

48. Both the Plaintiff and Defendant did not have the exact date as to when Plaintiff resumed employment with Defendant after the injury.

49. Plaintiff in the Statement of Claim has claimed one (1) third loss of wages for three (3) weeks which indicate that Plaintiff went back to work after three (3) weeks.

This Court therefore awards $90.75 for lost wages for three (3) weeks and $7.26 being lost FNPF contribution.

50. Plaintiff also claimed loss of wages for the period 7 October 2008 to 31 October 2009. This could be the period between the date Plaintiffs employment with Defendant was terminated and when Plaintiff was employed by Guardforce.

51. Plaintiff in cross-examination stated that employment with Defendant was terminated because Defendant company had no job and he was sent home with plenty of other workers (paragraphs 20 (xvi), (xvii) and (xix) of this Judgment refers):-

52. Defendant's evidence was that Plaintiff's employment was terminated due to Plaintiff being caught stealing aluminium steel from Defendant company.

53. It is therefore obvious that loss of Plaintiff's salary from the period 7 October 2008 to 31 October 2009, was not caused because of the injury suffered by the Plaintiff in the accident. This conclusion is based irrespective of whether Court accepts Plaintiff's evidence or Defendant's evidence as to why Plaintiff's employment with Defendant was terminated.

54. Therefore the Court has no option but to reject Plaintiff's claims for loss of wages for the period 7 October 2008 to 31 October 2009 being the period Plaintiff allegedly remained unemployed after his employment was terminated by Defendant.

General Damages

55. Plaintiff claims damage for pain and suffering, loss of amenities of life and loss of future earnings, cost of future care.

Pain and Suffering

56. Plaintiff's counsel relied on the following cases for award of damages under this head:

(i) **Chand v. Master Builders and Joinery Ltd** [2012]; CA No. 52 of 2009;

(ii) **Buinimasi v. Food Processors (Fiji) Ltd** [2005] CA No. 0522 of 2003;

(iii) **Nisha v. Eastern Apparels Company Limited;** HCCA No. 209 of 1997;

(iv) **Chand v. Rajendra Prasad Limited**; HCCA No. 384 of 2003;

(v) **Enktamma v. Hari Ram & Anor.**; HCCA No. HBC 0251/94L;

(vi) **Yan Fai Wah v. Kong Seung Chuen and Anor.** [1999] HCPI No. 664 of 1998.

Defendant's Counsel relied on:-

(i) **Chand v. Master Builders and Joinery Ltd** [2012]; CA No. 52 of 2009;

(ii) **Vusovuso v. Government Printery** [2005] CA No. 44 of 2006;

(iii) **Nazrul Nisha v. Eastern Apparels Company Limited;** HCCA No. 209 of 1997;

57. In **Chand v. Master Builders and Joinery** it was found that while using machine to cut timber, Plaintiff's left hand became crushed in the machine resulting in Plaintiff being admitted and amputation of his left ring finger and

left little finger. The Learned Master in reference to **Tomasi Vusosuvo v. Government Printer** HBC 44/06 stated as follows:-

"The measure of impairment in that case was 16% whilst in this matter it is 8%. Taken this into account and the fact that there was complete loss of the middle and proximal phalanx in this case I am of the view that the sum of $5,000.00 is suitable and I award this sum accordingly." (page 3)

58. It appears that in **Chand's** case the Learned Master failed to appreciate the fact that "impairment" is used to assess loss of future earning capacity and not pain and suffering. Pain and Suffering is assessed on basis of nature of injury and what level of pain Plaintiff went through when he/she was injured.

This Court is of the view that $5,000.00 awarded for pain and suffering and loss of amenities of life for a person who lost two fingers after his fingers being crushed in a machine is far too less.

59. The facts in **Buinimasi's** case is stated at paragraph 43 of this Judgment. The Plaintiff suffered a deep laceration extending from left side of his neck to the left supraclavicular fossa. Plaintiff was awarded Twenty Thousand dollars ($20,000.00) for general damages by Judgment delivered on 17 August 2005, some twenty years ago.

60. In **Nisha v. Eastern Apparels**, Plaintiff's left hand finger was cut in a machine and her said finger was later amputated. Plaintiff went for check-up once a week for four months as she was in pain. In Judgment delivered on 7 August 2001, Plaintiff was awarded Fifteen Thousand Dollars ($15,000.00) for pain and suffering and loss of amenities of life.

61. In **Chand v. Rajendra Prasad Ltd** Plaintiff's right hand ring finger was cut in a machine whilst working as a butcher. Court awarded $8,333.40 for pain and suffering. Here again the manner of calculating this figure by the Court is questionable.

62. In **Enktamma v. Hari Ram and Anor.** Plaintiff, an elderly woman suffered from following in a motor vehicle accident:-

"1. Laceration to the left eyebrow

2. Open fracture of the left index finger

3. Laceration to left middle finger

4. Tender left subcostal region"

Plaintiff's left index finger had to be amputated at the metacarpophalangeal joint with left middle finger being sutured and dressed. The medical evidence was that sometimes stump can prove very painful in amputation cases and in older person healing process could take much longer than young ones. Evidence was also given that Plaintiff would have residue pain in future.

Court awarded Plaintiff Thirty-five Thousand Dollars ($35,000.00) for pain and suffering and loss of amenities of life.

63. In **Yan Fai Wah v. Kong Seung Chuen and Anor.**, Plaintiff while using a circular saw to a shot in a wooden plank had his left thumb amputated by the saw at the middle position of distal phalanx. Attempt to replant his thumb failed and Plaintiff had to attend follow ups at the hospital for almost a month. Medical evidence was that Plaintiff had difficulty holding newspaper or book for a long time, hold bowl of rice close to his mouth or pick up glass of water with his left hand.

Hong Kong High Court awarded Plaintiff HK$350,000.00 in lieu with award for pain and suffering in Hong Kong.

64. This Court finds that Plaintiff's injury was not that serious as was in **Chand v. Master Builders**, **Buinimasi**, **Chand v. Rajendra Prasad Ltd**, **Enktamma** and **Yan Fai Wah**. No doubt Plaintiff did suffer pain because of injury which would have been severe at the time of accident.

65. In view of damages in above cases and lapse of number of years from date of judgments referred to it is just and fair that Plaintiff be awarded a sum of twenty thousand dollars ($20,000.00) for pain and suffering.

Future Economic Loss

66. Evidence is that Plaintiff is right handed.

67. This Court had doubts on the test carried out by PW1 to assess Plaintiff's permanent incapacity and it is also doubtful as to whether assessment related to Plaintiff's injured finger only or his whole body.

68. This Court finds that Plaintiff's injury is not that serious that it will not enable him to work in the future to earn his living. Therefore I do not award any amount for future economic loss.

Cost of Future Care

69. No evidence has been produced to show that what sort of care Plaintiff will require in future.

70. In view of the nature of Plaintiff's injury this Court does not accept that Plaintiff will not be able to look after himself in the future.

Interest

71. It is just and fair that interest be awarded at six percent (6%) per annum for both special damages and general damages.

Cost

72. Having found that the Defendant breached its duty of care and Plaintiff being fifty percent (50%) negligent it is just to award costs in favour of the Plaintiff at a lower scale. Trial lasted for two (2) days and both parties filed written submissions.

Conclusion

73. This Court holds that:

(i) Defendant owed a duty of care to the Plaintiff;

(ii) The Defendant breached its duty of care owed to the Plaintiff;

(iii) Plaintiff's injury was caused as a result of the accident and breach of duty of care by Defendant;

(iv) Plaintiff contributed to his injury and was fifty percent (50%) negligent.

74. Defendant is to pay the Plaintiff a sum of $14816.00, in special and general damages including interest up to the date of Judgment which said sum is made up as follows:

Special Damages [paragraph 49]			
Loss of one third wages and FNPF	$ 98.01		
Less 50%	$ 49.00		
	$ 49.01		
Interest at 6% per annum from 21/5/08 *(date of Accident)* to 31/10/17 *(date of Judgment) (3451 days)*	$ 13.99		
		$	**63.00**
General Damages			
Pain and Suffering	$20,000.00		
Less 50%	10,000.00		
	$10,000.00		
Interest at 6% per annum from 1/12/09 *(date of Writ of Summons)* to 31/10/17 *(date of Judgment)* (*2892 days)*	$ 4,753.00		
		$14,753.00	
Total		**$14,816.00**	

Orders

75. I make following Orders:

(i) Defendant do pay Plaintiff the sum of Fourteen Thousand Eight Hundred Sixteen Dollars ($14,816.00) including interest;

(ii) Defendant, do pay Plaintiff cost of this action assessed in the sum of $2,500.00.

At Suva

31 October 2017

Mr D. Singh for the Plaintiff

Ms S. Devan for the Defendant