

IN THE HIGH COURT OF FIJI
WESTERN DIVISION AT LAUTOKA
CIVIL JURISDICTION

CIVIL ACTION NO. HBC 313 OF 2005

BETWEEN : **NATALIE KATZMANN** formerly of Harvester Road, Vitogo, Lautoka, but now of 74 Adelaide Street, Oxley Park NSW 2760, Australia, Assistant Manager.

PLAINTIFF

AND : **BARSTOCK INVESTMENTS (FIJI) LIMITED** a limited liability company having its registered office at Vuda Point, Lautoka.

DEFENDANT

Appearances : Ms V. Lidise for the plaintiff
Mr R. Singh with Ms A. Harikishan for the defendant
Date of Trial : 11 March 2019, 20-22 November & 25-26 November 2019
Date of W/submission: 06 February 2020 (defendant) and 14 February 2020 (plaintiff)
Date of Judgment : 07 May 2020

J U D G M E N T

Introduction

- [01] The plaintiff brought this action for compensation for the personal injuries she suffered.
- [02] By a writ of summons endorsed with the statement of claim filed on 26 October 2005, the plaintiff claims damages against the defendant for the personal injuries she allegedly suffered while she was a guest at the resort run by the defendant.
- [03] The plaintiff had been amending her claim from time to time. Finally, the plaintiff further amended her amended claim, of course with the leave of the court, on 16 February 2012, which is almost 6 and ½ years after filing the statement of claim. The relief sought in the amended statement of claim includes:

- a. General injuries suffered
- b. Special damages for medical, travelling expenses, medication and loss of wages plus superannuation
- c. Further special damages to be particularized during the trial.
- d. Mental anguish, pain and suffering and inconvenience.

[04] The defendant filed, with the leave of the court, its amended defence to the further amended statement of claim and denying the allegation of negligence on its part, pleaded as defence to the claim in the alternate that the plaintiff's injuries were the results of contributory negligence or that she had impliedly consented to the risk that led to her injuries.

[05] The claim is based on couple of causes of action namely the defendant's negligence act and false and misleading representation.

[06] The trial commenced on 11 March 2019 with the plaintiff's evidence having taken part heard. On 15 March 2019, the trial was adjourned for continuation from 20 November to 26 November 2019. This adjournment was necessitated as a result of the plaintiff's application to file supplemental list of documents as the trial was going on.

The facts

[07] The brief background facts of the case are as follows.

- 7.1 Barstock Investments (Fiji) Limited, the defendant was the owner of a resort known as First Landing Beach Resort and Villas, Vuda (*the resort*)
- 7.2 In January 2005, Natalie Katzmann, the plaintiff checked in the resort as a guest with her husband.
- 7.3 On 18 January 2005, according to the plaintiff, while being a guest at the resort, she accidentally drank several mouthfuls of an unknown liquid negligently stored by the defendant in a "*Fiji Water*" bottle and negligently placed by the defendant in her room.
- 7.4 As a result of it, she says, she suffered personal injuries and Post Traumatic Stress Disorder (PTSD), and she claims damages against the defendant on the basis that the defendant was negligent in placing the bottle containing the chemical in her room.

The evidence

Plaintiff's witnesses

[08] At the trial, the plaintiff's witnesses were: (i) Natalie Katzmann, the plaintiff (PW1), (ii) Jonathon Adams (PW2), (iii) Dr Ram Raju (PW3), (iv) Safaira Vurabere (PW4) and (v) Sean Frankie (PW5).

Natalie Katzmann's evidence

[09] Natalie Katzmann (PW1) in her oral evidence states:

- a) On 18 January 2005, she checked into the First Landing Resort with her husband, Mr Habibul Rahiman. At around 9.30pm she and her husband went to the Resort's restaurant where her husband ordered dinner. After dinner, they bought a 1.5 Litre bottle of Fiji Water from the Resort's restaurant (PEX1).
- b) She and her husband then went to their assigned room (Room 210). She had her shower and subsequently felt thirsty. She picked up a 500 ml bottle of Fiji Water which was lying on the shelf beside the fridge and drank 4 mouthfuls of the liquid from the bottle.
- c) She said that upon drinking the last mouthful (the 4th mouthful) of the liquid, she realized that the liquid tasted like "Vicks" and called her husband immediately; and that upon drinking she did not gargle her mouth with water or vomit.
- d) She and her husband informed the Hotel manager Maggie Davon who arrived with the House Cleaning Supervisor (Safaira Vurabera). They stayed in the room with her for a while (she could not recall the exact length of time). Up to this point in time she did not have diarrhoea and/or vomiting.
- e) She said that the liquid contained in the Fiji Water bottle was "Unique Pine".

- f) Her husband then took her to the Lautoka Hospital which is around 20 minutes away from the Resort. She did not have diarrhoea and/or vomiting along the way.
- g) At the Lautoka Hospital, she was taken to the A&E Unit where a "triage form" was filled out (PEX2).
- h) At the hospital, she was given Mylanta to drink, following which she vomited. This was the first time she vomited and subsequently she said she had diarrhoea. The doctors advised her to stay the night for further observation, but she decided to leave the Lautoka Hospital due to 'filthy' stated of the hospital and return to the Resort.
- i) From the hospital she came back to the Resort. On her way to the Resort, she said she did not vomit.
- j) After returning from the hospital she feared for her life.
- k) On 19 January 2005, she visited Dr Ram Raju at Lodhia Street, Nadi with her husband. Dr. Raju prescribed Gastrolyte, Imodium, Norfloxacin and Mylanta II suspension. She also saw Dr Raju two other times, on 24 and 27 February 2005. (Dr. Raju's medical report (PEX3) and his medical certificate (PEX4)).
- l) Between 19 January and 21 January 2005, her husband and she remained at the Resort in Room 210. During this period, she said, she was experiencing burning sensation in her mouth, throat, lips, vomiting, and diarrhoea and had ulcers in her mouth. On 21 January 2005, her husband and she checked out of the Resort and checked into the Waterfront Hotel.
- m) On 20 January 2005, she with her husband and a family friend Mohammed Nagiff met with Jim Dunn (Director of Barstock Investments (Fiji) Limited trading as First Landing Resort) at the Resort to narrate the incident to him.
- n) Mr Dunn upgraded her stay together with her husband and her son to a 2 Bedroom Garden Villa including meals and other expenses

- o) When she checked in to the upgraded room at the Resort, she had diarrhoea, vomiting and stomach cramps. She was not able to eat and was also scared to drink anything as it hurt her mouth. She only drank soft drinks, not water.

In Australia

- p) On 1 February 2005, Naltalie returned to Australia.
- q) Between 31 January 2005 and 5 May 2005 she saw her doctor, Dr. Srinivasan, a general practitioner on multiple occasions and she complained of diarrhoea, occasions of incontinence, burning sensation in her mouth and throat to her doctor. Dr Srinivasan issued her with medical certificates excusing her absence from work.
- r) Dr. Srinivasan referred her to a gastroenterologist, Dr. Christopher Pokorny for further medical investigation. She saw Dr. Pokorny on 1 February 2005 and underwent an endoscopy and Dr. Pokorny discovered that she had mild esophagitis (PEx9 (b) is Dr. Pokorny's report dated 22 February 2005).
- s) Dr Pokorny conducted an endoscopy on the Plaintiff on 14 February 2005 (PEx9 (b)). On 22 March 2005, Dr Pokorny reviewed her. Dr. Pokorny's report (PEx9 (d)) stated that her symptoms were extremely unlikely to be caused by chemical ingestion. It states that alcohol seemed to have aggravated her situation.
- t) She complained of intermittent diarrhoea and lower abdominal pain. Dr Pokorny conducted a colonoscopy on 11 April 2005 and Dr. Pokorny reviewed her on 14 April 2005 (PEx9 (e)). Her colonoscopy results were normal. Dr Pokorny suggested a repeat colonoscopy.
- u) She did not go through a repeat colonoscopy as suggested by Dr. Pokorny.
- v) She said there were no medical reports from June 2005 to 2010.
- w) She visited a psychologist Dr Jim Maclain in 2007.

- x) In 2009, she again visited Dr Srinivasan who referred her to a psychologist Dr Harry Mayr and got a psychological report (PEx9 (a)).
- y) She visited Dr Mayr from 2009 to 2010. During cross examination, she was shown Dr Mayr's psychological report (PE 9 (a)).
- z) Upon consulting Dr Mayr her health started improving; she started to go out; and she returned to work in 2011.
- aa) Dr Mayr suggested that she visit a psychiatrist for medication, but she did not see a psychiatrist until mid—2018.
- bb) Dr Mayr even told her that there was nothing more he could do for her and as such they mutually agreed that she would stop consulting him.
- cc) On 18 May 2011, she said she was examined by Dr Selwyn Smith.
- dd) She visited Dr Adam's on 23 July 2018 and provided him with all medical report and documents. She also sent the medical records obtained from Dr Mayr to Dr Adams. (Dr Adams' report dated 27 July 2018 was marked as 'PEx9').

[10] Under cross-examination PW1 states:

- a) She confirmed that her husband upon smelling the content of the bottle instantly realised that the liquid was not water. She further said that it did not occur to her that the bottle she drank from was unsealed; that the liquid was brown in colour or it had a different smell.
- b) She agreed that had she exercised precaution, the incident (if there was one) could have been avoided.
- c) She agreed that there is no scientific evidence regarding the contents of the bottle.
- d) She agreed that:
 - (a) she arrived at the Lautoka hospital at 11.30pm;

- (b) she lay in bed in no obvious distress, was conscious, coherent and alert (this is what was recorded in the hospital form);
 - (c) it was her husband who informed the hospital staff that she drank the chemical; and
 - (d) she was mobilising.

- e) Even though she started to vomit and to have diarrhoea, she did not check with the doctor as to the contents of the Mylanta nor did she ask for the expiry date of the Mylanta.

- f) She agreed (as a worker in the health industry herself) that the reason why doctors advise patients to be admitted at the hospital in chemical ingestion case is to rule out possibilities of mental health and attempted suicide.

- g) She said that Dr Raju did not conduct any test on her, nor referred her to any public hospital or a psychiatrist/ psychologist for tests. While travelling to Dr. Raju's clinic at Nadi which is some distance away from the Resort, she confirmed that she did not vomit or have any episodes of diarrhoea.

- h) She confirmed that, at the time when she met Mr Dunn on 20 January 2005, :
 - (a) Did not have medical reports;
 - (b) Did not have 500ml bottle she allegedly drank from and/or was not aware what chemical was in the bottle; and
 - (c) Had not seen her vomit or have diarrhoea episodes.

- i) She confirmed that she used to go to Dr Srinivasan to obtain medical certificates which stated that she was unfit to work and that the doctors would give her only 2-3 days sick leave.

- j) She confirmed that there was no medical report from Dr. Zaman that proved that he conducted any tests on her at all. Dr Zaman gave her a 3 week- medical certificate.

- k) When the contents of the endoscopy report of Dr. Pokorny (PEX9 (b)) were read, she agreed that —

- (a) the endoscopy report showed the tests as normal; and
 - (b) Dr Pokorny told her that her symptoms were unrelated to the incident.
-
- l) She confirmed that she did not tell Dr Mayr that she was advised to get admitted at the Lautoka Hospital on the night of the incident.
 - m) She could not recall if she told Dr Mayr that the water she drank tasted like "Vicks" and that she drank 4 mouthfuls of the liquid even though she recalled this to be the case when providing a background to Mr Adams some 13 years after the incident.
 - n) She confirmed that the purpose for visiting a psychiatrist in 2018 was not for medication or seek medical help but for a psychiatrist report to be prepared and used at the trial.
 - o) She confirmed that the medical reports submitted so far had shown no physical damage to her.
 - p) She admitted that she failed to discover Dr Mayr's medical records and that these medical records are not before the court as evidence.
 - q) She knew that Fiji Water was sold in 500ml, 1 Litre and 1.5 Litre.
 - r) She drank 4 mouthfuls from a 500ml Fiji Water bottle and the chemical was in a small bottle, 500ml. She denied that the bottle which contained the chemical was 1 Litre bottle.
 - s) She confirmed that to date there is no evidence of what was actually in the bottle.

Jonathon Adams (PW2)

[11] His evidence was:

- a) He examined Natalie on 23 July 2018 at the request of her Fiji lawyer. He prepared a report dated 27 July 2018 (PEx9).
- b) He is a qualified Forensic Psychiatrist residing in Sydney, Australia.

- c) He attained his training in psychiatry in United Kingdom. In order to practice as a doctor in Australia, a yearly registration with Australian Health Practitioner Regulation Agency (AHPRA) is a requirement. This requirement applies to psychiatrists as well.
- d) As a Forensic Psychiatrist he conducts medical assessments in both criminal and civil matters and prepares psychiatrist reports for various instructing bodies including police, defence, prosecution, court, and plaintiff.

[12] Under cross-examination he (PW2) stated:

- a) He agreed that his abridged Curriculum Vitae (CV) does not mention his registration with AHPRA. He confirmed that no documentary evidence of his registration with AHPRA, nor certificates of his degree in medicine and training in psychiatry were produced to the Court. He agreed that there was no independent verification provided to the Court with regards to the contents of his CV as well.
- b) He agreed that none of his previous reports were submitted in Court as evidence of the work he had previously done.
- c) He claimed to have written over 1000 reports.
- d) He confirmed that when Natalie visited him for an assessment he knew that she was working as a receptionist and also working for her family business as she was doing prior to 2005.

Dr Ram Raju (PW3)

[13] Dr Ram Raju, a local private medical practitioner in his evidence said:

- a) Natalie visited him on 19 January 2005, a day after the purported incident (PEx10).
- b) Natalie complained of vomiting, diarrhoea, heart burn and chest pain as a result of chemical ingestion.

- c) He gave Natalie Gastrolyte to maintain hydration, Norfloxacin for diarrhoea and Mylanta II suspension for anti-acid effect.
- d) He explained that Mylanta II is a double strength Mylanta. He said the side effects of Mylanta, in rare case, are diarrhoea, vomiting and nausea.
- e) He did not issue any medical certificate to Natalie on that day (19 January 2005).
- f) Natalie visited him again on 24 January 2005 and she complained of diarrhoea, heart burn and vomiting. He put Natalie on drips for approximately 6 hours as she appeared to be dehydrated and prescribed Losec (better than Mylanta), Gastrolyte and Maxlon (for diarrhoea). He said upon completion of the drip, she appeared better, and issued a medical certificate to her (PEx3).
- g) He gave another medical certificate to Natalie for 2 days on 27 January 2005 (PEx4).

[14] In cross-examination he states:

- a) He confirmed that he is a friend of Natalie's husband. Natalie's husband and he are members of the Hash Harriers Club. They sometimes go on hiking trips together.
- b) He agreed that he did not conduct any tests to determine the genuineness of the information relayed to him by Natalie. He said he relied on whatever Natalie said to him.
- c) He confirmed that he did not conduct a toxicology report and/or specialises in toxicology to perform tests to determine the chemical ingested, the structure, the component and the quantity of the chemical ingested.
- d) He agreed that different chemicals react differently and the treatment depends on the composition and the volume of the chemical ingested. Major steps are taken where a person ingests fatal chemical.

- e) When he was asked whether Natalie informed him that she vomited after consuming Mylanta at the Lautoka hospital, he said “no”. He agreed that without having the benefit of this information, he prescribed double strength Mylanta to Natalie.
- f) He said he neither referred Natalie to the Lautoka Hospital nor to the Nadi Hospital. He confirmed that it is only in serious cases that doctors refer patients to either Lautoka Hospital or Nadi Hospital. However, his view was that Natalie’s condition was neither serious in nature nor life threatening for it to be referred to the hospital.
- g) He was asked if a doctor needs to rule out factors of whether chemical ingestion was forced or consumed by mistake, he said “yes”. He confirmed that neither he referred Natalie’s case to the police for investigation nor to St Giles Hospital for psychiatric evaluation.
- h) (Of Natalie’s second visit on 24 January 2005) he again confirmed that these were not his findings but were information simply relayed to him by Natalie. He further confirmed that he did not conduct any investigation or tests to ascertain the cause of the symptoms Natalie was complaining of.
- i) He said that although Natalie was a returnee patient, he did not refer her to the hospital. It was his assessment that Natalie was not in any danger when she visited him for the second time.
- j) He said that it was his assessment that Natalie would recover by 27 January 2005. He further said that usually 2–3 days sick sheet is sufficient for minor medical condition/injury.
- k) He did not identify in the medical certificate the condition Natalie was suffering from, he did not fill in the next review date on the form and as per his assessment there was no need for a review.
- l) He prepared his medical certificate dated 27 January without examining Natalie and he prepared the medical certificate simply on the basis of what Natalie and her husband said to him over the telephone.

Safaira Vurabera (PW4)

[15] Safaira Vurabera (PW4) also gave evidence on behalf of the plaintiff. Her evidence was that:

- a) She is employed by the First Landing Resort for the past 25 years and is currently employed as an Executive Housekeeper.
- b) At the time of the incident she was employed as the Housekeeping Supervisor. One of her duties as a Housekeeping Supervisor was to mix chemical and give it to staff for cleaning rooms.
- c) Unique pine is brown in colour and when it is mixed with water, the mixer turns colourless.
- d) She was called in by the Resort Manager Ms Davon at around 10pm on the night of the alleged incident in Natalie's room. When she reached there, she saw a gentleman was making phone calls while Ms Davon and herself were standing.
- e) The gentleman in the room pulled out a 1.5 Litre Fiji Water bottle.

[16] Under cross-examination, she states:

- a) When "*Unique Pine*" is mixed with water the mixture is bit brown in colour.
- b) On that night, she was in Natalie's room for around 10 – 30 minutes but she (witness) did not see Natalie vomiting.
- c) She confirmed that she did not see a 500 ml bottle and that as soon as" one opens the cap of the bottle unique in which pine mixture is stored, he/she is able to smell it. Natalie's husband instantly knew that there was a chemical in the bottle.

Sean Frankie (PW5)

[17] Last witness for the plaintiff was Sean Frankie (PW5). He was a Customer Service Officer with Bank of South Pacific. He gave evidence on exchange rate.

However, under cross examination he said that he was not aware as to what the exchange rate was on 18 January 2005 and agreed that exchange rate fluctuates every day.

Defendant's evidence

[18] James Rankin Dunn, a Director at the First Landing Resort gave evidence on behalf the defendant. His evidence was as follows:

- a) He is managing the Resort and the staff and ensuring that no inconvenience is caused to guests at the Resort.
- b) The Housekeeping staff is responsible for reporting to the Housekeeping Supervisor who then reports to the Hotel Manager and finally the Hotel Manager reports to him (witness) Mr Dunn.
- c) In 2005 the Resort's Hotel Manager was Maggie Davon.
- d) When guests check in to the hotel, the front desk staff allocates a room, a key is handed over to the guests; the porter/front desk staff escorts the guests to their room; and the porter/front desk staff briefs the guests regarding the room and its contents including air condition/fan control, switch, coffee/tea facilities and bar fridge containing a jug of water.
- e) The Resort never provided complimentary water bottles to the guests in their room. So, Natalie bought a 1.5 Litre bottle of Fiji Water from the restaurant on the night of 18 January 2005.
- f) He was away in Suva the night on which Natalie allegedly drank the chemical at the Resort. While he was in Suva, on 19 January 2005, Ms Davon informed him that a guest claimed that she drank chemicals contained in a Fiji Water bottle.
- g) He said he was neither shown the bottle nor he was provided any scientific evidence/report which proves that the bottle in fact contained chemicals.
- h) Ms Davon informed him that on the night of the incident since Natalie was complaining of stomach pain, Ms Davon gave her 2 small cartons of

milk to drink and then she was taken to the Lautoka Hospital in a transport arranged by the Resort.

- i) Ms Davon informed him that the next day (19 January 2005) she made an appointment with the Resort Doctor (Dr Sharma) to see Natalie but her husband took her to Dr Raju instead.
- j) He said Natalie and her husband did not provide him a copy of her medical report despite several requests.
- k) On 20 January 2005, while he was still in Suva, he called Dr Raju requesting for an update on Natalie's medical examination conducted on 19 January 2005, and Dr Raju informed him that Natalie's symptoms were temporary and that given the type of chemical she ingested, her life was not threatened.
- l) He returned to the Resort on 21 January 2005. On that day Police came to the Resort and interviewed Ms Vurabera and Ms Lutumailagi.
- m) Ms Davon informed him that a hotel guest while checking out overheard Natalie's husband saying that he will sue First Landing Resort for \$1 million.
- n) On 22 January 2005, he met with Natalie, her husband and Mr Nagiff at the Resort to discuss about the incident and Natalie's health. He said Natalie informed him that she was recovering, and he apologised for the inconvenience caused to her.
- o) In order to provide comfort and relaxation to Natalie, he offered her free accommodation in a 2 Bedroom Garden View Villa with a swimming pool, lounge and kitchen which had a nightly rate of \$440 at that time.
- p) Natalie and her husband informed him that they were returning to Australia on 26 January 2005 and so the offer of free accommodation was for 4 nights only. Natalie and her husband accepted the offer and checked in to the Villa on 22 January 2005.

- q) On 24 January 2005, he had another meeting with Natalie's husband and Mr Nagiff. Natalie's husband informed him that Natalie had not been feeling well as a result he took her to Dr Raju again who prescribed further medication.
- r) He said that during the second meeting it was discussed and agreed: (a) waiver of all charges including food, beverage and accommodation for Natalie and her husband from 18 January 2005 up to check out; (b) reimbursement of all medical and travelling expenses incurred by Natalie while in Fiji; and (c) extension of date of free accommodation for Natalie and her husband to 29 January 2005.
- s) Natalie's husband also wanted a reimbursement of future medical expenses that may be incurred in Australia and loss of earnings however the Resort's insurance brokers advised that a reimbursement on medical expenses would be considered if Natalie agreed to provide her medical report.
- t) Natalie and her husband requested for further extension of their stay at the Resort to check out on 1 February 2005, and he agreed to extend their stay in the Villa.
- u) At check out on 1 February 2005, Natalie's bill totalled to \$6,913.75 (DEx3). This figure included cost of accommodation, meals, drinks, boutique and spa. Natalie was enjoying the facilities on the property including spa, boutique and fire dance shows during dinner at the Resort. The figures also reflected that Natalie had been ordering food and beverages, the value of which on one occasion was approximately \$300.00.
- v) He waived those charges, and also reimbursed \$4,170.50 which covered expenses for Natalie's visits to the doctor in Fiji, medication and transportation while in Fiji even though he did not receive any medical reports.
- w) He said the decision to compensate Natalie was solely a business decision. This was done to compensate Natalie for the inconvenience and discomfort caused in an attempt to amicably resolve the matter and provide an opportunity for Natalie to consider First Landing Resort for her future stays in Fiji.

- x) On 1 March 2005, Natalie's husband returned to Fiji and met with him seeking reimbursement of Natalie's loss of earnings for the month of February and costs associated with her medical consultations in Australia which totalled to \$5,738.20.
- y) He in consultation with the Resort's insurance brokers, they asked Natalie to sign a Memorandum of Discharge prior to making the payment. He said the Resort's insurance brokers and he felt at that point that this matter must not be left open and having considered the various indicators that Natalie's health was improving and the fact that he had not seen the bottle containing the chemical or a scientific report evidencing that the bottle contained the chemical, a Memorandum of Discharge was necessary.
- z) He said that Natalie refused to sign the Memorandum of Discharge and decided to take legal action against the Resort.

[19] Under cross examination he states:

- a) His understanding was that a bottle containing cleaning agent was placed there. It was not a deliberate act. In his 24 years of operation, this is the only time a bottle was left in the room like this case. He said: *'it was an accident on our part'*.

Agreed facts

[20] The facts agreed between the parties at the Pre-Trial conference were as follows:

- 20.1 The defendant is and was at all material times the owner of a resort known as First Landing Beach Resort and Villas situated at Vuda Point, in Vuda (hereinafter referred to as *"the resort"*).
- 20.2 On or about 18 January 2005, and at all other material times, the plaintiff was a guest at the defendant's resort.

- 20.3 At all material times, the defendant from its resort premises sold and displayed for sale natural artesian water known as Fiji Water in 500 milliliter, 1 liter and 1.5 liter bottles in its restaurants.
- 20.4 The plaintiff was taken to the Lautoka Hospital on 18 January 2005.
- 20.5 The plaintiff visited Dr Ram Raju on 24 January 2005.

Law

- [21] The plaintiff's claim is founded on negligence. The law of negligence is that a defendant is liable if-
- (a) He or she owes a duty of care to the plaintiff;
 - (b) He or she breaches the duty of care owed to the plaintiff;
 - (c) The plaintiff suffered a loss or damage or injury; and
 - (d) The loss or damage or injury was caused by the defendant's breach.

Discussion

- [22] The plaintiff initiated proceedings against the defendant claiming damages for the personal injury suffered by her while she was a guest at the resort owned by the defendant. The claim is based on the premise that the defendant had breached a duty of care owed to her as a guest at the defendant's resort.
- [23] The case for the plaintiff is that on 18 January 2005, she swallowed several mouthfuls of a cleaning liquid while she was a guest at the resort. She alleges that the cleaning liquid (Unique Pine) was negligently stored in a 500ml Fiji Water bottle in her room by the defendant, and she drank from it and suffered injuries, loss, damages and PTSD.
- [24] As the claim is based on tort or negligence, the plaintiff must establish that: (a) the defendant owed a duty of care to her, (b) the defendant breached that duty and (c) she suffered injury as a result of such breach. These elements must be proved on the balance of probability (See: *Singh vs Attorney General of Fiji* [2008] FJHC 393; HBC0221.1998 (13 November 2008)).

[25] The defendant denied both liability and quantum. The defendant's case was that the plaintiff did not suffer injuries, if she had drunk any such liquid and/or if she had suffered any injury she contributed to her injury and should not be awarded any damages.

The issue

[26] The principle issue was whether or not the plaintiff suffered any injury as a result of drinking the liquid stored in a 500ml Fiji Water bottle while she was a guest at the resort.

[27] It was not in dispute that the plaintiff was a guest at the resort on 18 January 2005.

[28] It was also not in contest that the defendant owed a duty of care to the plaintiff while she was a guest at the resort.

Liability issue

[29] I intend to determine the liability issue in the light of pleadings, evidence, oral and documentary, presented in court and the closing submissions filed by both parties.

[30] The alleged drinking of liquid occurred in January 2005. The head of the damages claimed by the plaintiff includes PTSD. In order to establish PTSD, the plaintiff relies on the expert/psychiatrist report of Dr Jonathan Adams dated 27 July 2018 (PEX9).

[31] It is noteworthy that the plaintiff's claim of PTSD entirely rest on the psychiatrist report obtained in 2018 for an injury sustained in 2005. The psychiatrist report has been obtained some 13 years after the alleged incident.

Expert evidence

[32] The plaintiff called two witnesses as expert witnesses namely Dr Ram and Dr Adams (claiming to be a forensic psychiatrist). The issue of PTSD is largely a question of expert evidence.

- [33] Mr Singh of counsel for the defendant did not want to call Dr Adams as a doctor because, he says, Dr Adams had not provided any document to establish that he is a doctor.

Dr Adams' evidence

- [34] Firstly, let me deal with Dr Adams expert report. He presented his report and gave oral evidence.
- [35] The evidence provided by Dr Adams' report on the issue of PTSD was expressed in the following terms:

“...
...

In my opinion at the time of my assessment Ms Katzmann continued to experience symptoms of PTSD and major depression. Positively, she manifested a reasonable level of insight. It appears to be the case that she has adapted her functioning, including her occupational functioning (working from home), in order to best manage her symptoms. Nevertheless, I understand that the impact upon her interpersonal and social functioning has been significant. This was corroborated by her sister and her husband.

...
...

In my opinion Ms Katzmann would benefit from engaging in psychiatric/psychological treatment. I believe she should be referred to a psychiatrist, and medication strategies should be considered, in the first instance antidepressant medication. She should undergo psychological therapy, either with a treating psychiatrist or with a clinical psychologist. Social management strategies will need to be incorporated into her treating plan.

...
...

As discussed above, in my view it is reasonable to conclude that Ms Katzmann's symptoms of PTSD and major depression had a significant impact upon her capacity to work during the four to five year period after the incident.

...
...

... in my view, it is reasonable to conclude that her symptoms of PTSD and major depression would impact upon her capacity for future employment outside of the family run-business.”

- [36] Dr Adams said: he attained his training in psychiatry in UK. To practise as a doctor in Australia, a yearly registration with the Australian Health Practitioner

Regulation Agency (AHPRA) is a requirement, and this requirement applies to psychiatrist as well. He presented his Curriculum Vitae (CV). He continued to say that as a Forensic Psychiatrist he conducts medical assessments in both criminal and civil matters and prepares psychiatrist reports for various instructing bodies including police, defence, prosecution, court and plaintiff, and had written over 1000 reports.

[37] Under cross examination, Dr Adams admitted the following:

- b) No documentary evidence of his registration with AHPRA, or certificates of his degree in medicine and training in psychiatry were produced in court.
- c) No independent verification provided to the court with regards to his CV.
- d) None of his previous reports was presented to court as evidence of the work he had previously done, albeit he claimed to have written over 1000 reports.

[38] The defendant strenuously challenges Dr Adams' evidence. Mr Singh on behalf of the defendant submits that the court should not rely on Mr Adams' evidence for the following reasons:

38.1 Mr Adams did not withstand the credibility test.

38.2 In his report, Mr Adams states that he is bound by schedule 7 of the Uniform Civil Procedure of New South Wales (UCP). When he was asked whether UCP specifies the content of the psychiatrist report, he said it guides the content. When the contents of Schedule 7 were read out to him in relation to his report, he agreed that his report did not have a brief summary and a declaration which were required under the Australian law.

38.3 It is accepted that Australian law is not applicable in Fiji. However, Mr Adams claimed that he will be "*bound by*" the requirement of the Australian law. He was aware that his report was for court purpose in Fiji. It became clear in cross examination he blatantly disregarded his undertaking that he be bound by a particular law. He claimed to have

given evidence in several cases and prepared over 1000 reports. As an expert (if he is one) he ought to have known what the law requires of him.

38.4 Mr Adams claims that he gave evidence in several cases in Australia. His report does not comply with the rules which he himself said he will be bound by. Based on this, we submit it cannot be said that Mr Adams is credible and that Mr Adams is what he claims to be. A person claiming to be having as much experience as Mr Adams claims to have would not blatantly breach the law or that his report will be in breach of the regulations.

Report

38.5 Mr Adams report is flawed and is contradictory.

38.6 Mr Adams said in his opinion that the plaintiff was suffering from PTSD and major depression. He said his opinion was based on assessments, review of materials, discussions with the plaintiff's sister and the plaintiff's husband.

38.7 Mr Adams said that all the information provided to him to conduct the assessment was provided by the plaintiff. He confirmed that he was not given copy of the statement of defence to conduct plaintiff's assessment. He also confirmed that he had not obtained medical records from Dr Smith and said that he did not see it fit either to ask for Dr Smith's medical records. He confirmed that his notes on plaintiff's assessment in his private room on 23 July 2018 was not before the court.

38.8 Although he said he reviewed documents, when he was asked in cross-examination if he reviewed all the medical certificates and sick sheets, he said he needed to refer to the report to confirm the same.

38.9 Mr Adams stated that after obtaining the information he is supposed to corroborate the facts presented to him by the plaintiff. However, he only did this with the plaintiff's sister and husband who could be biased.

38.10 In cross examination, Mr Adams said that he did not speak with-

(a) the plaintiff's neighbours;

- (b) the plaintiff's employers with whom she was in employment prior to 2005; and
- (c) the plaintiff's employers post 2011 except her husband with whom she worked in their family owned business to corroborate the information that the plaintiff provided him. According to Mr Adams corroboration was a key component.

- 38.11 Mr Adams confirmed that his report of 27 July 2018 does not make any reference to Diagnostic Statistic Manual 5 which is the method used to diagnose PTSD. When asked about this, Mr Adams conveniently stated that he is not allowed to do so. He was to shown Dr Mayr's report which makes specific reference to the Manual.
- 38.12 Mr Adams in his evidence said that PTSD has had and continues to have severe effects on the plaintiff's interpersonal, social and occupational functioning. However, in cross examination Mr Adams confirmed that the plaintiff returned to work in 2011 as receptionist (a role which the plaintiff held prior to the incident). She also worked for her husband's business which was something she did prior to the incident. Given these facts, Mr Adams conclusion is not logical or supported by evidence.
- 38.13 In the present case, Mr Adams report of 27 July 2018 does not specify the methods and/or the criteria he used to arrive at the conclusion that the plaintiff was suffering from PTSD.
- 38.14 The plaintiff consulted Mr Adams on 23 July 2018 on which date he also had brief discussion with the plaintiff's husband and sister.
- 38.15 It was in one session that Mr Adams formed the view that the plaintiff was suffering from PTSD. In his report, he does not state what method or test (if any) was used to come to conclusions.
- 38.16 He confirmed that when the plaintiff visited him for an assessment he knew that she was working as a receptionist and also working for her family business as she was doing prior to 2005. However, in 2018 Mr Adams finds that the plaintiff will find difficulty in seeking employment.
- 38.17 This is simply not correct. The plaintiff landed her dream job. She has been trying to secure this job for some time. This is confirmed by her husband (Mr Habibul Rahiman) at paragraph 13 of his affidavit sworn

and filed on 5 March in this matter. Mr Rahiman states that *“My wife has just secured employment at the Liverpool Hospital as a permanent employee. This is a government hospital and having tried over many years to secure a job at a government hospital she does not want to do anything to jeopardise her job”*.

38. 18 Again, Mr Adams finding is contradictory to the facts and his findings and conclusion is unreliable.

[39] Counsel for the defendant refers to me three cases that dealt with expert evidence: *State v Niudamu* [2017] FJHC 688; HAC129.2015 (8 September 2017), *Haworth v Starwood Properties Ltd* [2019] FJHC 809; HBC215.2012 (16 August 2019) and *G P Reddy & Company Limited v New India Assurance Company Limited* [2011] FJHC 680; HBC48.2008L (31 October 2011).

[40] In *G P Reddy* Justice Wickramasinghe at paragraphs 121 and 123 said:

“121. ...A court cannot take judicial notice of an expert. The expertise of an expert must be assessed on the facts in hand. Each case is unique and must be proved with credible evidence in support of that case...”

123. To me just oral evidence of Mr. Luff stating that he has hands on experience with over 2300 investigation will not suffice to determine whether he in fact possessed sufficient skills and knowledge to have excluded ‘electrical fault’ as a possible cause of the fire. His pertinacity that he is an expert to determine origin of fires does not qualify him automatically to be an expert on ‘electrical’ causes...”

[41] In *State v Niudamu* (Aluthge J) held at paragraphs 26, 27 and 28:

“26. Before a court will admit evidence of an expert it must be satisfied that the witness has the appropriate expertise. In Clark v Ryan some members of the High Court, Menzies and Windeyer, JJ., said that this rule was not complied with unless the witness gained his or her expertise from a course of study (see pp. 591-2). Dixon, CJ. and McTiernan, J. took the view that the expertise could be gained from either a field of study or as a result of practical experience (pp. 491-2, 498-99). A similar view has been taken in R v Silverlock [1894] 2 Q.B. 766.

27. A witness is therefore, allowed to state his or her opinion with regard to such matters provided he or she is expert in them. Having heard evidence of the proposed witness Ms. Mason, I am not satisfied that she is an expert witness in the field of international law who can assist this court to resolve the issues before this Court although it appears that she has some qualifications to assist the New Zealand government on indigenous issues.

28. The CV of the so called expert witness was not disclosed to the Prosecution until the last moment thereby denying the Prosecution an opportunity to scrutinize her credentials and qualifications. No certificate of her expertise and experience was tendered in her evidence to support her evidence. The opportunity and time given to the Prosecution to attack the credibility of the witnesses' credentials and qualification was dangerously limited."

[42] Differentiating between a fact witness and expert witness, Nanayakkara J in *Haworth* said (at paragraphs 36 and 37):

"(36) There is a fine line between a retained expert and a non-retained treating physician. Typically, treating physicians are considered fact witnesses (opposed to expert witnesses) because they are testifying to the facts and circumstances surrounding their own treatment of the plaintiff, and unlike witnesses designated as experts, they are not rendering a medical opinion as to causation or reviewing material outside of their own medical records. A physician that is a true fact witness will only testify to his own personal observations when diagnosing, examining and treating the plaintiff. Therefore, Dr. Devere, Dr. Flume, Dr. Roy and Dr. Rose can attest to the plaintiff's medical conditions and treatments and the rules of disclosure do not apply to them. They will only testify to procedures they personally conducted and will only rely on notes and reports that they personally created in the ordinary course of their duties as Doctors. They will not testify to anything they did not personally witness. In the instance case, Dr. Devere, Dr. Flume, Dr. Roy and Dr. Rose were not labeled as expert witnesses. They are labeled as a fact witnesses. Essentially, a physician called to testify about his care and treatment of a plaintiff is a sophisticated fact witness and his role in the case is not dissimilar to that of a witness to an accident. They have no

legal duty to give medical opinions that are not based on their personal observations and treatment of the plaintiff.

(37) Although all physicians are "expert witnesses" because of their credentials, a legal distinction is made between physicians who testify based solely on facts gained from their actual treatment of a patient (fact witness), and physicians who give opinions based upon facts and/or materials furnished to them during the course of litigation (expert witness). When a treating physician testifies about both his treatment of the plaintiff and relies on additional information concerning materials beyond his treatment, he is essentially converted into an expert witness. A treating physician cannot or should not offer a medical opinion outside the scope of his personal observations. While some Court's disagree, the majority of Courts even allow treating physicians to testify to causation, prognosis and the permanency and degree of injury without a written report so long as those opinions were reached during the course of treatment."

- [43] Ms Lidise of counsel for the plaintiff submits that Dr Adams' finding in his capacity as an expert witness that the plaintiff suffered and continues to suffer from PTSD and depression can and should be accepted by the court, and that the provisions of the Civil Evidence Act and the requirements of relating to the basis upon which an expert opinion can be safely accepted by the court, justify the acceptance of Dr Adams' evidence and his report as credible.
- [44] I do not think that hear evidence rule (s. 6 of the Civil Evidence Act) is applicable in this case because Dr Adams presented his written report and gave oral evidence at the trial.
- [45] The duty of the expert is expressed to be to help the court on matters within his or her expertise, a duty that overrides any obligation felt by the expert to whoever is instructing him. The experts should not take it upon themselves to promote the point of view of the party instructing them or engage in the role of advocates.
- [46] An expert is a competent expert witness if the court considers that he or she has the necessary expertise, however it was obtained (See: *R v Silverlock* [1894] 2 QB 766).

- [47] It is important that expert evidence should be, and should be seen to be, the independent product of the expert uninfluenced by the exigency of the litigation (See: *Whitehouse v Jordan* [1981] 1 WLR 2 246 per Lord Wilberforce).
- [48] The plaintiff called Dr Adams to give expert evidence. Undoubtedly, he was called as an expert witness, not as fact witness who testifies to his own personal observations when diagnosing, examining and treating the plaintiff.
- [49] Dr Adams did not present any document, including the registration with AHPRA, or certificates of his degree in medicine and training in psychiatry, to demonstrate that he is an expert suitable to give expert evidence in this matter. The court cannot take legal notice of his expertise. Even his AHPRA registration number is not mentioned in his CV. It is, therefore, doubtful whether his is currently practising in Australia. He claimed to be a consultant psychiatrist.
- [50] It is the obligation of the party calling an expert to give evidence that the witness is an expert and he or she has the necessary expertise to help the court. I accept the defendant's submission that Mr Adams had failed to establish that he is an expert. On the evidence, I find that the plaintiff has failed to establish that Mr Adams is an expert and he possesses necessary expertise to assist the court in the matter. I can reject his report and evidence on this ground alone. However, for the sake of completeness, I feel obliged that I need to comment on his credibility.
- [51] Dr Adams has assessed Natalie and prepared a report on the instruction of her solicitor. He knew that his report will be used in court proceedings initiated by Natalie. The alleged incident occurred in 2005. He had done his assessment of Natalie in 2018, some 13 years after the incident.
- [52] Natalie visited Dr Adams for assessment for the first time ever on 23 July 2018. After this single visit, he had prepared his assessment report dated 27 July 2018. Dr Adams had concluded that her symptoms of PTSD and major depression would impact upon her capacity for future employment outside of the family run-business
- [53] Natalie was not a regular patient for Dr Adams. She had seen him for the purpose of assessment report to be used in court proceedings. He never treated her. As such, Dr Adams cannot testify to his own personal observations when

diagnosing, examining and treating the plaintiff. It seems that he had just heard the history narrated by the plaintiff and had gone through the medical report she had provided. He says he verified what she had told him from the plaintiff's husband and sister. He had completed his assessment within the same day upon a single visit. He admitted that he did not do his own independent investigation before preparing his report regarding the plaintiff over an incident that occurred in 2005. He was in a rush in assessing the plaintiff for PTSD and preparing his report. It appears he has only considered the plaintiff's interest and forgot his obligation towards the court. He had taken it upon himself to promote the point of view of the plaintiff whose solicitor instructed him to prepare the assessment to be used in court. He did not even consider the fact that the plaintiff had secured a permanent employment in a government hospital and she had been working on and off for her husband at the family business.

[54] Dr Adams' report, in my opinion, simply repeats what Natalie had told him and it is unsubstantiated by facts particularly his conclusion that the plaintiff's PTSD and her major depression continues when she had secured a permanent employment in a government hospital. His report does not explain the methodology he used in arriving at the conclusion in 2018 in relation to an incident which occurred in 2005.

[55] I do not see Dr Adams' report and his expert evidence to be the independent product of uninfluenced by the exigency of the litigation.

[56] I entirely accept the defendant's submissions on the credibility of Dr Adams's report and his evidence.

[57] For these several reasons, I find that Dr Adams' report to be an overtly biased report. I would accordingly reject Dr Adams' report and his evidence.

Dr Raju's evidence

[58] On 19 January 2005, a day after the alleged incident Natalie visited Dr Raju, a local private medical practitioner. She complained of vomiting, diarrhoea, heart burn and chest pain as a result of chemical ingestion. In evidence, he said he

gave Natalie Gastrolyte to maintain hydration, Norfloxacin for diarrhoea Mylanta II suspension for anti-acid effect.

[59] Dr Raju said Mylanta II is a double strength Mylanta. He admitted that the side effect of Mylanta, in rare case, were diarrhoea, vomiting and nausea. He said Natalie did not tell him she developed these symptoms after drinking Mylanta at Lautoka Hospital. He agreed that without the benefit of this information, he prescribed double strength Mylanta to Natalie.

[60] Under cross examination, Dr Raju confirmed that:

- a) He is a friend of Natalie's husband. He and Natalie's husband are members of the Hash Harriers Club and sometimes go on hiking trips together.
- b) He did not conduct any tests to determine the genuineness of the information relayed to him by Natalie.
- c) He did not conduct toxicology report and/or specialises in toxicology to perform tests to determine the chemical ingested, the structure and the quantity of chemical ingested.
- d) Different chemical reacts differently and treatment depends on the composition and the volume of the chemical ingested. Major steps are taken where a person ingests fatal chemical.
- e) Natalie did not inform him that she vomited after consuming Mylanta at the Lautoka Hospital.
- f) He neither referred Natalie to the Lautoka Hospital nor to the Nadi Hospital. Natalie's condition was neither serious in nature nor life threatening for it to be referred to hospital. He neither referred Natalie's case to the police for investigation nor to St Giles Hospital for psychiatric evaluation.
- g) On 27 January 2005, he issued a medical certificate to Natalie without seeing her for 2 days (PE4). He prepared the medical certificate on the basis of what Natalie and her husband told him.

[61] Natalie visited Dr Raju again on 24 January 2005, and complained of diarrhoea, heart burn and vomiting. This time he put Natalie on drips for approximately 6 hours as she appeared to be dehydrated and prescribed Losec (better than

Mylanta), Gastrolyte and Maxlon (for diarrhoea). He did not refer her to the hospital because she was not in danger when she visited him for the second time.

[62] On 24 January 2005, Dr Raju issued a medical certificate to Natalie (PE3) and his assessment was that Natalie would recover by 27 January 2005. He said usually 2-3 days sick sheet is sufficient for minor medical condition/injury.

[63] Dr Raju's evidence cannot be considered as expert evidence. His evidence may be relevant to the fact that he had treated Natalie on the basis of her complaints. He did not make any finding of his own.

Natalie's (plaintiff) evidence

[64] In the re-amended statement of claim, the plaintiff states [at paragraph 4-6] that:

"...

4. *That on or about the 18th day of January 2005, while being a visitor and/or guest at the Defendants' Resort, the Plaintiff accidentally swallowed several mouthfuls of an unknown liquid negligently stored by the Defendant in a bottle of "Fiji Water" and negligently placed by the Defendant in her room.*

5. *Subsequently the Defendant by its employees admitted that the "Fiji Water" 500 milliliter bottle from which the Plaintiff drank from, contained a detergent known as "Unique Pine" and was used by its cleaners as a cleaning agent in the rooms.*

6. *As a result of the Defendant's negligent act, the Plaintiff sustained injuries, loss and damages and suffers from Post-Traumatic Stress Disorder.*

..."

[65] They would have known that the resort does not provide complimentary bottled water to its guest. That is why they (she and her husband), bought a 1.5 Litre bottle of Fiji Water from the resort restaurant before going to the room (PE1, a

- purchase receipt issued by the restaurant which includes 1.5 Litre bottle of Fiji Water).
- [66] It was her evidence that she went to the room with her husband, had her shower, picked up a 500 ml bottle of Fiji Water which was lying on the shelf beside the fridge and **drank 4 mouthfuls of the liquid** from the bottle. The liquid tasted like "Vicks" and called her husband immediately; and that upon drinking she did not gargle her mouth with water or vomit.
- [67] Natalie informed of the incident to the Hotel Manager Ms Maggie Davon who rushed to her room with the House Cleaning Supervisor (Ms Safaira Vurabera). They both stayed in the room with her for a while and did not see there Natalie vomiting.
- [68] The House Cleaning Supervisor's (Vurabera) duty was to mix chemical and give it to staff for cleaning the rooms. In her evidence, Vurabera said unique pine is brown in colour and when it is mixed with water, the mixer turns colourless. The gentlemen in the room (Natalie's husband) pulled out a 1.5 Litre Fiji Water bottle. However, in cross examination, she confirmed that: the mixture was bit brown in colour. She did not see a 500 ml bottle. As soon as one opens the cap of the bottle in which unique pine mixture is stored, he/she could smell it.
- [69] Although Natalie claimed that she drank chemical that was stored in a 500 ml Fiji Water bottle, she or her husband did not show the 500 ml water bottle to Davon and Vurabera when they were in her room immediately after the accident.
- [70] Notably, if she had drunk chemical from a 500 ml Fiji Water bottle she would have shown it to the staff (Davon and Vurabera) who visited her room shortly after the incident. Instead, what was shown to them was a 1.5 Litre Fiji Water bottle (this one could have been the water bottle they bought at the restaurant).
- [71] It is also significant to note that Ms Lutumailagi, the house keeping staff who stored the liquid in a bottle had said in her police statement that she used a "medium bottle". Fiji Water bottles come in "500 ml, 1 Litre and 1.5 Litre. Apparently, medium bottle is the 1 Litre bottle. Natalie also admitted this.

- [72] There is no evidence in court to suggest that any chemical was stored in a 500 ml bottle in Natalie's room. As such, it is hard to believe Natalie in saying that she drank chemical stored in a 500 ml Fiji Water bottle.
- [73] It is also hard to believe that she feared for her life after returning from the hospital.
- [74] She was taken to the Accident and Emergency Unit (AEU) at Lautoka Hospital which is approximately 20 minutes' drive from the resort. She did not vomit while she was taken to the hospital. She started to vomit only when she was given Mylanta to drink in the hospital. The doctor advised her to stay overnight for observation, but she refused to stay at the hospital saying the hospital was filthy. By refusing to stay at the hospital, she had denied the doctors to conduct further tests and examination. She never went back to the Lautoka Hospital but conveniently visited Dr Raju because he is her husband's friend.
- [75] In the hospital (Lautoka) 'triage form' (PE2) is noted:
- (a) *She (Natalie) arrived at the hospital at 11.30pm;*
 - (b) *She lay in bed in no obvious distress, was conscious, coherent and alert.*
- [Emphasis provided]
- [76] In the emergency department "*triage*" refers to the methods used to assess patients' severity of injury or illness within a short time after their arrival, assign priorities, and transfer each patient to the appropriate place for treatment.
- [77] During the cross examination, she admitted that it was her husband who informed the hospital staff that she drank chemical and she was mobilizing.
- [78] Importantly, she did not tell the doctors she subsequently visited including Dr Raju and all other doctors she got treatment in Australia the fact that she only started to vomit after given Mylanta at the Lautoka Hospital. Without this information not only Dr Raju but also Australian doctors had given Mylanta. Dr Raju said he prescribed Mylanta II suspension which is double strong Mylanta.
- [79] The common side effects of Mylanta include: nausea, vomiting, and diarrhoea. These are the symptoms she (Natalie) was complaining of. Dr Raju also

confirmed that in rare cases the common effects of Mylanta to be nausea, vomiting and diarrhoea.

[80] She was constantly complaining of nausea, vomiting and diarrhoea to her doctors. The doctors too constantly prescribed Mylanta to her. The fact that she vomited immediately after drinking Mylanta at the Lautoka Hospital would have been vital information for her doctors in treating her for nausea, vomiting and diarrhoea. For one reason or the other, she had hidden this vital information from her doctors.

[81] She was normally doing her activities at the resort post incident.

[82] On 20 January 2005, she, her husband and a family friend Mohammed Nagiff met with the defendant's director, Mr Dunn (DW1). At that meeting, Mr Dunn:

(a) did not have any medical reports;

(b) did not have the 500ml bottle that she allegedly drank from and/or was not aware what chemical was in the bottle; and

(c) had not seen her vomit or have diarrhoea.

[83] Mr Dunn however upgraded her stay together with her husband and her son to a 2 Bedroom Garden Villa including meals and other expenses. It was her evidence that when she checked in to the upgraded room at the resort, she had diarrhoea, vomiting and stomach cramps and she was not able to eat and was also scared to drink anything as it hurt her mouth.

[84] The resort's bill (DE3, which was not challenged by the plaintiff) reflects entries for beauty works and boutique on 26 and 27 January 2005. It appears that she was engaged in hotel activities.

[85] I accept Mr Dunn's evidence that he saw Natalie having good time at the resort and attending to resort activities during her stay at the resort after the incident.

[86] According to Mr Dunn, she was not willing to be seen or examined by the resort's doctor (Dr Sharma), but preferred to visit Dr Raju.

[87] When Mr Dunn called Dr Raju for an update on Natalie's medical examination conducted on 19 January 2005, Dr Raju had told him that Natalie's symptoms

- were temporary and given the type of chemical she ingested, her life was not threatened.
- [88] In his evidence, Mr Dunn confirmed that upon their (Natalie and her husband) he agreed to extend their stay in the Villa to February 2005.
- [89] Natalie checked out of the resort on 1 February 2005. At the time of checking out her total bill was \$6,913.75 (DE3). The bill included cost of accommodation, meals, drinks, boutique and spa.
- [90] Mr Dunn said he took a business decision and waived Natalie's resort charges and reimbursed \$4,170.50, expenses for Natalie's visits to the doctor in Fiji, dedication and transportation while in Fiji even though he did not receive any medical reports. He further said the decision to compensate Natalie for the inconvenience and discomfort caused was taken in an attempt to amicably resolve the matter and provide an opportunity for Natalie to consider First Landing Resort for her future stays in Fiji.
- [91] On 1 March 2005, Natalie's husband returned to Fiji and met with Mr Dunn seeking reimbursement of Natalie's loss of earnings for the month of February and costs associated with her medical consultation in Australia totalling \$5,738.20.
- [92] It was Mr Dunn's evidence that he consulted with the Resort's insurance brokers, they asked Natalie to sign a Memorandum of Discharge (MoD) prior to making the payment, and that the Resort's insurance brokers and he thought that Natalie's health was improving an MoD was necessary. Natalie refused to sign the MoD.
- [93] Ms Lidise on behalf of the plaintiff contends that the waiver of resort charges and the request to sign an MoD amounted to admission of negligence on the part of the defendant. I would reject this argument. I accept the defendant's evidence that the waiver of resort charges was a business decision.
- [94] During cross examination, Natalie was shown a medical certificate issued by Dr Srinivasan based in Australia certifying that he examined her on 31 January 2005 and that she was unfit to work from 31 January to 4 February 2005 (document

- tabbed 8 in the Plaintiff's Bundle of Documents –Part A), she confirmed that Dr Srinivasan was not correct given the fact that she was in Fiji on 31 January 2005.
- [95] It appears that Natalie obtained the medical certificate from Dr Srinivasan without actually seeing him on 31 January 2005.
- [96] On 24 March 2005, Natalie visited Dr Zaman who certified that she was unfit for work until 15 April 2005 (total of 21 days) (PE 9F). For one reason or the other Natalie did not disclose Dr Zaman's report. It is not clear what his finding was and why she was unfit to work for 3 weeks.
- [97] Under cross examination, she confirmed that Dr Zaman's medical report was not discovered. In these circumstances, the court could reasonably infer that if Dr Zaman's medical report was discovered it would have been against her claim.
- [98] Natalie agreed that Dr Pokorny found that there were no abnormalities and that her blood test, stool microscopy and culture results were normal. She also agreed that Dr Pokorny told her that **her symptoms were unrelated to the incident**. Further, despite her constant complaint of intermittent diarrhoea, Dr Pokorny's report states that the stool sample submitted for further testing was "formed". She does not agree with the findings of Dr Pokorny the Specialist.
- [99] She did not provide Mr Maclain's assessment report to court. However, she provided the receipts (which do not bear the official stamp of Mr Maclain) purportedly issued by Maclain for assessment.
- [100] She said there was no evidence suggesting that she had visited a doctor in 2008.
- [101] Dr Mayr's report notes that Natalie is suffering from Post-Traumatic Stress Disorder. This report has been obtained for the sole purpose of court proceedings. She agreed that this report reflects the story she told Dr Mayr. She said Dr Mayr told her that there was nothing more he could do for her and as such they mutually agreed that she would stop consulting him. This is not true because Dr Adams' report states that the reason she stopped seeing Dr Mayr was that she "was starting to pull herself" and as such no longer needed to see Dr Mayr.

[102] She said, on 18 May 2011, she was examined by Dr Selwyn Smith. Dr Smith states that [page 7] “...It is my opinion that Natalie is displaying a pathological mode of responding to her current health status.” However, according to Dr Pokorny no physical injury to her gastrointestinal tract has occurred.

[103] Under cross examination she confirmed that the medical reports submitted so far had shown no physical damage to her.

[104] Natalie was an untruthful witness for the following reasons:

(a) She said she drank 3-4 mouthfuls of chemical which was allegedly stored in a 500 ml Fiji Water bottle. No one saw a 500 ml Fiji Water bottle in her room. She did not even show it to Mr Dunn when she had meeting with him. It was not even shown to staff (Davon and Vurabera) who visited her room shortly after the incident. They were only shown a 1.5 Litre Fiji Water bottled.

(b) She said the liquid (chemical) smelt strongly and tasted like ‘Vicks’ when she drank. She did not spit or gargle. She swallowed all 4 mouthfuls of chemical. It is hard to believe when she said she swallowed 4 mouthfuls of chemical with the strong smell and the taste like Vicks. One would have tempted to spit out when something unusual goes in the mouth with the taste like Vicks.

(c) When checked in she bought a 1.5 Litre Fiji Water bottle. It would have been sealed. She drank chemical from an unsealed 500 ml Fiji Water bottle which is something unbelievable. Ms Lutumailagi, the house keeping staff who in her police statement said she used a medium Fiji Water bottle (1 Litre bottle) for cleaning detergent purpose.

(d) She concealed information, without actually saying anything that is untrue, to her doctors that she only vomited after given Mylanta to drink at the Lautoka Hospital. She left Lautoka Hospital against the doctor’s advice that she should stay overnight in the hospital for observation and examination.

[105] There is no evidence that Natalie suffered any injuries (physical or psychiatric).

[106] I disbelieve the plaintiff's evidence that she drank 3-4 mouthfuls of chemical which was allegedly stored in a 500 ml Fiji Water bottle kept in her room. Presumably, even if I had accepted the plaintiff's evidence that she drank chemical as she alleges, I would, in the circumstances of the case, have still dismissed her claim on the basis that she had contributed to it.

Breach of sections 52 and 56 of the Fair-Trading Decree

[107] The statement of claim alleges that the defendant breached sections 52 and 56 of the Fair-Trading Decree. It is not clear how these sections are relevant to the plaintiff's claim.

[108] The plaintiff led no evidence in respect of this claim.

[109] Section 52 of the Decree deals with forfeiture of goods upon conviction. It has no application to the plaintiff's claim.

[110] Section 56 of the Decree deals with false or misleading representation and it has 11 subsections in it. This section makes certain false or misrepresentation in trade or commerce, in connection with the supply or possible supply of goods or services or in connection with the promotion by any means of the supply or use of goods or services an offence.

[111] The defendant was never charged under section 56 of the Decree.

[112] There is no evidence that the defendant falsely misrepresented in trade or supply of goods or services. The selling and displaying for sale Fiji Water in 500 milliliter, 1 liter and 1.5 liter bottles in its restaurants cannot itself amount to false or misleading representation.

[113] The claim for damages for breach of section 56 of the Decree necessarily fails and should be dismissed.

Conclusion

[114] For the several reasons I have set out above, I conclude that the plaintiff has failed to establish on the balance of probability that she suffered injuries as a result of the defendant's negligent act while she was staying at First Landing Resort. This follows that the defendant is not liable in negligence as alleged by the plaintiff. I would accordingly dismiss the plaintiff's claim against the

defendant. Presumably, even if I had accepted the plaintiff's evidence that she drank chemical as she alleges, I would, in the circumstances of the case, have still dismissed her claim on the basis that she had contributed to it.

[115] Since the plaintiff was unsuccessful on liability issue, assessment of damages has become redundant.

Costs

[116] As a winning party, the defendant is entitled to costs of defending these proceedings. The defendant submits that the plaintiff's claim should be dismissed with costs on an indemnity basis or alternatively cost on a higher scale in favour of the defendant.

[117] It is apparent the defendant had incurred substantial costs in defending this matter over the years since the institution of this action in 2005.

[118] In my view the defendant is entitled to costs, which is to be assessed.

The outcome

1. Plaintiff's claim dismissed.
2. Plaintiff shall pay costs, which is to be assessed, to the defendant.



M.H. Mohamed Ajmeer
2/5/20
.....
M.H. Mohamed Ajmeer
JUDGE

At Lautoka
07 May 2020

Solicitors:

For the plaintiff: Young & Associates, Solicitors

For the defendant: Munro Leys, Solicitors