IN THE HIGH COURT OF FIJI
AT LABASA
CIVIL JURISDICTION

Civil Action No. HBC49 of 2020

BETWEEN : **SHARWAN KUMAR** of Branch Road, Labasa, Unemployed

PLAINTIFF

AND : **PINTO INDUSTRIES PTE LTD** a limited liability company having its registered office at Vakamasisuasua Industrial Subdivision Labasa, Fiji

DEFENDANT

Before : **Banuve, J**

Counsels : **Sarju Prasad Esq for the Plaintiff**
Gordon & Co for the Defendant

Date of Hearing : **27 January 2025**
Date of Judgment : **25 March 2026**

JUDGMENT

A. INTRODUCTION

1. The Court regrets the delay in this judgment which was attributable to Counsel for the Defendant's inability to file written submissions due to urgent medical reasons for which he had undergone treatment in Australia. Counsel was only able to file written submissions in September 2025.

2. The Plaintiff had filed its submissions on 26 February 2025, and the Court is grateful to both counsels for their submissions.

B. THE FACTUAL OUTLINE

3. The Plaintiff was a laborer aged 42 years old, who at the material time, was employed by the Defendant at its factory situated at Vakamasisuasua Industrial Subdivision, Labasa. The Plaintiff was paid wages at the rate of $147.20 (One Hundred and Forty Seven Dollars and Twenty Cents) weekly, after deduction of $12.80 (Twelve Dollars and Eighty Cents), being his Fiji National Provident **Fund** contribution.

4. For clarity the Court reproduces the relevant parts of the Amended Statement of Claim, filed on 16 March 2021;

1. ***THE*** *Plaintiff was at all material time a laborer, aged 42 years, and brings this action for compensation for injuries sustained by him in the cause of his employment with the 1st Defendant.*

2. ***THE*** *1st Defendant was at all material times the Employer of the Plaintiff and was based at Vakamasisuasua Industrial Subdivision, Labasa.*

3. ***THE*** *2nd Defendant is the party responsible for payment of the judgment sum.*

4. ***THAT*** *at all material times the Plaintiff was employed by the 1st Defendant as a laborer at the 1st Defendant's company, which is a factory within the meaning of the Factories Act Cap 99, at their premises in Labasa and was paid wages at the rate of $147.20 (One Hundred and Forty Seven Dollars and Twenty Cents) weekly, after deduction of $12.80 (Twelve Dollars and Eighty Cents,) being his Fiji National Provident Fund (FNPF) contribution.*

5. ***THAT*** *it was an implied term of the Plaintiff's contract of employment, that the 1st Defendant would by its servant and/or agents, take all reasonable care to provide and maintain a safe system of work, and effective supervision of the same, and would not expose the Plaintiff to a risk of injury or damage, which they knew or ought to have known, and would take all reasonable measures to ensure that the place where the Plaintiff carried out his work, and the machines he was required to operate and use, were safe, and that the 1st Defendant would provide and maintain a safe and proper system of work.*

6. ***THAT*** *on the 24th day of May 2019, being the material time, the Plaintiff while at work was directed by the servants and agents of the 1st Defendant's company to place/pack/slot in a piece of timber underneath the left front wheel of the forklift registration no. JJ 562 (hereinafter referred to as the said forklift) in order for the forklift to gain and maintain its balance and to move out of the narrow passage and whilst placing/packing/slotting the piece of timber underneath the front left wheel, the forklift suddenly shifted from its original place as a result of which the Plaintiff's head was pressed against the wall and the Plaintiff sustained serious injuries.*

7. *The said action was caused solely due to the negligence of the part of the forklift operator, who was the servant and agent of the 1st Defendant, and the 1st Defendant is vicariously liable for the actions of its forklift operator.*

PARTICULARS OF NEGLIGENCE

(i) Failing to drive with due care and attention.

(ii) Failing to keep any proper lookout or to have any proper regard for the Plaintiff at the material time.

(iii) Failing to exercise such degree of care and control over the said forklift, as was warranted having regard to all the circumstances.

(iv) Failing to take any adequate precaution to ensure that it was safe for the Plaintiff.

(v) Failing to advise the Plaintiff of the risk involved.

(vi) Failing to provide or maintain a safe and proper system of work or instruct their workmen including the Plaintiff to follow that system.

(vii) Exposing the Plaintiff to a risk of injury or damage of which they knew or ought to have known.

(viii) Failing to provide additional workmen to attend to such dangerous activity;

(ix) Requiring the Plaintiff to engage in a dangerous activity alone without due regard to his safety.

(x) Failing to caution the forklift operator to be more careful while carrying out dangerous activity as in this situation.

(xi) Failing to see the Plaintiff in sufficient time or at all to save the accident.

(xii) Being careless and/or negligent and reckless under all the circumstances of the case.

8. THAT as a result of the accident the Plaintiff suffered serious injuries, pain and suffering and loss of amenities of life, loss of earnings and reduction of earning capacity, loss of future earnings and cost of nursing care and future nursing care.

5. The Defendant filed an Amended Statement of Defence, on 14 April 2021 in which it denies all liability, and allege rather, that the Plaintiff's injury were sustained and caused by reason of the sole negligence of the Plaintiff, and/or his own serious and wilful misconduct, or further, his injury were caused by reason of contributory negligence and/or his serious and wilful misconduct. The actions of the Plaintiff amounting to negligence and/or contributory negligence were particularized. The said particulars appear as an agreed issue in the 'Agreed Facts and Issues,' filed by the parties in the Pre-Trial Conference Minutes.

C. AGREED FACTS AND ISSUES

6. According to the Pre-Trial Conference Minutes filed on 23 December 2024, the following facts and issues were agreed between the parties.

AGREED FACTS

1. ***THE*** *Plaintiff was at all material times, a laborer aged 42 years.*

2. ***THE*** *Defendant was at all material times, the Employer of the Plaintiff, and was based at Vakamasisuasua Industrial Subdivision, Labasa.*

3. ***THAT*** *on the 24th day of May 2019, being the material time, the Plaintiff while at work, sustained injuries.*

ISSUES

4. ***WAS*** *the Plaintiff paid net wages of $147.20 (One Hundred Forty Seven Dollars and Twenty Cents) weekly, after deduction of $12.80 (Twelve Dollars and Eighty Cents) being his Fiji National Provident Fund contribution?*

5. ***WAS*** *it an implied term of the Plaintiff's contract of employment that the Defendant would provide and maintain a safe and proper system of work?*

6. ***WAS*** *the Plaintiff directed by the servants and agents of the Defendant company on 24th May 2019 to place/pack/slot in a piece of timber underneath the left front wheel of the forklift registration no. JJ562, in order for the forklift to gain height and maintain its balance, and to be able to move out of the narrow passage?*

7. ***DID*** *the forklift suddenly shift from its original place causing the Plaintiff's head to be pressed against the wall resulting in the Plaintiff sustaining injuries?*

8. ***WHETHER*** *the Plaintiff suffered injuries by reason of his own sole negligence, and/or contributory negligence, and/or serious and/or wilful misconduct and/or voluntarily assuming and accepting risk of injury and by reason of the following:*

   a. *The plaintiff failing to implement and/or obey and/or follow and/or adhere to the occupational health and safety training and/or briefings given to him during his employment.*

   b. *The plaintiff failing to implement and/or obey and/or follow and/or adhere and/or take heed of the instructions and/or safety instructions given to him by the forklift driver.*

   c. *The plaintiff failing to maintain and/or keep a safe distance from the forklift, as directed and/or instructed by the forklift driver.*

   d. *The plaintiff failing to move out of the path, and/or intended path of the forklift, as directed and/or instructed to him by the forklift driver*

   e. *The plaintiff being in the vicinity of the forklift, when he knew he was not supposed to be.*

   f. *The plaintiff failing to keep any or any proper look out or to have any proper regard for and/or to the forklift being operated in his vicinity, which he was well aware of.*

   g. *The plaintiff failing to maintain a safe distance from the forklift and/or the working area/vicinity of the forklift.*

   h. *The plaintiff voluntarily assuming and accepting a risk of injury by being and/or remaining in the work area of the forklift despite being told to move away and/or required to stay clear from.*

   i. *The plaintiff failing to follow and obey and adhere to the directions and/or procedures of the Defendant and/or its other employees.*

D. TRIAL

7. During the trial the following witnesses gave evidence for the parties. PW1-PW3for the Plaintiff and DWI-DW4 for the Defendant

1.	**Nitya Nand Prasad**	(Supervisor) -	**PW1**
2.	**Sharwan Kumar**	(Plaintiff) -	**PW2**
3.	**Indra Wati**	(Plaintiff's wife) -	**PW 3**
4.	**Dr Alan Biribo**	(Neurosurgeon) -	**DW1**
5.	**Ravin Kumar**	(Accountant) -	**DW 2**
6.	**Nelson Kumar**	**(**Construction Supervisor) -	**DW 3**
7.	**Chander Hash**	(Patient) -	**DW4**

8. The following documents were tendered as exhibit;

1.	*Plaintiff's Birth Certificate* -	**Exhibit P1**
2.	*Plaintiff's FNPF Card* -	**Exhibit P2**
3.	*Plaintiff's Earnings Statement* -	**Exhibit P3**
4.	*Vehicle Owners History Pinto Industries Ltd.* -	**Exhibit P4**
5.	*Pinto Industries Ltd-OHS Factory - Rules Briefing 25/2/19*	**Exhibit D1**
6.	*Pinto Industries Ltd-Plastic Factory-OHS Rules.*	**Exhibit D2**
7.	*General Employment Agreement* -	**Exhibit D3**
8.	*Medical Report (Dr Alan Biribo) Dated 11th March 2024* -	**Exhibit D4**

E. ORAL EVIDENCE

9. ***PW1*** *Nitya Nand Prasad testified that he had worked in 2019 as a Supervisor with Pinto Industries Ltd and was working at its premises on 24 May 2019 the date when the Plaintiff had an accident. PW 1 was having lunch around 1.00 pm on the day when he was informed that the Plaintiff had an accident nearby on the factory floor. PW1 did not see the accident*

occurring, rather went to the site of the accident after being informed, and found the Plaintiff unconscious, with some co-workers trying to revive him by sprinkling him with water. A twin cab vehicle was then arranged to take the Plaintiff to the Hospital. PW1 testified that the accident occurred on a pathway in the Plastics factory, not normally used by forklifts, but which was used for that purpose on the day. Normally, the fork lift would enter the factory through another entrance, to access the stock of cement, kept there.

Mr Hussein	:	*Okay, now let me bring you back to the pathway that you were talking about. The pathway for walk, can you explain to me what is the pathway used for?*
Mr Nand	:	*Pathway was used for the laborers to take-carry their material in the wheel barrow to put in the machine.*
Mr *Hussein*	:	*Okay and on that particular day what was there at the pathway?*
Mr Nand	:	*Wheelbarrow. I mean the forklift was there when he got hurt.*
Mr Hussein	:	*So the forklift was where exactly?*
Mr Nand	:	*On the pathway.*
Mr Hussein	:	*On the pathway?*
Mr Nand	:	*Yeah*
Mr Hussein	:	*And that pathway is normally used for workers?*
Mr Nand	:	*Workers*
Mr Hussein	:	*Do forklift use that pathway?*
Mr Nand	:	*No*
Mr Hussein	:	*Okay-why don't the forklift use that pathway?*
Mr Nand	:	*Because it was for the workers, another exit was for the forklift. That was not safe for the forklift.*

PW1 also testified that he was responsible for the formation of a OHS Committee and two documents Exhibits D1 and D2, were tendered through him.

***PW2** testified that he was injured whilst working at the Defendant's premises on 24 May 2019. At the time he was earning $147 net a week .*
The Plaintiff explained that the forklift came into the premises and went by him to pick up cement whilst he was working at the plastic making machine. On encountering difficulty trying to exit through a narrow internal entranceway measuring about 4 feet wide, the

forklift driver called out to the Plaintiff to place a piece of timber underneath the left front tyre to facilitate balance and traction and the heavily laden machine to exit. Whilst bent down in a narrow space against an adjoining wall to place the piece of timber under the left tyre as requested ,the forklift moved and hit the Plaintiff's head causing him to lose consciousness. The Plaintiff only recovered in Hospital, then was taken to Suva the next day for urgent surgical treatment at CWM Hospital, then was sent back to Labasa Hospital, from where he was discharged on 3 June. The Plaintiff's wife looked after him for 2 months and then his mother-in-law took over his care for which she was paid a fee. The Plaintiff continues to attend clinics for his injury. The Plaintiff testified that it was the forklift driver's fault that caused the accident. The Plaintiff also testified that he has spent money as set out in a 'Schedule of Special Damages,[1]' covering Medical Damages, Police Report (Medical and Police Expenses). Transport Expenses, Loss of Earnings, Loss of FNPF contribution and Nursing Care (mother-in-law).

The issue of Special Damages were largely not contested by the Defendants and liability for its payment was conceded to by the Defendants in submissions.[2]

***PW3** Indra Wati the Plaintiff's wife gave evidence that she was informed of the accident whilst at work at her place of work a Garment Factory on 24 May 2019. She then went to the Emergency Section of the Labasa Hospital but could not see the Plaintiff until late in the evening when he was transferred to the Men's Surgical Ward, where she found him unconscious was in neck braces and the left side of his head swollen. PW3 was informed by the doctors that her husband had been injured at work but that he had to be shifted to CWM Hospital, Suva, on the next day. The Plaintiff underwent a CT scan at CWM Hospital and then later transferred back to Labasa Hospital. The treatment protocol that the Plaintiff was subjected to at the Labasa and CWM Hospitals were not disputed by the Defendants.[3] The -Plaintiff was discharged on 3 June 2019, taken home by his family, in pain, by taxi as whilst they had a car, the Plaintiff was the sole family member who could drive. Subsequently, the Plaintiff was visited at his home in Siberia, Labasa by nurses to check on his wound dressing, and he had to attend a fortnightly clinic at the Hospital to assess his condition. After a period of 2 months PW3's mother was enlisted to assist in the care of her husband, for which she was paid $15 a day, as PW3 had to return to work.*

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[1] **Exhibit P5**

[2] During trial the Defendant's counsel had stated that he has no objections to the Schedule of Special Damages filed by the Plaintiff's counsel (**Exhibit P5**). In response the Plaintiff had not lead particulars of the incurred expenses (see paragraph 129 Plaintiff's Written Submissions)

[3] Transcript p 82 of 172

PW3 stated that prior to the accident, the Plaintiff was a normal person, used to work, take part in religious activity, spent time with his children, family and friends and played football. After the accident the Plaintiff gets angry and easily frustrated and about once a month suffers from fits and is unable to spend time with PW3, and their children, cannot tolerate loud sound or music. The Plaintiff is no longer employed as he continually suffers from bodily pain, headache and is physically weak, and has to be taken to Hospital for regular clinic by taxi to and from Siberia, where they reside. The Plaintiff was paid his salary for a period of 2 years after the accident, before the Defendant ceased its payment, thereafter, PW3 has been solely responsible for her family's upkeep, from her wages. PW3 is unable to leave her husband alone to attend social gatherings, as he cannot look after himself well, and their life together as a couple is not good.

***DW1** Dr Alan Biribo, a Neuro-Surgeon, testified that he examined the Plaintiff, and provided a Report[4] dated 11 March 2024. The doctor testified he found the Plaintiff not honest and inconsistent with his response to questions so could not conduct a balanced and fair assessment. DW1 was unable to proceed with an impairment assessment of the Plaintiff because of the lack of radiological evidence to support the symptoms presented as well as inconsistencies noted in the clinical examination.*

***DW2,** Ravin Kumar, the Accountant at Pinto Industries Ltd confirmed that the Plaintiff was employed in the Plastics Division. He testified that Pinto Industries Ltd was fully compliant with the National Occupational Health and Safety Services in 2019, as evident by a Certificate of Workplace Registration.[5]*

When pressed, DW2 maintained that he had a 'fair idea' that the company was OHS compliant, despite the accident sustained by the Plaintiff occurring in 2019, prior to his commencing employment with the Defendant company in 2021.

***DW3,** Nelson Kumar, the Construction Manager with the Defendant company, testified that he knew the Plaintiff, but did not witness the accident. DW3 stated that he saw the Plaintiff attend a wedding in Siberia sometime after the accident, appeared norma, and had driven to the venue in a vehicle, although he was using a walking stick to get around.*

***DW4,** Chandar Hash testified that he was also admitted at the Mens Surgical Ward of Labasa Hospital in May 2019, as he had an obstruction (fish bone) to his throat which required attention, he said he was aware that someone had been admitted next to him in the*

[4] Exhibit **D4**
[5] Exhibit **D5**

Ward, whose head was crushed in a forklift, seemed to be in a lot of pain, although he did not know his name nor could he identify him.

F. ANALYSIS

10. The Court shall proceed to determine the Agreed issues in the order they were laid out in the Pre-Trial Conference Minutes filed on 23 December 2021.

(i) Was the Plaintiff paid net wages of $147.20 (One Hundred Forty Seven Dollars and Twenty Cents) weekly after deduction of $12.80 (Twelve Dollars and Eighty Cents) being his Fiji National Provident Fund contribution?

The Defendants did not seriously contest this issue and the Court notes that the parties had agreed to this amount at the PTC. The Court finds in the affirmative, on this issue.

(ii) Was it an implied term of the Plaintiff's contract of employment that the Defendant would provide and maintain a safe and proper system of work?

The Defendant affirmed in evidence that its factory and workplace were fully compliant with the Occupational Health and Safety Rules and Regulations. DW2 Ravin Kumar testified that Pinto Industries Ltd was fully compliant in 2019, with OHS requirements, as attested to in a *Certificate of Workplace Registration* issued dated 5 April 2019.[6] The Defendant , however denies that it owes a duty of care,[7] in the circumstance, to the Plaintiff.

The Court finds however, that the Defendants does owe a duty of care, at common law, to the Plaintiff, and its effort to disprove this duty is misconceived, as the Court will allude to later.

The Plaintiff was an employee of the Defendant, at the material time, as such the Defendant owed him a duty of care to provide a safe system of work, free of danger and risk to the Plaintiff.

[6] Exhibit **D5**

[7] Paragraph 18 Amended Statement of Defence filed on 14 April 2021

*" At common law an employer is under a duty of care to take reasonable care for the safety of his employees so as not to expose them to unnecessary risk. This duty of care must be considered and in measuring it, one must balance the risk against the measures necessary to eliminate the ris**k-Watt** v Hetfordshire County Council [1954] 2 AllER 368.*[8]

(iii) ***Was the Plaintiff directed by the servants and agents of the Defendant company on 24 May 2019 to place/pack/slot in a piece of timber underneath the left front wheel of the forklift registration No JJ 58 for the forklift to gain height and maintain its balance and to be able to move out of its narrow passage****?*

The Courts finds in the affirmative on this query.

(iv) Did the forklift suddenly shift from its original place causing the Plaintiff's head to be pressed against the wall resulting in the Plaintiff sustaining injuries?

The Court finds in the affirmative on this issue and, on the balance of probabilities, the forklift was driven negligently into an access way in the factory, normally used by workmen, and inappropriate for use for heavy mobile machines, like forklifts, and consequently by operating the machine on the factory floor, on the relevant day, it stuck at a narrow aperture on the factory floor, because of the differing levels in the floor. The Court finds that this issue establishes that it was inappropriate for the forklift driver to operate the forklift in the manner he did on 24 May 2019, since the narrow internal entrance on the factory floor which he used, coupled with the differing levels in the floor, were clear evidence that it was not adapted for safe forklift operation and the decision by its driver to do so on 24 May 2019, exposed workmen like the Plaintiff, working in the adjacent plastics factory, to an inherently dangerous and unsafe work practice. This unsafe practice was exacerbated by the forklift driver directing the Plaintiff to leave his workstation at the plastics factory and place a piece of timber, under the left tyre of the mobile, heavy-laden forklift. In leaving his work station at the plastics factory as requested

[8] As referred to in *Chand v Vision Trading Ltd*-Civil Action HBC 128 of 2014, per A.M Mohamed Mackie,J

the Court finds that the *Plastic Factory OHS Rules*[9] no longer applied to the Plaintiff, as the hazardous act of placing the timber under a mobile forklift was not part of his duties in the plastics factory, and it is disingenuous for the Defendant to suggest otherwise. The forklift, under the control of its driver, shifted because of the enhanced traction/balance caused by the timber, which its driver did not control, directly causing the accident, to the Plaintiff, resulting in his sustaining serious head injury. The decision to direct the Plaintiff , to undertake the inherently dangerous and hazardous act of placing a timber under a mobile, heavy machine like the forklift, without any safety supervision , is further evidence that the Defendants breached the duty of care, it owed the Plaintiff to provide him with a safe and healthy workplace. The Court emphasizes that it finds the Defendants had breached the duty of care it owed to the Plaintiff, in the circumstance.

(v) WHETHER the Plaintiff suffered injuries by reason of his sole negligence and/or contributory negligence and/or serious and/or wilful misconduct and/or voluntarily assuming and accepting a risk of injury?

It would be noted from the Court's finding at (iv), and affirmed here, that it does not find the Plaintiff either negligent or contributory negligent, rather that it was the Defendant that breached the duty of care it owed the Plaintiff, as defined in law -*Chand v Vision Trading Ltd-* Civil Action HBC 128 of 2014. The Court also finds after evaluating the evidence that the Plaintiff could not have contributed to the accident occurring. Put in another way, the Plaintiff had been normally engaged at his workplace in the Plastics factory on 24 May 2019 for which his health and safety had been prescribed by the *Plastic Factory OHS Rules*.[10]As discussed earlier the Court finds that these Rules did not apply to the hazardous task the forklift driver asked the Plaintiff to leave his workstation at the plastics factory, to undertake.

The issue of contributory negligence, on the other hand depends entirely on the question of whether the Plaintiff could have reasonably avoided the consequences of the Defendant's negligence-*Grayson v Ellerman Lines Ltd (*1920) AC 466 at 477- The Court finds that the Plaintiff was in no position to avoid the consequence of

[9] Exhibit **D2**
[10] Exhibit **D2**

the Defendant's negligence. The Defendant had a practice of ordering laborers like the Plaintiff to carry out additional work and duty, other then that which they were formally allocated, at any time. The capricious manner which these additional duties could be imposed meant that the orderly safety and health guidelines imposed by the *OHS Rules and Regulations*, would not be guaranteed. Further, workers like the Plaintiff could not be expected to refuse or avoid taking on the 'additional work 'required of them by the Defendant, even if inherently dangerous, given their lowly employment status and for fear of reprisal from the Defendant, as employer, if they refused, as this exchange in the Court Record[11] reveals;

> ***Mr Gordon***: *Yes. Mr Kumar I put it to you given that you are working there for some 12, 13 years you ought to have known the danger of what you have been asked to do?*
> ***Mr Kumar***: *Yes, Your Lordship*
> ***Mr Gordon***: *And you could have said no and avoided the injury that was caused to you?*
> ***Mr Kumar***: *If I would have said no, company would have sent me home.*

The Court finds that the Defendant's attempt to extend the cover provided by the *Plastic Factory OHS Rules* to cover the 'additional hazardous work undertaken by the Plaintiff on 24 May 2019, as disingenuous, and the Court finds that the Rules did not apply in the circumstance on the said place of accident leading to the serious injury sustained by the Plaintiff on 24 May 2019.

(vi) What is the extent of the injury of the Plaintiff?

The Court accepts the Particulars of Injuries in paragraph 9 of the Amended Statement of Claim filed on 16 March 2021, as confirmatory of the extent of physical injury sustained by the Plaintiff from the accident he had on the Defendant's premises on 24 May 2019, as it is not contested by the Defendant, at trial.

[11] Page 74 of 172.

(vii) Whether the said accident was caused due to the negligence on the part of the forklift operator who was the servant and agent of the Defendant and whether the Defendant is vicariously liable for the actions of the Forklift operator?

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11. The Court finds in the affirmative on this issue, and it understands that the Defendant's defence at trial proceeded on the premise that the forklift operator was its employee, and that it would be held vicariously liable, if the operator was found negligent.

12. The Court does find that the forklift operator was negligent in the manner he operated Forklift Registered No JJ 562, on the factory floor, on 24 May 2019 directly causing the accident in which the Plaintiff sustained serious injury. The evidence against the Forklift operator is uncontroverted, albeit he is deceased. The Court finds that the allegations of negligent conduct made against the forklift operator, and particularized in paragraphs 7(a)to (l) and 8, of the Amended Statement of Claim filed on 16 March 2021, as sustained, for which the Defendant is vicariously liable, as his employer. In *Lautoka General Transport Co Ltd v Vosa* [2008] FJCA 75, the Court of Appeal in applying general principles on vicarious liability held that the master is not responsible for the wrongful act of his servant unless it is done in the course of employment. In this instance, the forklift operator was working during normal working hours, albeit in an area where forklifts were rarely used, for the normal operation of the Defendant causing the accident to the Plaintiff, in the negligent manner that he operated the forklift. The Defendant is vicariously liable for the actions of the forklift operator, and the Court notes that the Defendant did not, at trial, seriously dispute this issue.

(viii)-(ix) Whether the Defendant was negligent and/or reckless about the safety of the Plaintiff at the material time? Did the Defendant owe a duty of care to the Plaintiff and if so, what were those duties of care and did it breach those duties of care?

The Defendant was clearly reckless about the safety of the Plaintiff at the material time by not providing any supervision to guarantee a modicum of safety to the

Plaintiff when undertaking the inherently hazardous and dangerous task of placing a piece of timber under the tyre of a mobile forklift, as he was directed to undertake on 24 May 2019.

In relation to the contents of the duty of care, the Court can only proceed on the basis of the evidence before it. The *Plastics Factory OHS Rules*[12] provides rules and guidelines to ensure safety for workers engaged in the Plastics factory. Placing timber under the tyres of an operational forklift is not a recognized activity undertaken in the plastics factory, so the fact that the Plaintiff was directed to do so by the forklift driver, breached the duty of care to provide a safe workplace for the Plaintiff in that factory, guaranteed by the Plastics Factory OHS Rules.

(x) Whether the Plaintiff now suffers from permanent incapacity because of his injuries and if, so what is the degree of impairment?

There is dispute between the parties about the issue of medical evidence in relation to reports provided by Dr Kiran Gaikwad and Dr Alan Biribo. Dr Gaikwad had been summoned by both parties to clarify his findings in relation to a Medical Report, dated 2 June 2022 he had compiled after examining the Plaintiff. Both parties were aware of the Report and had disclosed it in Affidavits Verifying their List of Documents, signaling their intent to rely on the Report, at trial. A Medical Report was also prepared by Dr Alan Biribo, dated 11 March 2024, whose use was objected to by the Plaintiff. After a careful consideration of the relevant position of the parties, the Court will allow the use of Dr Gaikwad's Report, whilst disallowing the use of Dr Biribo's Report for the reasons outlined.

(a) Dr Kiran Gaekwad

The matter proceeded to trial, on the understanding that Dr Gaekwad and Dr Biribo who were both travelling from Suva, would only be available on 28 January 2025. The Plaintiff had no objection about the calling of Dr Gaikwad as an expert witness, as both parties relied on the Report he had complied, dated 2 July 2022, and the Report had been exchanged in pre-trial discovery. The Plaintiff agreed

[12] Exhibit D2

that it would close its case on 27 January 2025, and due to time constraint, counsels agreed that the Plaintiff would on 28 January 2025, allow the Defendant to call Dr Gaikwad as his witness, and allow the Plaintiff to cross examine him. Prior to the case commencing on 28 January 2025, the Court was informed, that contrary to the understanding reached between the parties on 27 January 2025, the Defendant would not be calling Dr Gaekwad as a witness. The Defendant objected to the Plaintiff re-opening its case to enable him to call Dr Gaekwad, and asked for a ruling on this issue. In order to avoid delay the Court said it would rule on this issue, later. It does so now. The Court finds the approach taken by the Defendant as disingenuous. The Defendant had known on 27 January 2025, that the Plaintiff would not be calling its own medical witness Dr Rauni Tikoinayau, whose evidence it sought to rebut through Dr Gaikwad, as he was unwell. It was incumbent on the Defendant to inform the Plaintiff, *before it closed its case,* that it would not be calling Dr Gaekwad, since it knew that the Plaintiff would not be calling Dr Tiloinayau. This would have allowed the Plaintiff the opportunity to call Dr Gaekwad, who was a witness common to both parties, before it closed its case.

In order to address the prejudicial effect of this development the Court has examined the contents of the report provided by Dr Gaekwad, and allowed its use, and has used it in its determination, since neither party objects to its content.

The Court otherwise accepts the particulars pleaded in paragraph 12(a) to (e) of the Amended Statement of Claim, filed on 16 March 2021 as confirmatory of the extent of permanent incapacity sustained by the Plaintiff from the accident he had on 24 May 2019.

(b) Dr Alan Biribo.

The Court will not allow the use of the Medical Report prepared by Dr Biribo, dated 11 March 2024[13], because the Defendant had not complied with Order 25, Rule 8(1)(b) of the *High Court* Rules 1988, and not disclosed the substance of the Report within the prescribed period. As affirmed in *Haworth v Starwood Properties Ltd* [2019] 809; HBC215.2012 (16 August 2019);

[13] Exhibit **D4**

53. O.25, r 8(1)(b) requires a special report on the expert evidence to be prepared for the purposes of a personal injury action, failing which expert witnesses may not be called. This is to be prepared after discovery.
54. As pointed out, the Plaintiff has not complied with this requirement.
55. The Rule is intended to assist the Court by limiting expert evidence and also to accord justice to the parties by allowing them sufficient time to consider and respond to expert evidence. Such evidence is only opinion on which witnesses may differ and is based on expertise on which alternative professional views may be required.

The Court, therefore, based on Dr Gaekwad's Report, finds that the Plaintiff suffers from permanent incapacity from the injury he sustained in the accident caused by the Defendant, at its premises on 24 May 2019. The Court also finds the degree of impairment to be **28%** as, assessed by Dr Gaikwad in his Medical Report dated 2 June 2022.[14]

(xi) ***Has the Plaintiff suffered pain and suffering and loss of amenities of life and loss and damages because of the accident and the resulting injuries? If so, what is the quantum of special and general damages payable to the Plaintiff?***

G. SPECIAL DAMAGES

13. The Court finds in the affirmative on this issue. It will first deal with the issue of Special Damages as this is not contested by the Defendant, a concession attributable to the intervention of senior counsel for the Defendant. The relevant amounts are laid out in the schedule.

SCHEDULE OF SPECIAL DAMAGES			
1	**MEDICAL AND POLICE EXPENSES**		
	(a) MEDICAL EXPENSES		
	Medicines	1,300.00	
	Medical Report (CWM)	105.00	

[14] **Index I** Medical Report from Dr Kiran Gaikwad dated 2.6/22-**PLAINTIFF'S BUNDLE OF DOCUMENTS**

	Medical Report (Dr R. Tikoinayau)	1,327.00	
	(b) POLICE REPPORT	21.80	
	Total Medical and Police Expenses		**2,753.80**
2	**TRANSPORT EXPENSES**		
	Airfare Labasa/Suva	105.00	
	Boat fare from Suva to Labasa	65.00	
	Transport expenses Home/Hospital Return various occasions	549.20	
	Total Transport Expenses		**719.20**
3	**LOSS OF EARNINGS**		
	Period of Loss	24/5/2019 (Date of Injury) to 6/12/2024 (Date of Hearing)	
	Number of Weeks	185 Weeks (289 – 104[15] weeks) (1295 days)	
	Net Income per week	417.20	
	Agreed in PTC		
	185 weeks		**27,232.00**
4	**LOSS OF FNPF CONTRIBUTION**		
	Loss of FNPF for 185 weeks @ $12.80 per week as agreed in PTC	2368.00	
	Total FNPF Contribution		**$2,368.00**
5	**NURSING CARE**		
	Cost of Nursing care	17389.00	
	Total of Nursing Care		**$17,389.00**

	TOTAL OF SPECIAL DAMAGES		**$50,462.00**

(c) The Court has adjusted the amount awarded as 'Loss of Earnings' as it was affirmed at trial that the Plaintiff was paid by the Defendant for a period of 2 years after the accident , and finds that the Plaintiff is entitled to a sum of **$50,462.00** (Fifty Thousand and Five Hundred and Forty Two Dollars) as special damages.

General Damages

Pain and Suffering and Loss of Amenities

(d) The Plaintiff sustained serious injury to his head on 29 May 2019, which irrevocably changed his life. Over the immediate period after the accident it is undisputed that the Plaintiff went through a traumatic and debilitating period of suffering, given the severity of his injury which irreversibly altered his personal, social and family life.

PW3, the Plaintiff's wife testified that after the accident the Plaintiff was basically home bound, not able to care for himself , cannot work without assistance and reliant on others to maintain personal hygiene and suffers continuously from pain to date, requiring frequent visits to Labasa Hospital for treatment and medication to alleviate his pain and suffering.

The Defendant lead evidence of DW3, Nelson Kumar and DW4, Chandar Hash against the claim of loss of suffering and loss of amenities by the Plaintiff. The Court has carefully evaluated the evidence of these 2 witnesses, and on the balance of probabilities, do not find them reliable. Mr Kumar (DW3) was defensive on cross examination and the Court finds on the balance of probabilities, as altogether too convenient and designed to discredit, the Plaintiff, despite him barely acquainted with the Plaintiff at work, and the significant difference in their work station, with the Plaintiff being a laborer and DW3, the Construction Manager. The evidence of DW4, Chandar Hash was of little relevance since he could not identify the Plaintiff, despite their admission at Labasa Hospital, at the relevant time.

(e) The Court finds that the evidence adduced by the Plaintiff as being unchallenged on this issue.

Dr Kiran Gaikwad assessed the Whole Person Impairment of the Plaintiff at 28% using the AMA5. In *Kumar v CJ Patel & Co Ltd* [2019] FJHC 406;HBC 07.2017, the Court held, as follows;

> *38. In determining damages, it is necessary to consider general level of comparable award*
> *39. In Chand v Courts (Fiji) Ltd and Sheik Mohammed Amin, Civil Appeal No ABU0031 of 2012 (2 October 2015) the Court of Appeal upheld an award of general damages of $85,000 where the plaintiff was assessed with 18% whole person impairment. He had suffered back injury and could only walk with crutches.*
> *40. The principles laid down in Chand's case to determine damages for pain and suffering was followed in Fiji Forest Industries v Naidu [2017] FJCA 106;ABU0019.2014(14 September 2017).*

(f) In this case, the Plaintiff and his wife gave unchallenged evidence in regards to pain and suffering and loss of amenities of life. The Plaintiff submits that based on Dr Gaikwad's assessment, and on comparable awards given in cases like *Nasese Bus Co Ltd v Chand* [2013] FJCA 9;ABU40.2011 where general damages awarded were $90,000 (Ninety Thousand Dollars) and in *Kumar v CJ Patel* [2019] FJHC 406; HBC 07.2017, where general damages awarded were $110,000.00 (One Hundred and Ten Thousand Dollars), that the award for pain and suffering and loss of amenities ought to be $100,000 (One Hundred Thousand Dollars).

(g) The Court accepts that this award is appropriate in the circumstance.

<u>Loss of Future Earnings</u>

(h) In determining the loss of future earnings the Court in *Kumar v CJ Patel & Company* held:

> *"56. In AG v Suruj Narayan, (ABU 0057 of 2008) Calanchini, J (as he then was cited the following passage from the decision of the House of Lords in Wells v Wells [1998] UKHL 27;[1999] 1 AC 345 at paragraph 66:*

A plaintiff who has been deprived of earning capacity, whether in whole or in part has lost the chance of exploiting the chance of exploiting that capacity to the full. In most instances, the chance of exploiting the capacity is high and this is reflected in the approach taken by the courts, which is usually to assume that it would have been exploited to the full, at least to the normal retirement age. That one hundred percent probability is then discounted by the chances of its not being exploited due to the normal contingencies of life."

(i) In submissions, the Plaintiff referred to the multiplier used by Justice Brito-Mutunayagam in *Eta Naqeletia v Kumar* [2012] FJHC 29, where the Court took a multiplier of 8 years for a 46 year old fish vendor and the case of *Fiji Forest Industries Ltd v Naidu* [2017] FJCA 106 where the Court of Appeal used a multiplier of 11 for a 41 year old casual laborer .

(j) The Plaintiff worked for 12 -13 years prior to the accident and has not been able to work after the accident, nor does he hold any qualification to enable him find alternative employment, were he physically able to. The Plaintiff is not physically able.. In evidence, it was shown that the Plaintiff earned $4.00 per hour, is required to work an 8 hour day, in a 5 day week amounting to $160.00 (One Hundred and Sixty Dollars), gross weekly, with FNPF deductions, his net weekly wages was $147.20 (One Hundred and Forty Seven Dollars and Twenty cents).

The Plaintiff proposes a multiplier of 11 years as appropriate given the Plaintiff is 42 years old, and he therefore is entitled to a sum of $84,198.40 (Eighty Four Thousand, One Hundred and Ninety Eight Dollars and Forty cents ($147.20 x 11x 52) as loss of future earnings . The Plaintiff is entitled to a sum of $9,152 (Nine Thousand, One Hundred and Fifty Two Dollars) ($16x 11x52) for loss of future FNPF. The Court accepts the Plaintiff's proposal.

G. <u>FINDING</u>

14. The Plaintiff has succeed in its claim for compensation for the injury he sustained on 24 May 2019 caused by the negligence of the Defendant on 24 May 2019 at its

factory in Vakamasisuasua Subdivision, Labasa and is awarded damages, as tabulated;

1	**GENERAL DAMAGES**	$100,000	
2	Interest on General Damages @ 2% per annum	$10,980.82	From 28/9/20 to 25/3/26
3	**SPECIAL DAMAGES**	$50,462.00	
4	Interest on Special Damages @ 2% per annum	$6,915.23	From 24/5/19 to 25/3/26
5	Loss of Future Earnings	$84,198.40	No interest paid
6	Loss of FNPF	$9,152.00	No interest paid
	TOTAL	**$261,708.45**	

ORDERS:

1. **The Plaintiff succeeds in its claim against the Defendant.**
2. **The Plaintiff is awarded damages in the sum of $261, 708.45, together with interest, in terms of the *Law Reform (Miscellaneous Provisions) (Death and Interest)* Act {Cap 27] as amended, from the date of judgment until payment in full.**
3. **Costs to the Plaintiff summarily assessed at $4,000**

Dated at Labasa this 25th day of March 2026

HIGH COURT OF FIJI LABASA

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Savenaca Banuve

Judge