IN THE SUPREME COURT OF FIJI
[APPELLATE JURISDICTION]

CIVIL PETITION NO. CBV 0012 of 2022
[Court of Appeal No. ABU 0051 of 2018]

BETWEEN	:	**COURTS (FIJI) LIMITED**
		Petitioner
AND	:	**DHIMANT PATEL**
		Respondent
Coram	:	**The Hon. Justice Anthony Gates, Judge of the Supreme Court** **The Hon. Justice Brian Keith, Judge of the Supreme Court** **The Hon. Justice Lowell Goddard, Judge of the Supreme Court**
Counsel	:	**Mr. R.R. Gordon for the Petitioner**
	:	**Mr. E. Maopa for the Respondent**
Date of Hearing	:	**12 April 2024**
Date of Judgment	:	**26 April 2024**

JUDGMENT

Gates, J

Introduction

[1] This case is concerned with whether a litigant can bring a civil action based on a breach of a provision in Part 2 of the Health and Safety at Work Act 1996. The petitioner asks the Court to resolve a conflict in the existing decisions of the High Court as to whether Section 15 of the Act excludes such an action.

Facts

[2] On 6th of December 2012 at around 3pm the respondent [original plaintiff] Mr. Dhimant Patel entered the petitioner's Mega Store at Votualevu, Nadi. The respondent was then a retired person aged 62. He went in to purchase a gift for his 6 month old grandson. It was to be a baby walker.

[3] He was familiar with the store and said he had been inside many times before.

[4] Upon entering he turned to the right and headed to the escalator. He did not approach it from the front but from its left hand side. As he approached he fell into "a void". From this hole he had to be lifted out by staff at the store. The respondent suffered pain, injuries and fractures of the left fibular and the right 9th rib. The ankle fracture was treated in a cast. He was on crutches for many weeks. He suffered pain from the outer side of the left ankle and had cramps over the calf muscles. He could not stand for long periods. Mr. E.D. Taloga, a Specialist Orthopaedic Surgeon, in his report [10.11.2016] compiled at the request of the petitioner's lawyer, stated that:

> *"The ankle fracture has healed well without any abnormal radiological findings and I do not envisage any future treatment will be required for this injury. There is no rateable permanent impairment as a result of the injuries sustained by Mr. Patel."*

[5] This void that he had fallen into was a hole, sometimes referred to as a pit or manhole. Presumably it provided an access point for maintenance and repair work on the escalator. From the Courts Internal *Incident Report Form* completed by one Mr. Sarnit Chand on the same day as the accident, the hole appears in his rough sketch plan to have been rectangular in shape extending the width of the steps of the escalator and of similar dimensions at the top to one of the steps.

[6] The respondent said "it was fairly deep, and when I fell into it, I hit steel structures:" A fellow shopper lent him her phone and the respondent called his wife. An ambulance was arranged and he was taken to Dr. Raju's clinic. There he had an injection to relieve the

extreme pain he was experiencing, and x-rays were taken. Dr. Joeli Mareko, a surgeon from Lautoka Hospital, came regularly to Nadi. He examined and treated the respondent and put a cast on his ankle. This was kept on for 3 to 4 months, and Mr. Patel used crutches during that time.

[7] Dr. Raju gave a report on 27th of June, 2013. He summarised the position 6 months after the incident:

> *"Dr. Mareko and myself have treated him since and followed up closely on a number of occasions. He had full cast applied to his left leg that was removed in March this year. An ankle crepe support bandage was recommended to be worn after the cast was removed.*
>
> *Dhimant has recovered well but he still gets pain and discomfort on prolonged walking or standing. He also gets occasional pain at the region of the left chest injury."*

Missing parts of the Court Transcript

[8] The respondent, through his counsel, called four witnesses at the trial to establish his case. The petitioner as defendant called one witness. The Court record includes the evidence of Mr. Patel [plaintiff] and Ms. Esther Turavita, a fellow visitor to the store that day. However, the transcript does not include the evidence of Dr. Ram Raju, who attended his patient Mr. Patel in the ambulance and brought him to his surgery. It also omits the evidence of Ms. Sereana Siluwale, an officer from the Labour Department. Mr. Sarnit Chand for the petitioner, had given evidence, but that too is not in the transcript.

[9] The Court ordered a search for a tape of this part of the evidence which appears to have been given on Day 2 of the trial. The old recordings could not be found. This was the outcome even after other computers in the Transcription Unit at Lautoka had been searched by IT Section.

[10] The lack of this evidence was a situation which existed at the time the hearing took place before the Court of Appeal. Neither counsel for the parties appear to have raised this

omission in the record prior to the appeal below or in the appeal before us. Our attention has not been brought to the omission. But from the arguments raised, and points made, on the evidence we can conclude that the loss of it has not been material to this appeal.

[11] We have Dr. Raju's report. His evidence has not impacted on the appeal points argued. Ms. Sereana Siluwale, for the Labour Department, gave evidence and produced a preliminary report prepared by another officer. The judge noted that the report had not been signed, and the maker of the report had not been called as a witness to prove its contents. The judge concluded "The officer (who) came to Court in this regard was not privy to the contents thereof or a part to the investigation. Thus, her evidence and the prepared report had to be disregarded." The petitioner's counsel incorrectly sought to rely on the Labour Department Report in his written submissions to us. The report could not go in because he had himself objected to it at trial. The report, and evidence of the Labour Department witness who attended the trial, both had to be disregarded.

[12] The only evidence quoted and relied on by the judge [page 17 of his judgment] from the defence witness Sarnit Chand arose as follows:

> *"e. Had the defendant taken any extra and much needed protective measures as averred in paragraph 5 (ii) of its statement of defence, particularly by placing a "Repair in progress" sign or red cones to cordon off the area, it could have transpired through the evidence of defence witness* ***Mr. Saneet Chand*** *by highlighting them in his sketch D-2 and the learned defence counsel would, undoubtedly, have put it to the plaintiff during the cross-examination.*
>
> *f. The following answer of the above defence witness to the question posed by the Court clearly shows that there was nothing in place to block the pit other than the chair on the front side of the manhole.*
>
> ***CRT: Apart from placing the chair in front of the pit, wasn't there any object placed on the sides of the pit?***
>
> ***A: No.***
>
> ***Q: Why didn't you place any objects on the side?***
>
> ***A: Because one of our staff should have been full time there; or if he needs to come up, then he should have secured that."***

<u>The High Court</u>

[13] The respondent's statement of claim pleaded negligence, and alleged the petitioner had breached its duty of care which had resulted in injuries. The claim also alleged breach of the Health and Safety at Work Act Provisions [Sections 9, 10, and 11]. It alleged a failure to comply with the statutory obligations of the Act [Sections 9 – 13]. Besides special damages of $893.00 there was a claim for general damages for (i) Negligence and (ii) Breach of Statutory Duty.

[14] The defence had argued the Act was inapplicable to a civil action by virtue of Section 15:

> *"<u>Civil liability not affected by Part 2:</u>*
>
> *15. Nothing in this Part should be construed as –*
>
> *(a) conferring a right of action in any civil proceedings in respect of any contravention, whether by act or omission, of any provision of this Part."*

[15] Part 2 had imposed certain duties upon employers towards their workers, contravention of which made them liable to criminal penalties. Mackie J in the trial of this matter found that civil liability could be founded on the Act. But he held that even if he were wrong in that finding, the respondent still had a remedy under the common law duty of care. In effect, that duty was owed by a company operating a department store such as Courts to all visitors (customers and consumers) to its premises, to ensure their safety throughout their visit.

[16] The Judge issued his final orders:

> *"1. Judgment in favour of the Plaintiff.*
> *2. The Defendant is to pay the Plaintiff special damages in the sum of $788.00 together with the interest at 3% for the period from 6th December 2012 to 11th May 2018, which amounts to $128.50.*

3. *The Defendant is to pay the Plaintiff general damages in the sum of $11,000.00 together with interest at 6% for the period 25th March 2013 to 11th May 2018, which amounts to $2,725.00*
4. *The total amount payable by the Defendant as special and general damages plus interest shall be $14,641.50.*
5. *The Defendant is ordered to pay $1,150.00 as costs summarily assessed."*

The Court of Appeal

[17] The Court of Appeal in the leading judgment of Guneratne JA, dismissed the appeal, finding that negligence had been established along with special damages. The Court reduced general damages by 25% finding there had been contributory negligence. This reduced the award from $11,000 to $8,250. Costs in the High Court of $1,150 were upheld but no order for respondent's costs in the Court of Appeal were awarded in view of the Court's determination of contributory negligence.

[18] The Court found that the judge had approached the matter on common law principles. Therefore, the judge's discussion, in part erroneous, on the interpretation of several sections of the Act were irrelevant to the finding of negligence. The storeowner owed a duty of care to its visitors, and there had been a breach of that duty by reason of negligence. The Court rejected the grounds arguing otherwise.

[19] The Court found there had been contributory negligence and that the trial judge had not addressed the alleged misjudgement on the part of the respondent sufficiently. The factor that weighed with the Court was that the respondent entered the store wearing sunglasses. Hence the 25% reduction in damages.

The Health and Safety at Work Act and Civil Actions: the Cases

[20] Mr. Gordon said special leave ought to be granted to provide authoritative clarification of the extent of Section 15, the exclusion of civil liability under the Act. He argued this was necessary in view of a lack of unity in the High Court decisions on the point.

[21] According, to the Court of Appeal the issue raised before them was that the obligations under the Act were imposed on employers *vis-a-vis* their workmen. Only Section 10 referred to duties towards *non-workers.* Mr. Gordon had raised the Section 15 argument as a preliminary objection at the trial and in closing, which the trial judge dealt with. However, there is no mention of Section 15 in the judgment of the Court of Appeal. Perhaps this is because the Court accepted that the common law remedy of negligence had been pleaded and was open on the evidence, and therefore had felt that it was unnecessary to say anything more about Section 15.

[22] In ***Krishna v Standard Concrete Industries Ltd*** [2008] FJHC 42, Jiten Singh J said:

> *"[30] It appears therefore that the Health and Safety at Work Act is a preventive piece of legislation. It lays emphasis on prevention of accidents. If an Act does no more than state that a certain act constitutes a criminal offence, it may be taken to indicate that the person injuriously affected by the commission of the offence is intended to have a civil remedy: Rickless v. United Artists Corporation - (1987) 1 ALL 197. However the Health & Safety at Work Act is not silent on this aspect."*

[23] The judge went on to say *"The Act would lose a lot of its efficacy and objectives if a worker injured as a result of employer's breach of the provisions of the Act could not sue him."*

[24] His Lordship concluded at paragraph [31]:

> *"I am of the view what Section 15 means is that there has to be an injury as a result of failure to comply with the Act before one can bring civil proceedings. Section 15 does not prohibit civil proceedings but retains the essence of tort law that there must be injury to found a claim."*

[25] With respect, that conclusion is incorrect. In ***Raj v Flour Mills of Fiji Ltd*** [1999] FJHC 166, the plaintiff claimed liability under the common law and secondly for breach of statutory duty under the Health and Safety at Work Act.

Shameem J said:

> *"Section 9(4) provides that contravention of the section creates a criminal offence. Section 15 of the Act provides that:*
>
> *'Nothing in this Part shall be construed as –*
>
> *(a) conferring a right of action in any civil proceedings in respect of any contravention, whether by act or omission, of any provision of this part.'*
>
> *In the light of this provision I find that section 9 of the Health and Safety at Work Act 1996, has very little relevance to these proceedings."*

The judge went on to find negligence at common law proven in that the defendant company had failed to provide a safe system of work.

[26] In ***Prasad v Kumar*** [2008] FJHC 368, Jitoko J made the following observations on the applicability of the Act:

> *"The Nature of the Duty of the Employer*
>
> *At common law an employer is under a duty 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 risk: see Denning LJ in Watt v Hertfordshire County Council [1954] 2 AER 368.*
>
> *Our Health and Safety at Work Act 1994 and its Regulations, in addition to common law obligation, impose on every employer a general duty to ensure, so as far as reasonably practicable, the health safety and welfare at work of all his employees.* ***It must however be noted that the duty under the Act does not give rise to civil liability. This is still govern(ed) by common law****. (Emphasis mine)"*

[27] In ***Dakuna v Laucala Island Resort Ltd*** [2017] FJHC 10, Master Nanayakkara, in ruling on a summons to strike out, was hearing a case alleging breach of statutory duty arising under the Act, as well as negligence. The Master ruled:

> *"The language of Section 15 of the Health and Safety at Work Act, 1996 is unmistakeably clear to me; there can be no Civil Claims for a breach of Part II."*

[28] He added:

> *"One word more, as correctly pointed out by Counsel for the Defendant, Health and Safety at Work Act 1996 was modelled on the Health and Safety Work Act 1974 UK, which contains a similar restriction in Section 47 (1) (c) which reads;*
>
> *"Civil liability*
>
> *(1) Nothing in this Part shall be construed as –*
>
> *(a) as conferring a right of action in any civil proceedings in respect of any failure to comply with any duty imposed by sections 2 to 7 or any contravention of section 8; or ..."*
>
> *As Counsel for the Defendant correctly submitted, the House of Lords held that Section 47(1) of Health and Safety at Work Act 1974 [UK], restricted any civil liability since the statute was not enacted for the purpose of creating liability for personal injury. In* ***R v Chargot Limited (t/a Contract Services) et al [2008] UKHL 73****, Lord Hoffimann said as follows –*
>
> *"Section 47 (1) provides that nothing in Part I of the Act is to be construed as conferring a right of action in any civil proceedings for any failure to comply with any duty imposed by sections 2 to 7. A note to this section in Current Law Statutes explains that the policy of the Act was not to create any new liability for personal injury pending the report of the Pearson Commission on civil liability and compensation for civil liability, leaving the position as regards breaches of any existing statutory provisions unaffected. But the Act provides for the imposition of criminal sanctions."*

[29] These authorities were canvassed by the trial judge in his judgment. The effect of Section 15 must now be beyond doubt. Part 2 provides for criminal sanctions and Section 15 unmistakeably excluded civil liability under the Act. The respondent's arguments that these cases are only High Court decisions and that the facts of each are distinguishable, are unmeritorious. Counsel for the respondent did not provide any detail as to the way in which he concluded the facts of each case were distinguishable. This disposes of grounds 1 (b), 1(c), 1(d), 1(g).

Occupiers Liability Act 1968

[30] Ground 1 (a) states that the Court of Appeal had itself raised the possible cause of action as being under the Occupiers Liability Act when neither party had done so. This is said to be an error of law.

[31] The respondent had not pleaded in his statement of claim a breach of this Act. It was not referred to by counsel in the examinations of witnesses or in argument, nor was it ever an agreed issue for determination. It did not feature anywhere in the judgment of the High Court.

[32] The respondent submits "The Court below mentioned the Occupiers Liability Act but there is no reliance on it in the instant case by the trial judge and or by the Court of Appeal." This correctly sums up the position for this Court. Guneratne JA said he found the judge's conclusions had "nothing to do with any statutory duty and a breach of it but rather a duty of care and a breach of that duty expected from an owner of premises owed to a customer visiting such premises."

[33] These comments took the mention of the Occupiers Liability Act no further, and the issue was not relevant to the decision. This ground fails.

Grounds 1 (e) and (f)

[34] These grounds were not really grounds, but expressions of frustration by counsel at the outcome of his arguments in the Court of Appeal judgment. They alleged that the Court erred "when it failed to engage with the petitioner's appeal," and "failed to follow a proper path of reasoning and/or logical process of reasoning in arriving at its conclusions, findings, and orders." These grounds do not require an answer from this Court. It is our task to decide on grounds raising specific points.

Ground 1 (d)

[35] Ground 1 (d) alleged that the Court of Appeal misinterpreted Part 2 and Sections 9, 10, 11, 15, 48 and 48 (5) of the Act. This has largely been covered in the earlier discussions of the effect of Section 15 in excluding a civil action. For completeness it could be added that, with the exception of Section 10, other sections dealt with duties of *employers*, not the owners or custodians of premises. The duties were imposed in order to protect their workers, not visitors. Section 10 did impose duties on *"employers"* towards *"non-workers"*. But contraventions were to be met with criminal sanctions, such as where an Inspector could serve a penalty notice to persons who appear to have committed an offence under the Act [Section 48]. In particular Section 48 (5) makes reference to civil proceedings arising from the same incident:

Section 48 (5):

> *"Payment under this section is not to be regarded as an admission of liability for the purpose of, nor in any way as affecting or prejudicing, any civil claim, action or proceedings arising out of the same occurrence."*

Ground 2 – Vicarious Liability

[36] The petitioner says the respondent had failed to identify which workmen working for the petitioner had owed a duty of care to the respondent, and for which breaches of duty the petitioner as employer could be held vicariously liable. It is said the workmen should have been identified, and joined in the action, or at least to have been referred to in the pleadings.

[37] The Court of Appeal held that this was not a case of negligence where a workman, employed as a driver, by negligent driving had caused injury. The statement of defence did not state that any employee of the petitioner had anything to do with the manhole, or indeed with the carrying out of any safety measures that day. Vicarious liability seems in these circumstances to be inappropriate. The overall responsibility for visitors safety,

whilst repairs and maintenance of the escalator were to be carried out, would rest squarely on the company, the owner of the store. That responsibility lay with the management not the workmen. In this regard no one workman was being blamed for negligence. In these circumstances, the pleadings need not refer to an identified workman.

[38] The Court of Appeal was right to reject this argument. Ground 2 also fails.

Ground 3 – Insufficient Pleadings

[39] This ground in the petition overlapped with the last ground on vicarious liability. It claims broadly that the petitioner should not be held liable for negligence. I shall deal with that claim further on. The second part of the ground argues that negligence had not been pleaded with sufficiency, in that the claim was not "certain and precise."

[40] In referring to the grounds brought to the Court of Appeal Guneratne JA observed "I found that the said grounds, to say the least, were prolix," though the judge found that "on his feet counsel highlighted the essential aspects this Court was required to make a determination on." In his judgment Guneratne JA did not refer to the insufficiency of pleadings argument.

[41] The respondent's pleadings may have lacked some detail and polish, but essentially the claim was set out sufficiently to enable a proper defence to be filed. The defence knew what they had to meet. Of course clarity is always to be desired. Any failing in the pleadings in this case did not impede the conduct of a fair trial of the claim. This is not a matter for the grant of special leave, and the ground must fail.

Ground 3 (a) Petitioner not liable to respondent in Negligence

[42] In essence, this ground alleges that the case was not proved against the petitioner. In the Court of Appeal Guneratne JA concluded on this point:

> *"[27] Thus, the negligence on the part of the Appellant stood established as found by the learned Judge (as being a finding of fact). Sitting as an*

appellate Court Judge, I am not inclined to interfere with that finding in the absence of any misdirection and/or non-direction. Accordingly, I affirm the said finding on primary negligence."

[43] The case for negligence rested on three main points. First, visitors had not been kept away from the dangers of the uncovered manhole. There was a two seater chair placed in front of the escalator close to where the manhole was which was inadequate. It would have been necessary to cordon off that area completely. There was nothing to prevent visitors from approaching the manhole from the sides. Second, the manhole itself was left uncovered. Third, there was no suitable signage warning visitors away from the hazard.

[44] The trial judge referred to the respondent's evidence as "uncontradicted and convincing." The defence had pleaded that they had taken all reasonable precautions to ensure safety. But the evidence exposed that the only measure taken was the placing of the chair in front of the open manhole. In cross-examination defence counsel had concentrated on the placing of the chair. It had never been adduced in evidence that there were various signs in place warning customers of the hazard, or indeed of other measures in place. The judge said [at page 20 of the judgment]:

"d. In my view, had the defendant properly cordon(ed) off the area in the way it should be, by using the prescribed materials and signs, when such a maintenance was carried out with an open manhole in a place of this nature, this unfortunate event could very well have been avoided.

e. In my judgment, Mr. Dhimant Patel fell into the manhole in the defendant's premises and sustained injuries as a result of defendant's failure on its statutory duty of care and negligence on its part by failing to cover the open manhole, put up warning signs, and seal off the area. The usage of a chair to block only one side of the manhole, itself suggests that the defendant did not have in place necessary safety equipment to be used on the occasion of repairs and maintenance.

f. It is clear beyond doubt, from the overwhelming evidence before this Court, that the defendant was negligent towards the plaintiff, who was a customer at the defendant's premises. It failed to put in place proper and safe warning signs and equipment which could have avoided the plaintiff's fall into the manhole and the tragedy he had to face with."

[45] The respondent's witness Esther Turavita was in the store that afternoon. She said the store was empty. She said that there was no sign. She was the person who lent her phone to the respondent for him to inform his wife. In cross-examination she confirmed that she had not seen any sign. She said she had not seen any workman working.

[46] In considering the evidence of the safety measures the judge decided [at para 26 d]:

> *"d. The plaintiff's evidence is very clear that there was nothing except for the two seater chair placed only in front of the manhole. Though, the defendant in paragraph 5(ii)(b) and (c), of its statement of defence took up a position that there was a large and conspicuous "Repair in Progress" sign and Red Cones were placed, nothing transpired in evidence to substantiate it. Not even a single suggestion was made to the PW-1 on these purported precautionary arrangements."* (emphasis added)

[47] Even from the defence's sole witness Sarnit, it was elicited that there was only the chair placed in front of the pit or manhole, nothing had been placed on the sides. They had relied, he said, on one of the other staff members being at the spot full-time. He was not there, and so there was no warning at all to customers.

[48] The evidence to prove negligence and breach of the duty of care had been given. It remained uncontradicted by any other evidence. The judge found against the defendant company. There is no reason to overturn that decision. This ground fails.

Grounds 4(a) and 4(b) was the percentage of contributory negligence at 25% too low?

[49] In his submission the respondent's counsel raised the issue of the store lighting, which would here countermanded the effect of dark glasses on a person's vision. The trial judge rejected the defence allegation that the wearing of dark glasses was the main causative factor of the fall into the pit.

[50] The respondent referred to the store lighting. At the start of his evidence in chief the respondent had said: "(The Shop) it was brightly lit and in the front I could see the TVs

and the electrical goods were being sold downstairs." He give a similar answer in his re-examination.

[51] In cross-examination the respondent was asked about his wearing of dark glasses:

> *"Q:* ***And you had dark glasses on?***
> *A:* ***Yes.***
> *Q:* ***I put it to you that you saw the open pit.***
> *A:* *No, I didn't see the pit; because when you walk into a store, you always look at the side, you don't look down on the floor, so I wasn't looking down on the floor, I was looking at my…*
> *Q:* *Mr. Patel I put it to you that there were two (2) chairs blocking the open pit, and it would not have been possible for you to absent-mindedly fall into that pit.*
> *A:* *If there were 2 chairs that blocking that left side, and somewhere else, from the left side, I definitely would have run into it; so it wasn't there.*
> *Q:* *I put it to you Mr. Patel that you saw the open pit, you were curious as to what the open pit was, and with your dark glasses you misjudged it, and fell into the open pit.*
> *A:* ***That's absolute nonsense; no***.
>
> *Q:* *With your dark glasses, you misjudged.*
> *A:* *No.*
> *Q:* *And you fell into the pit.*
> *A:* *No; the store was brightly lit, and I could see. I always wear sunglasses in stores or supermarkets, so it's nothing new."*

[52] The judge wrote his analysis of what was being put [para 30 b]:

> *"b. Learned counsel did not make any suggestion that plaintiff's vision was diminished by the dark glass, instead he suggested by the 2nd question* ***that he saw the open pit*** *and being curious as to what the open pit was, and with his dark glasses he misjudged it, and fell into the open pit. The witness was prompt in answers to these questions as above and I am convinced neither he misjudged nor fell into the pit due to his alleged curiosity. The plaintiff being a matured senior citizen would not have resorted to incur a danger of this nature by his own act as suggested by the defence counsel."*

[53] At first it appeared the allegation was that the respondent had diminished vision by reason of wearing dark glasses, what Mr. Gordon had categorised as "wearing dark glasses 'for style'." But the allegation was that:

i) The respondent had in fact seen the open pit;
ii) But for reasons of curiosity as to what the open pit was;
iii) He had misjudged it, because he was wearing the dark glasses;
iv) And as a result he fell into the pit.

[54] The question put was in effect four questions in one. Unsurprisingly the respondent reacted with vigour calling the suggestion "absolute nonsense." Guneratne JA considered the respondent's answer "evasive in objective reasoning and was not acceptable."

[55] No other witnesses saw the incident as it occurred. The respondent rejected the suggestion that he had seen the pit, had been curious, and had then misjudged his movement, and for that reason had fallen into the pit. The judge accepted the respondent's rejection of these suggestions. If the dark glasses had the effect of misjudgment in the brightly lit store, why would he have seen the pit in the first place? There was no reason to reject the trial judge's finding which was entirely reasonable for him to have found.

[56] It was the petitioner's appeal that the contributory negligence percentage should be a greater figure, perhaps 70%. The Section 15 issue on which there had been conflicting views expressed by the Courts, leads to the opinion that the finding should be set aside and that the trial judge's rejection of contributory negligence should be restored. This was an egregious error and one that has resulted in injustice. There was no petition from the respondent to set aside the finding of contributory negligence. In deciding between the parties, where negligence lay, it was clear Mr. Gordon was both master of his brief and fully able to defend his client's position. Special leave should be granted on the petitioner's petition pursuant to Section 7 (3) (a) of the Supreme Court Act. This ground should be rejected, and the original finding of the trial judge restored in rejecting contributory negligence.

A Judge making a Solo Visit to the Scene

[57] At the end of the first day of the trial the following exchange between judge and counsel took place concerning a possible view:

> *"RG: Sorry to disturb your Lordship; but I was just talking to my learned friend; and I know your Lordship is going to take the task of this regarding a site visit; a scene inspection, there is substantial dispute as to what is there. I asked my learned friend whether he will be interested in having the Court visit the site; he says that he's indifferent, I suppose.*
>
> *CRT: That is going to take time whether to visit.*
>
> *RG: That's right, I think I'm testing your Lordship's patience. The other option, my Lord was that I could take photos on my i-pad tonight and show your Lordship tomorrow, and show my learned friend tomorrow; but show you first and then your Lordship can see.*
>
> *CRT: Oh let me do my shopping in Courts for something.*
>
> *RG: Very well, Sir. While you hear my witness, and then he'll tell you what was there.*
>
> *CRT: I will just walk around and see what is there and come back.*
>
> *RG: Absolutely Sir.*
>
> *EM: But the scene may be different now than that was in 2012, which even if my learned friend is agreeable then just to call one of the staff who was present in 2012 to verify the position of the escalators – whether there were two or only one or the stairs upstairs; because even if we go in now; it will be different. I just went to that shop maybe early this year; there's a stairs only – up and down; and the escalators is on the right –where they go up the steps to do your payments and shopping of furniture on the second floor. It may be different now rather than; in 2012.*
>
> *RG: My learned friend's problem has now; his own witness has said that there were two and a stairs.*
>
> *CRT: If you need to go officially on an inspection, there will be more differences, there will be more changes; so I will unofficially go.*
>
> *RG: Yes, my learned friend is saying that he's suggesting that it was different in 2012; but PW2 that they were together; two in a stairs – going up, going down; so it wasn't different in 2012.*
>
> *We'll leave it as it is?"*

[58] The classic judicial pronouncement on judges taking views on their own was that of Denning L.J. in ***Gold v Evans and Co*** [1951] 2 TLR 1189 at 1191:

> *"It is a fundamental principle of our law that a judge must act on the evidence before him and not on outside information and, that, the evidence on which he acts must be given in the presence of both parties or, at any rate, each party must be given an opportunity of being present…I think that a view is part of the evidence…But, even if a view is not evidence, the same principles apply. The judge must take his view in the presence of both parties, or, at any rate, each party must be given an opportunity of being present. The only exception is when a judge goes by himself to see some public place, such as the site of a road accident, with neither party present."*

[59] In ***Evans v Aspinal*** May 9, 1974 CA (unreported) Edmund Davies L.J. said:

> *"During the luncheon adjournment of a trial the judge inspected, in the absence of the parties, the steps in the defendants' hotel on which, it was alleged, the plaintiff had slipped. Thereafter the judge found for the defendants indicating that he had been substantially influenced by his inspection. The Court of Appeal allowed the plaintiffs' appeal and a new trial was ordered. The inspection by the judge was described as "a most unfortunate and unwitting irregularity" about which the plaintiff might feel a grievance."*

[60] The better view would seem to be that every view should be undertaken as part of the Court proceedings officially. What is seen and observed is to be seen and observed, officially and together, by the interested parties, judge, court staff, counsel and their clients.

[61] We do not know whether a view was undertaken privately or *solo* by the judge. If it did occur, it has not figured in the record of proceedings or in the judge's judgment. Nothing further need be said on this.

Keith, J

[62] I have had an opportunity to read the judgment of Gates J. For the reasons which he gives, I agree with the orders which he proposes. Gates J understandably addressed the

grounds of appeal on which Courts relied, and I add a few words of my own in view of the arguments raised orally, and because I have approached the case from a slightly different angle.

[63] *Civil liability under Part 2 of the Health and Safety at Work Act 1996*. The sections of the Health and Safety at Work Act 1996 ("the 1996 Act") which Courts were alleged to have breached were in Part 2 of the 1996 Act. I agree with the Court of Appeal that breaches of the duties imposed by these sections gave rise to criminal liability only. They did not give rise to civil liability. With respect to the judge, that was the plain and obvious effect of section 15 of the 1996 Act. I therefore entirely agree with Gates J that the judge had been wrong to follow the case of *Krishna v Standard Concrete Industries Ltd* [2008] FJHC 42 which had held otherwise.

[64] In his oral submissions, Mr. Maopa for Mr. Patel sought to get round section 15 in two ways. First, section 15(c) of the 1996 Act provides:

> *"Nothing in this Part shall be construed as–*
>
> *...*
>
> *(c) affecting the extent (if any) to which a right of action arises or civil proceedings may be taken with respect to breaches of the duties imposed by or under the associated health and safety legislation."*

Mr. Maopa contended that since section 15(a) was in Part 2 of the 1996 Act, section 15(c) prevented section 15(a) from being construed as preventing civil proceedings for breach of any of the duties imposed by Part 2. I do not agree. Section 15(c) preserved civil liability in respect of breaches of the duties imposed "by or under the associated health and safety legislation". Section 5(1) of the 1996 Act defines "associated health and safety legislation" as meaning the legislation declared by Part 10 of the 1996 Act to be associated health and safety legislation. Section 60, which is in Part 10 of the 1996 Act, lists the statutory provisions which are associated health and safety legislation for the purposes of the 1996 Act. The provisions in Part 2 of the 1996 Act are not among them.

[65] Secondly, section 48(5) of the 1996 Act provides:

> *"Payment under this Section is not to be regarded as an admission of liability for the purpose of, nor in any way as affecting or prejudicing, any civil claim, action or proceedings arising out of the same occurrence."*

The payments referred to are the sums payable pursuant to a penalty notice issued by a Health and Safety Inspector. Mr. Maopa argued that this provision assumes that civil proceedings can be brought for breach of the duties imposed by the 1996 Act, and in effect trumps section 15(a). Again, I do not agree. Civil proceedings can, of course, be brought for breach of the duties imposed by the 1996 Act, save for the duties the breach of which do not give rise to civil liability. The duties imposed by Part 2 of the 1996 Act are an example of the duties the breach of which do no not give rise to civil liability.

[66] *The Occupiers' Liability Act 1968*. The 1996 Act was intended to reform the law relating to the health and safety of workers. Since Mr. Patel did not work for Courts and was not working at the time of the accident, the 1996 Act had nothing to with this case. So if the 1996 Act was not the relevant statute in this case, what was? The answer is the Occupiers' Liability Act 1968 ("the 1968 Act"). It covers the civil liability of occupiers of premises to their lawful visitors. It therefore covers the civil liability of a department store to those who enter the store. Section 4(1) of the 1968 Act provides that the occupiers' duty of care to their visitors is "the common duty of care". That common duty of care – not to be confused with the common *law* duty of care – is described in section 4(2) of the 1968 Act as:

> *"a duty to take such care as in all the circumstances of the case is reasonable to see that the visitor will be reasonably safe in using the premises for the purposes for which he or she is invited or permitted by the occupier to be there."*

Indeed, the common law duty of care does not apply in those case such as the present one in which the common duty of care owed by the occupier of premises to its visitors applies. That is the effect of section 3(1) of the 1968 Act which provides:

> *"The provisions of sections 4 and 5 shall have effect, in place of the rules of the common law, to regulate the duty which an occupier of premises owes*

to his or her visitors in respect of dangers due to the state of the premises or to things done or omitted to be done on them."

[67] The effect of all this is that Mr. Patel's *only* cause of action was for breach of statutory duty – namely breach of the common duty of care imposed by section 4 of the 1968 Act. It follows, therefore, that not only was the judge wrong to found liability on the basis of breach of the duty imposed by the 1996 Act. He was also wrong to found liability under the common law. He should have found liability on the basis of breach of the common duty of care imposed on Courts by section 4 of the 1968 Act.

[68] Where does that leave Mr. Patel's case? A cause of action based on the common duty of care imposed on Courts by section 4 of the 1968 Act was not pleaded, nor relied on at trial. In these circumstances, has the case really got to be remitted back to the High Court for a fresh trial on whether Courts was in breach of that common duty of care, or can that drastic step be avoided? I think it can. On his way to finding breaches of duties imposed on Courts by the 1996 Act and the common law, the judge made a number of critical findings. The two most significant were:

- Although there was a two-seat bench or couch placed in front of the escalator, so that the open pit housing the escalator's mechanism was between the bench or couch and the bottom of the escalator, there was nothing at the sides of the pit to prevent visitors from walking into the pit.
- There were no signs warning visitors (a) that there was an open pit at the bottom of the escalator or (b) that there was nothing at the sides of the pit to prevent visitors from walking into the pit.

As Gates J has pointed out, neither of these findings can be assailed on appeal. They were both findings which it had been open for the judge to make on the evidence. Having considered with care sections 4 and 5 of the 1968 Act which regulate the common duty of care owed by Courts to visitors to its store like Mr.

Patel, I have no doubt whatever that the trial judge would have concluded that Courts had been in breach of the common duty of care it owed to Mr. Patel under section 4 of the 1968 Act. To remit the case back to the High Court would in these circumstances be an exercise in futility: the result would be exactly the same. The judge's judgment on liability does not need to be set aside.

[69] *Contributory negligence*. I agree with Gates J that the judge's finding that there was no contributory negligence on the part of Mr. Patel should be restored. The only problem is that no cross-petition seeking that result had been filed. And since Mr. Patel's legal team had not filed any written submissions prior to the hearing in the Supreme Court of Courts' appeal, Courts would not have known before the hearing that the restoration of the judge's order on contributory negligence was being sought.

[70] Although Mr. Gordon for Courts powerfully made that point, he did not say that he was unable to argue that there should be a finding of some contributory negligence on the part of Mr. Patel. Indeed, whether Mr. Patel had by his negligence contributed to his injuries at all was something which inevitably would have had to be considered on Courts' case that the percentage of contributory negligence should have been much higher than the 25% discount ordered by the Court of Appeal. In other words, once the extent of Mr. Patel's contributory negligence was to be addressed by the Supreme Court on Courts' petition, it was open to the Supreme Court to find (even in the absence of a cross-petition) that this was not a case for a finding of contributory negligence at all – provided, of course, that Courts were able to argue the point properly, even without prior notice that it was to be taken. Since Courts were able to argue the point properly, it was open to the Supreme Court to address the issue.

Goddard, J

[71] I agree with both judgments.

Orders of the Court are:

1. *Special leave refused, save on grounds 1 (b) and 1 (c) – Section 15, and on grounds 4 (a) and 4 (b) - contributory negligence.*
2. *The petitioner's petition is dismissed.*
3. *The High Court Judge's finding that there was no contributory negligence is restored.*
4. *The petitioner to pay the respondent's costs in this Court of $6,000.*

The Hon. Justice Anthony Gates
Judge of the Supreme Court

The Hon. Justice Brian Keith
Judge of the Supreme Court

The Hon. Justice Lowell Goddard
Judge of the Supreme Court

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