IN THE HIGH COURT OF FIJI AT LABASA
CIVIL JURISDICTION

Civil Action No. 06 of 2013

BETWEEN	:	**MAHENDRA PRAKASH**
		PLAINTIFF
AND	:	**ROAD SUPERVISOR, TAVEUNI**
		FIRST DEFENDANT
		PRINCIPAL ENGINEER, MECHANICAL NATIONAL ROADS
		SECOND DEFENDANT
		ATTORNEY GENERAL
		THIRD DEFENDANT

BEFORE	:	**Hon. Justice Kamal Kumar**
COUNSEL	:	**Mr. S. Prasad for the Plaintiff**
		Mr. J. Mainavolau for the Defendants
DATE OF HEARING	:	**9, 10, 11 February 2016**
DATE OF JUDGMENT	:	**3 June 2016**

JUDGMENT

Introduction

1. On 22 February 2013, Plaintiff caused Writ to be issued with Statement of Claim claiming for special damages, general damages (pain and suffering), interest and costs arising out of injuries sustained by the Plaintiff in an accident during the course of his employment on 9 March 2010.

2. On 23 February 2013, and 16 April 2013 Defendants filed Acknowledgement of Service and Statement of Defence respectively.

3. On 22 July 2013, Plaintiff field Reply to Statement of Defence.

4. Thereafter no action was taken by the parties for almost sixteen (16) months when Plaintiff filed Notice to Produce and on 25 November 2014 Plaintiff filed Affidavit Verifying List of Documents.

5. No action being taken since then this matter was called before the Master on 3 February 2015, when counsel for defendants stated that defendants need to make an offer to settle this matter. This matter was then adjourned to 13 March 2015.

6. When this matter was called on 13 March 2015, parties were given further time to talk settlement and this matter was adjourned to 10 April 2015, when it was again adjourned to 1 May 2015 for further directions.

7. On 1 May 2015, parties sought further time to canvas settlement and as such the Master adjourned this matter to 29 May 2015.

8. On 29 May 2015, the Acting Master directed defendants to file Affidavit Verifying List of documents within fourteen (14 days) and thereafter to convene Pre Trial Conference **("PTC")** and file Minutes of PTC within fourteen (14) days and adjourned this matter to 29 June 2015, for mention.

9. On 29 June 2015, at the request of the parties they were given further time to explore settlement and defendants were directed to file Affidavit Verifying List of Documents and this matter was adjourned to 7 July 2015.

10. On 2 July 2015, Defendant was granted further seven (7) days to file Affidavit Verifying List of documents and this matter was adjourned to 10 July 2015, when Counsel for the Defendants informed the Court that parties are still talking settlement and as such the Master adjourned the matter to 13 July 2015.

11. On 13 July 2015, counsel for the Plaintiff informed the Court that there was no prospect of settlement when Court granted Defendant fourteen (14) days to file Affidavit Verifying List of Documents and adjourned the matter to 7 August 2015.

12. On 27 July 2015, Defendant filed Affidavit Verifying List of Documents.

13. On 7 August 2015, Master directed parties to complete discovery, hold PTC and file Minutes of PTC and adjourned this matter to 26 August 2015, for further directions.

14. On 26th August 2015, Plaintiff sought leave to amend the Writ, without any formal application when Defendants Counsel informed the Court that he has no objection to Plaintiff's application. Master directed Plaintiff to file Amended Writ of Summons on the same day and adjourned this matter to 28 August 2015.

15. On 28 August 2015, Master directed Plaintiff to file Amended Writ of Summons by close of business that day and directed parties to convene PTC and file Minutes of PTC. This matter was adjourned to 7 September 2015.

16. On 28 August 2015, Plaintiff filed Amended Writ of Summons.

17. On 7 September 2015, Counsel for the Defendants informed the Court that Defendants will not file Statement of Defence to Amended Statement of Claim, when the Master directed parties to convene PTC and file Minutes of PTC and adjourned this matter to 14 September 2015, to fix hearing date.

18. On 9 September 2015, Plaintiff filed Minutes of PTC.

19. On 14 September 2015, on Defendants application this matter was adjourned to 2 October 2015, to fix hearing date and to enable Defendants Counsel to obtain medical folder from Taveuni.

20. On 2 October 2015, Plaintiff was directed to file Copy Pleading and Order 34 Summons and this matter was adjourned to 9 October 2015, and on that day Plaintiff was directed to file Copy Pleadings within seven (7) days and this matter was adjourned to 6 November 2015.

21. On 6 November 2015, Plaintiff was granted further seven (7) days to file Order 34 Summons and Copy Pleadings and this matter was adjourned to 16 November 2015.

22. On 10 November 2015 Plaintiff filed Order 34 Summons which was returnable on 16 November 2015, when this matter was adjourned to 19 November 2015, due to non-appearance of Defendants Counsel.

23. On 19 November 2015, Plaintiff's Counsel sought further adjournment for Order 34 Summons to enable her to obtain medical report from Labour Department's Office in Suva and as such this matter was adjourned to 26 November 2015.

24. On 26 November 2015, Counsel for Plaintiff informed the Court that he is still to receive medical report from Labour Department and as such this matter was adjourned to 4 December 2015, when this matter was fixed for trial on 9, 10 and 11 February 2016 at 9.30am.

25. On 1 February 2016, parties filed Agreed Bundle of Documents.

26. On 2 February 2016, Plaintiff filed Application to further Amend the Statement of Claim which Application was returnable on 9 February 2016.

27. On 9 February 2016, Counsel for the Defendants informed the Court that defendants have no objection to Plaintiff's application as such order in terms of the application was made by the Court.

28. The Trial proceeded on 9 February 2016, and concluded on 11 February 2016.

29. I note that after close of pleadings, Plaintiff failed and/or neglected to file Summons for Directions as required by High Court Rules.

30. Nevertheless, the Plaintiff filed Affidavit Verifying List of Documents without leave of the Court. The Master of the Court on 10 April 2015 directed Defendants to file Affidavit verifying List of Documents and thereafter kept on extending time for Defendants to comply with the directions until Defendants filed the Affidavit Verifying List of Documents on 27 July 2015.

31. When this matter was called before the Master on 3 February 2015, Master should have directed Plaintiff to file Summons for Directions.

32. Discovery of documents in personal injury claim is automatic (Order 25 Rule 8 of High Court Rules) and as such the legal practitioners and the Court should not waste time in filing Affidavit Verifying List of Documents and to delay the cases from being listed for trial soon after the pleadings are closed.

Background Facts

33. The Plaintiff was a Grader Operator and resides at Qila Settlement, Taveuni.

34. The First Defendant was at all material times Sub Divisional Head of the Ministry of Works & Transport, at Taveuni under whose instructions all the works (jobs) were assigned.

35. The Second Defendant was at all material times the registered proprietor of Grader Registration No. GL 647 (hereinafter referred to as **"Grader"**).

36. The Third Defendant is the legal representative of the Government of the Republic of Fiji through whom the Government of Fiji is sued.

37. At all material times the Plaintiff was the employee of the Ministry of Works and worked under the supervision and instructions of the First Defendant and his servants/and or agents.

38. On 9 March, 2010 the Plaintiff during the course of his employment was instructed by the First Defendant or his agents/ Servants to grade, ditch, form and side clean the North Coast Road at Lavena, Taveuni by the said Grader registration No. GL647.

Issues to be Determined

39. I note that the Defendants in their final submissions accepted that the Defendants owed plaintiff a duty to provide safe system of work and to ensure that that Plaintiff's health is not put in danger during the course of his employment.

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

(i) Whether Defendants breached any duty of care owed to the Plaintiff?
(ii) Whether Defendant's breach caused Plaintiff injuries which resulted in Plaintiff suffering pain, special and general damages?
(iii) Whether Plaintiff was contributory negligent?
(iv) What is the quantum of damages?

Documentary Evidence

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

(i) Photocopy of Voter Registration Card of the Plaintiff
(ii) Photocopy of the Plaintiff's Birth Certificate
(iii) Photocopy of Medical Report dated 5th August 2011, from Taveuni Hospital
(iv) Photocopies (27) of Public Works Department's Operators Daily Work and Fuel Record
(v) Photocopy of notice by employer of the accident to Ministry of Labour
(vi) Photocopy of Land Transport Authority Search for Grader No. GL 647
(vii) Photocopy of member detailed Statement from Fiji National Provident Fund in respect to the Plaintiff.

42. Plaintiff gave evidence himself and called three (3) more witnesses.

43. Plaintiff's first witness was Raoni Tikoinayau from Colonial War Memorial Hospital, Suva (PW1).

44. During examination in chief PW1 gave evidence that:

(a) She is a medical officer and attached to Ministry of Employment as an assessor.

(b) She obtained MBBS Degree from Fiji School of Medicine, obtained credentials for permanent incapacity assessment from University of Sydney, Clinical Occupational Medicine from Monash University, and Diploma in Occupational Medicine from Otago University.

(c) She knows Plaintiff and she examined him on 19 December 2013, and also examined him briefly in the morning of 9 February 2016 (date of evidence).

(d) On 9 December 2013, she prepared medical report for injuries received by the Plaintiff on 9 November 2010 (Exhibit P1 – 2nd page)

(e) She prepared the report to provide an assessment on Plaintiff's disability after seeing the x-ray film and the Plaintiff when she gave Plaintiff fourteen percent (14%) permanent incapacity.

(f) She came to this assessment by going through history to determine mechanics of injury, by confirming diagnosis by using imaging (in this case) x-ray film and physical examination of injured parts by manipulation and measurement using goniometer and applying normal findings in the American Medical Association Guide 5 Edition.

(g) She assessed ligaments to be of moderate severity equivalent to four percent (4%) in a person.

(h) As per the guide mal-alignment of seventeen percent (17%) is equivalent to 10 % of whole person impairment.

(i) Therefore the total whole person impairment can be fourteen percent (14%).

(j) When she did her assessment she was not aware about medical report dated 5 August 2011, from Tamavua Hospital because she was asked by Ministry of Employment to do the report.

(k) With response to the report from Tamavua Hospital she said she could not recall if he had fracture but when she saw him in the

morning there was significant swelling on part of Tibia mentioned in the report. She had not reviewed x-ray and so could not say as to whether swelling is because of fracture or not. It could be fracture of fragment on distal portion of the fracture at that time. She said obviously there was a swelling on malleolus.

(l) She agreed that it was indication of fracture and hurting of Tibia.

(m) She doubted if the percentage (WPI) would increase if she had seen the fracture, but stated if it was significant then the percentage would have been higher.

(n) Person with that sort of injury will suffer pain and on a scale of 1-10 with 10 being on the highest, initially the pain will be around 8 or 9 and would gradually dissipate to around 5.

(o) Agreed that Plaintiff still had pain and the morning she gave evidence she saw swelling around ankle suggest Plaintiff has arthritis (inflammation) which is a continuing process.

(p) Agrees that the Plaintiff works with a limp because of mal-alignment and that swelling it indicates arthritis has had set around the joints to and is a post traumatic arthritis.

(q) Arthritis can be controlled but not treated.

45. In doing the assessment she found two (2) significant abnormalities and they were in:

(i) Ligaments – laxity of ankle.

(ii) Fracture of distal third fibula with an alignment of seventeen percent (17%).

46. During cross examination PW1:

(i) Stated that other factors that can cause arthritis are age, wear and tear and about 50% of the patients who suffer from arthritis are Fijians.

(ii) In response to question as whether pain would continue to decrease she stated that if inflammation sets in, it may get worse and as Plaintiff gets older.

(iii) Other factors that would affect Plaintiff's pain are his injury inflammation on his left leg and since he works everyday the pain and inflammation will get worse.

(iv) Explained inflammation occurs when flesh leaves bone and new bone sets in and flesh gets back.

(v) Stated that use of crutches will not affect level of pain as it will always cause inflammation.

(vi) Stated that before preparing the report she prepared a working sheet and that fourteen percent (14%) WPI was final assessment.

(vii) Confirmed that the Plaintiff told her that he jumped off the grader.

(viii) Stated that she wrote report based on information given by the Plaintiff.

(ix) Stated that after 19 December 2013, she saw the Plaintiff in the morning of 9 February 2016, and after two (2) years he was still the same.

(x) Stated that if she examined Plaintiff now, there's a likelihood he would have improved by three percent (3%).

(xi) Agreed that fitness of person decreases with age and said that sometimes it depends on person's body structures.

(xii) Stated that she does not have qualification in Orthopaedics and Orthopaedics' deal with injuries to bone and ligaments.

(xiii) When asked if Orthopaedics are the best experts to give evidence in this type of case she stated that she did assessment as she was taught but Orthopaedics are expert in healing joint and fractures.

47. Plaintiff was the next witness (PW2).

48. During examination in chief PW2 gave evidence that:

(i) He was born on 22 March 1958.

(ii) He has been a priest for twenty five to thirty years and in the year 2010 he was working as a grader operator at Public Works Department in Taveuni.

(iii) He had been employed by Public Works Department for seven (7) years prior to the accident.

(iv) In 2010 his immediate boss was Mr. Viliame Bale the Roads Supervisor in Taveuni.

(v) His duties as grader operator included taking of gravel to worksites, working on the road and clearing sites in all of Taveuni and he was directed by his supervisor as where he has to work.

(vi) He was injured on 9 March 2010, (Date of Accident ("**DOA**")).

(vii) On DOA he was operating his grader registration NO. GL647 ("**the grader**") between Bouma and Lavena and he had a floor boy working with him.

(viii) Grader had lots of mechanical problem which included:

(a) Engine stopped always when he had to call the mechanic and mechanic would come and repair the primary pump.

(b) Leakage in primary pump - due to which engine would stop running.

(c) Hydraulic clutch and brake problem.

(ix) He informed his boss most of the time personally, by entering in the worksheet before going home and when they have sittings and meetings.

(x) His boss told him to continue operating the grader and when spare parts will arrive, mechanic from Labasa will come and repair and sometimes he was told that when the bigger boss comes he would solve the problem.

(xi) He was also told by the boss he can either work or go home.

(xii) On 9 March 2010, some work was done on the grader but not what they were supposed to do.

(xiii) He wrote that the clutch needs to be repaired and the brake needed to be adjusted.

(xiv) He was told to continue to work and that when bigger boss will come the grader will be fully repaired by mechanics from Labasa.

(xv) A day before DOA he was told that mechanics from Labasa will come and repair the grader.

(xvi) On DOA, they were clearing the site after finishing grading and when he was site clearing he had to drive slowly because there was plenty load. The floor boy was with him.

(xvii) When he was clearing the site the grader's engine stopped and at that time he was at the steering wheel and the floor boy was standing on his right on the grader.

(xviii) When the grader started rolling, him and the floor boy agreed that they have to jump and he asked the floor boy to jump first.

(xix) Floor boy jumped first and at that time grader was rolling bit slowly. The floor boy could jump far.

(xx) He could not jump with the floor boy because he was sitting at the steering wheel where there is less space and he had to move steering to get up and jump.

(xxi) Steering of grader was quite close to him when he was operating it and as such he had to push it in order to get up.

(xxii) Just because the engine stopped brake did not work and the hand brake was without the cable.

(xxiii) After he pushed the steering he got up and jumped off the grader.

(xxiv) When asked if he knew, whether the tyre came over him he stated that he could not recall.

(xxv) When he jumped he injured his left ankle and he could not stand or sit down.

(xxvi) The grader fell in the ditch.

(xxvii) The place where he was working was bit sloppy and there was slight band.

(xxviii) Three or four people picked him and put him in the bus and after that government vehicle came and took him to the hospital.

(xxix) When he reached hospital, they laid him down on a bed, bandaged and put plaster and no x-ray was conducted at that time but was conducted after two (2) days.

(xxx) Hospital staff wanted to admit him but requested them to let him go home because his mother was seriously ill and did not have long to live.

(xxxi) He was taken home by government employee who brought him back to the hospital the next day.

(xxxii) The next day he was admitted and his leg was elevated by use of three or four pillows and he was admitted for two (2) weeks, after which he was discharged and was taken home by government employee.

(xxxiii) His plaster (cement) removed when he was discharged from hospital and his leg was bandaged.

(xxxiv) When he went home he tried to get better quickly and did many things including having the injured part of the leg touched or massaged by one I-Taukei lady who had power to touch or massage to get the leg better.

(xxxv) Distance between Taveuni Hospital and his home is twelve (12) kilometres and the distance between his home and main road is three (3) kilometres.

(xxxvi) Whilst he was going through touching therapy, he would also go to the hospital on the same day he would to see that lady.

(xxxvii) He had to hire vehicle to go to hospital.

(xxxviii) Return fare to hospital was forty dollars ($40.00) per trip.

(xxxix) He went to hospital once a week but did not count number of times.

(xl) When it was put to him that he claimed one hundred dollars for his travelling expenses he stated that is was over $400.00 to $500.00 and he only claimed $100.00 because his lawyer said to do so as he could not provide any receipts for the fare paid.

(xli) One hundred fifty dollars ($150.00) claim as medical expenses is for pain killers, zandu balm and things he bought for the lady when he went for massage.

(xlii) Other miscellaneous expense of $100.00 is claimed for expenses for going to and coming back from hospital.

(xliii) He is claiming $25,460.00 for loss of earning for 9 March 2010 to 22 March 2013 (date of retirement). His gross wages was $163.24 per week.

(xliv) He is also claiming interest and loss of Fiji National Provident Fund contributions by the employer.

(xlv) He could have worked until the age of sixty (60) under contract.

(xlvi) He is claiming for pain and suffering and loss of amenities of life.

(xlvii) Before the accident he was also doing farming, planting vegetables and dalo for export.

(xlviii) He was also carrying out his duties as priest on part time basis which he does very less now because he is not able to sit with his legs folded.

(xlix) When he was asked that he want to claim for loss of future earning he stated that he only wants from government for what he has

worked for and what government gives him and does not want to claim for work he has not done.

49. During cross examination to PW2 stated:

(i) He asked his solicitors to file the claim.

(ii) He has been operating the grader for years and that for the last two (2) years the grader has been having problems and when there was breakdown the grader was repaired.

(iii) During this period he was advising his supervisor also noted it on the worksheet.

(iv) There was no seat belt on the grader and he has been driving it even though it had clutch and brake problems.

(v) He told his supervisor and he said it will be repaired.

(vi) He confirmed driving grader despite knowing that it had problems and was dangerous because he was told by his supervisor that if he refused to drive that grader then he would lose his job which he did not want.

(vii) He had to take the risk. He thought about the grader stopping and causing him injury but he had to drive to not to lose his job.

(viii) When it was put it him that on DOA he was working on a hill he stated that it was not a very big hill but just a slope and if it was a hill he would have died.

(ix) On DOA floor boy was with him.

(x) He did not measure the distance between where the engine stopped and where the grader landed but could say that it was quite far.

(xi) He could not tell how long it took the grader to stop after the engine stopped.

(xii) When it was put to him distance between the engine stopped and where the grader stopped was only fifteen (15) metres he stated that he did not measure and cannot estimate.

(xiii) Key was still in the grader as he could not say at what speed the grader went after the engine stopped.

(xiv) Grader stopped on the left side of the ditch.

(xv) He jumped out of the grader and was not thrown out.

(xvi) When he jumped the grader was in motion and was still moving when he was in mid air.

(xvii) He could not remember if any part of the grader hit him after he hit the ground.

(xviii) He agreed that his injuries were not by the vehicle but after he landed on the ground.

(xix) When he fell he was lying down and saw the grader rolling and was behind and as such he had to roll backward to save himself.

(xx) There was no passenger seat and he had to keep floor boy to cut branches of trees.

(xxi) The ditch was a deep one, which was created by waves and the grader landed on reverse side.

(xxii) The seat of the grader was damaged and the grader was badly damaged.

(xxiii) Ditch was deep but could not tell the height of the ditch as he went to hospital and have not been there since then.

(xxiv) When it was put to him that he would not have been injured if he remained seated he stated that he would have been severely injured or would have died because there were big trees.

(xxv) He has been a civil servant for twenty four (24) years.

(xxvi) He was aware that it was mandatory requirement that all PWD vehicles had to have seat belts, but the grader did not have.

(xxvii) When he complained to the supervisor he was told he could go home.

(xxviii) He did not make any written complaints to Permanent Secretary of Works or any persons above his supervisor.

(xxix) In PWD, there was policy to employ retired employees on contract for five (5) years and he could have applied but did not apply.

(xxx) He agreed that there was no guarantee that he would have been given the contract but was sure that he would have got the contract.

(xxxi) Confirmed that hospital had put plaster (cement), he was admitted for two (2) weeks, when he was discharged the plaster was removed and bandage was tied and he was told to attend review.

(xxxii) Paid transport cost to and from hospital and for medication (herbal, zandu balm, vicks) but does not have any documentary evidence.

(xxxiii) His wife does vegetable farming now and he came from Taveuni to Court by boat and then by bus on his own and no one assisted him with his work.

(xxxiv) He climbs stairs on his own by holding railings.

(xxxv) He was tired.

(xxxvi) When it was put to him that there is smile on his face he stated that he has pain in leg and asked whether he should continuously show his pain to everyone.

(xxxvii) While in hospital he continued to receive wages and after discharge he could not work.

(xxxviii) He received letter from PWD that he had lot of sick leave and as such he does not have to work for PWD.

(xxxix) He received termination letter but did not have with him in Court.

(xl) During re-examination PW2 stated that:

(i) If he would have known that it would be too dangerous then he would not have driven the grader.

(ii) If he would have known that the engine would stop he would not have driven the grader.

(iii) In his opinion he had taken the right step when he jumped.

(iv) The grader is in depot and has never worked after the accident.

50. Plaintiff's third witness was Sairusi Baleiwai of Naqara Taveuni, unemployed (PW3).

51. During examination in chief PW3 gave evidence that:

(i) In 2010 he was employed at PWD, Taveuni as Chief Clerk and he had the responsibility to complete LD Form 1 (Exhibit P2) for employees injured at work.

(ii) He re-called 9 March 2010, and on that Plaintiff, the grader operator was injured and he prepared LD Form for the Plaintiff.

(iii) Exhibit P1 was filled and signed by him and date in item 3 in front page of the form should read 9 March 2010, and not 24 March 2010.

(iv) The gross earning per week being $163.24 of Plaintiff stated at page 2 of LD Form is Plaintiff's gross earning per week and does not include overtime or other allowance.

52. During cross examination PW3:

(i) Agreed that grader No. GL 647 was not functioning properly on DOA.

(ii) Agreed that the grader was not functioning properly before DOA.

(iii) Agreed that there was risk to operate grader if it had mechanical problem.

(iv) At PWD drivers were expected to operate machines despite problems.

(v) Agreed that if drivers refused to operate problematic vehicles, they could lose their job and that drivers were to follow instructions of supervisors.

(vi) Agreed that Plaintiff was well aware of the above facts.

(vii) Agreed that it is fair to say that if a driver knowingly operates the problematic machine, he accepts the risk factor that comes with operating such machines.

(viii) Agreed that Plaintiff continued to drive the grader despite knowing that it was dangerous as such accepted the risk.

(ix) Agreed that machines with mechanical problem can breakdown at anytime.

(x) Agreed that machines with problematic clutch/brakes will have high risk of getting into an accident other than normal vehicles.

(xi) Agreed that Plaintiff was not physically forced to drive the grader but stated that Plaintiff was instructed to drive.

(xii) If Plaintiff did not want to work he would have done it without the fear of being man handled.

(xiii) Drivers were instructed to operate but not physically.

(xiv) Plaintiff was permanent worker and was not sure if Plaintiff started work with PWD after Plaintiff was discharged.

(xv) He was not present at accident site and when he filled LD Form information was given by Plaintiff.

(xvi) He does not know if Plaintiff was thrown out of the grader or he jumped off the grader.

53. In re-examination PW3 stated that:

(i) When instruction is given to worker to operate a machine he is obliged to follow the instructions.

(ii) On DOA Plaintiff's obligation was to operate the grader to do drainage work.

(iii) If Plaintiff refused to operate the grader he would be liable for disciplinary action which may lead to him losing his job.

(iv) Plaintiff or anyone driving the grader would not know that at any point the engine will stop.

(v) He did not see the place of accident and the grader was brought back to the yard.

(vi) He does not know if grader has operated since 2010 because he left employment with PWD in 2010.

54. Plaintiff's next witness was John Driver of Somosomo Taveuni, unemployed (PW4).

55. During examination in chief PW4 gave evidence that:

(i) In 2010 he was employed as mechanic at PWD, Taveuni. His responsibility was to repair machine to make them in working condition.

(ii) He had been employed at PWD for twenty four (24) years.

(iii) PWD grader registration No. GL 647 was twenty (20) years old and was operated by the Plaintiff.

(iv) The grader was in poor condition as its fuel system was leaking, brakes/clutch was not very good, it was emitting black smoke.

(v) As the mechanic he attended to the grader and had put request to Labasa Head Quarters for mechanic to come and overhaul the engine and some mechanics were supposed to come and do it.

(vi) It was necessary to overhaul the engine because of leakage of two (2) pumps, emitting of black smoke, brakes and hydraulic system.

(vii) Because of leakage in fuel pumps, sometimes it sucks air which stops the engine.

(viii) To re-start engine you have to bleed the system to re-start the engine.

(ix) This sort of problem happened in the grader once every two (2) weeks.

(x) The operator did not know the problem that leakage of pump sucks the air.

(xi) He knows where the accident happened on DOA.

(xii) He attended the accident scene and was told that engine stopped, while grader was on hill.

(xiii) When he saw the grader was in a ditch beside the drain and the ditch was pretty deep.

(xiv) He did not see Plaintiff but saw Ashok, the floor boy who told him what happened.

(xv) He examined the grader, made a report and went back to the depot to call his boss in Labasa.

(xvi) The grader was towed back to the depot and when he left employment in 2013 it was still not repaired and the reason it was not repaired was that the parts of the grader was used as a spare parts for another grader.

(xvii) Reason parts of the grader was being used as spare parts because the mechanics in the same depot listen to supervisors in Labasa and whatever they say is done.

(xviii) The grader was not in good condition but the Plaintiff was still operating it because it was his job and the grader was used to grade all roads in Taveuni and pressure was put on him by the road supervisor to grade the roads and to keep roads in Taveuni up to date.

56. During cross examination PW4:

(i) When he visited the accident site he saw the ditch which was about six (6) metres deep.

(ii) When he saw the grader in the ditch, the front part was facing upwards.

(iii) At that moment the grader was in bad condition.

(iv) Stated that the tyres, the driver's seat and the steering wheel was all intact.

(v) Body of the grader was still in order and most parts were still intact.

(vi) He could not recall which part were not intact, and when asked if he agreed that the grader was not badly damaged after the accident, he stated that he thought only problem was the engine.

(vii) Agreed that engine problem was affecting the grader before and after the accident.

(viii) He had not seen any PWD's grader fitted with seat belt and grader registration No. GL647 was not fitted with seat belt.

(ix) The grader was not working properly before the accident.

(x) Graders can be dangerous to operate and risk of operating grader can be increased if it has mechanical problems.

(xi) Agreed that in 2010 PWD machines were having problems and prone to breakdown.

(xii) Agreed that despite problems, the drivers were expected to operate them and if drivers refused to drive they could lose their job.

(xiv) Agreed that Plaintiff was well aware of this fact.

(xv) Agreed that when drivers operate problematic machine they accept the risk that comes with it and the drivers accept that machine is dangerous but they have to continue to drive because they are instructed by the supervisor.

(xvi) Agreed that if grader operator like Plaintiff drives the grader he accepts the risk and danger.

(xvii) Agreed that machines with mechanical problem can breakdown at anytime.

(xviii) Agreed that machines such as grader registration No. GL 647 has higher risk of getting into an accident other than normal vehicles and if you drive such vehicles, you putting yourself in danger.

(xix) Agreed the employees are expected to follow instructions given by the supervisor.

(xx) Agreed that grader drivers are not physically forced or coerced into driving the vehicle.

(xxi) Agreed that if Plaintiff refused to drive the grader, he would not be physically forced to drive.

(xxii) Stated that if he was grader operator and supervisor instructed him to drive it if he was a Plaintiff he would have driven the grader.

(xxiii) When asked why, he stated because of pressure from supervisor and need for operator to grade the road.

(xxiv) Agreed that the grader was not written off but parts were being utilised for other graders.

(xxv) When asked whether it was safe for Plaintiff to jump or not, he stated that if he would have stayed in the grader he would have received more serious injuries.

57. In re-examination PW4:

(i) Stated that Plaintiff would not have known that the grader will stop on the hill.

(ii) Stated that when instructions were given to drivers, they were told that if they refuse they will find someone else to drive.

(iii) In response to question what happens to the driver, he stated that he does not know because he had not refused.

(iv) The grader was not that bad that the Plaintiff had guts to refuse and say he was not going to drive the grader.

(v) Grader was still there until 2013.

(vi) Stated that he heard from the supervisor that if drivers refused to drive they could lose their job.

(vii) Stated that Plaintiff would not have taken the risk to drive GL 647.

(viii) He could have missed some parts that were broken.

(ix) His purpose of going to accident site was to start the engine but he could not start.

(x) No one is forced to work and road supervisor gives written instructions to drivers.

Whether Defendants Owed Duty of Care to the Plaintiff.

58. Even though the Defendants in their submissions have accepted that they owe a duty of care to the Plaintiff I just want to state in clear terms that employers owe duty of care to its employees to provide safe system of work and to protect its employees from foreseeable risk and dangers.

59. Then common law duty has also become a statutory duty pursuant to Section 9 of the Health and Safety at Work Act (1996).

60. The Plaintiff was an employee of PWD, a government Department as such PWD owed him a duty of care to provide safe system of work free of danger and risk to the Plaintiff.

Whether Defendants Breached Their Duty of Care.

61. Plaintiff's evidence was that he was instructed by the First Defendant to operate grader which had mechanical problems.

62. I make following finding of facts:

(i) The grader registration No. GL 647 which the Plaintiff was operating for two (2) years prior to DOA had various mechanical problems.

(ii) He had complained to his immediate boss who instructed him to continue operating the grader until such time the bosses from Suva turn up and the engine of the grader is overhauled by mechanic from Labasa (Supposedly for PWD, Labasa).

(iii) Moreover, the grader broke down it was repaired, may be just to enable Plaintiff to carry out the job.

(iv) Defendant's main contention was that because the grader had lots of mechanical problems, Plaintiff should have refused to operate the grader and to which Plaintiff's response was that he was told that if he cannot operate the grader then he would go home and someone else will operate.

(v) Plaintiff's reason was confirmed by PW3 and PW4 the Chief Clerk and Mechanic respectively employed at PWD, Taveuni at the material time.

(vi) The questions that Defendants need to answer are this:

(a) If the supervisor of PWD, Taveuni, and the senior officers of PWD Labasa knew that the grader has so many mechanical problems then on DOA why was not it in the garage going through the repairs.

(b) Why was the grader put in operation when it had so many mechanical problems?

63. After analysing the evidence of Plaintiff which I find was credible and the evidence of PW3 and PW4 which confirmed the evidence of the Plaintiff in most respect as appears from paragraphs 42 to 49 of this Judgment and as such I have no hesitations in finding that the Defendants breached their duty of care owed to Plaintiff to provide safe system of work.

Whether Plaintiff Contributed to His Injury.

64. Defence relied on the case of **Staply v. Gypsum Mines Ltd** [1953] AC 663; **Barrett v. Ministry of Defence** [1994] 1 WLR 1217; **Jebson v. Ministry of Defence** [2001] 1 WLR 2055; **Rushton v. Turner Brothers Asbesto Co. Ltd** [1959] 1 WLR 96.

65. The principle in respect to issue on contributory negligence was stated in **Gani v. Chand & Ors. [2006] Civil Appeal No. ABU0117 of 2005 (10 November 2006)** by Fiji Court of Appeal as follows:

> **"The basic principle of contributory negligence is that, when a court is awarding damages to the plaintiff for injuries caused by the defendant, it may reduce the award if the plaintiff can be shown to have contributed to the injury by some negligence on his part. However, whilst the liability of the defendant arises from a duty towards the plaintiff, the assessment of contributing negligence is not based on a similar duty on the plaintiff towards the defendant. It was explained by Lord Simons in Nance v. British Columbia Electric Railway Co. Ltd [1951 AC 601, 611:**
>
> **"The statement that, when negligence is alleged as the basis of an actionable wrong, a necessary ingredient in the conception is the existence of a duty owed by the defendant to the plaintiff to take due care, is, of course, indubitably correct. But when contributory negligence is set up as a defence, its existence does not depend on any duty owed by the injured part to the party sued, and all that is necessary to establish such a defence is to prove to the satisfaction of the injury that the injured party did not in his own interest take reasonable care of himself and contributed, by this want of care, to his own injury. For when contributory negligence is set up as a shield against the obligation to satisfy the whole of the plaintiff's claim, the principle involved is that, where a man is part author of his own injury, he cannot call on the other party to compensate him in full.**
>
> **...this, however, is not to say that in all cases a plaintiff who is guilty of contributory negligence owes to the defendant no duty to act carefully.**

66. The facts of **Stapley** case are stated in the judgement of Lord Reid at pages 484 and 485 which is as follows:

"Before the accident Stapley and Dale were working together, Stapley being the breaker. He was a steady workman with long experience, but rather slow. He had for a time been a borer but had reverted to being a breaker. A well recognized danger in the mine is a fall of part of the roof. The roof is not generally shored up as any weakness in it can be detected by tapping it. If it is "drummy", giving a hollow sound, it is unsafe and must be taken down. There are three ways of doing this – with a pick, or with a pinch bar or crow bar, or by firing a shot. Whichever way is adopted, of course, men doing the necessary work must not stand immediately below the dangerous part of the roof. One morning when Stapley and Dale arrived at their stope they tested the roof and found it to be dummy. They saw the foreman, Church, about it and he ordered them to fetch it down. They all knew that that meant that no one was to work under the roof before it had come down. Church did not say which method was to be adopted. Both men were accustomed to this work and the method was properly left to their discretion. They used picks, but after half an hour had made no impression. The work was awkwardly placed as a fault ran across the mouth of the stope, the floor and roof inside being about eighteen inches higher than outside. Probably they could not use a pinch bar, but they could easily have prepared the place for firing a shot and sent for the shot-firer. Instead, according to Dale whose evidence was accepted, they agreed that the roof was safe enough for them to resume their ordinary work, and did so. There was a quantity of gypsum lying in the stope and if the roof had been safe their first task would have been to get to the haulage way. To do that, Stapley had to enter the stope and break the gypsum into smaller pieces and Dale had to make preparation in the twitten. So they separated, and when Dale came back half an hour later he found Stapley lying dead in the stope under a large piece of the roof which had fallen on him.

There is no doubt that if these men had obeyed their orders the accident would not have happened. Both acted in breach of

orders and in breach of safety regulations and both ought to have known quite well that it was dangerous for Stapley to enter the stope."

67. The Trial Judge in **Stapley** found that accident occurred due to Dale's fault and as such held Respondent liable but reduced the award by fifty percent , The Respondent appealed to Court of Appeal and the Appellant cross appealed. The Court of Appeal allowed Respondent's appeal and dismissed the cross appeal.

68. The Appellant appealed to House of Lords which assessed contributory negligence at eighty per cent (80%).

69. Lord Reid in agreeing with the assessment of contributory negligence stated as follows:

"A court must deal broadly with the problem of apportionment, and, on considering what is just and equitable, must have regard to the blameworthiness of each party, but 'the claimants share in the responsibility for the damage' cannot, I think, be assessed without considering the relative importance of his acts in causing the damage apart from his blameworthiness. It may be that in this case Dale was not much less to blame than Stapley, but Stapley's conduct in entering the stope contributed more immediately to the accident than anything that Dale did or failed to do."

70. In **Stapley's case**, both Staply and Dale continued to work under the roof when they were ordered by their foreman to bring the roof down after they complained to him about the condition of the roof.

71. In this instance there no evidence was produced to show that the Plaintiff disobeyed any order or PWD's policies or regulations.

72. In **Jebson** case the Claimant was a soldier and he travelled in a lorry for a night out organised by their Company Commander for relaxation purpose. It was not disputed that there would be a party and good deal of drinking. The

lorry was to be driven by only the authorised driver who was on duty. Lance – Sergeant Myoh was appointed "senior passenger" and as such was:

> ***"Designated vehicle supervising officer and seated in the vehicle with the driver. He is in charge of all passengers and is to ensure that the vehicle is not overloaded ...[and]... he is to ensure that the vehicle is driven in a safe and proper manner".***

73. On return journey the claimant and other soldiers except for driver and senior passenger were drunk. One of the Lance Corporal stood on his seat and climbed on the tailgate with intention of climbing on the canvas roof.

74. Claimant tried to persuade the Lance Corporal to come down and climbed on the tailgate.

75. Claimant then had change of heart and stood with the Lance Corporal on the tail gate. Claimant fell on the road and was injured.

76. Evidence of three young women who were following in a car driven by one of them was that the claimant, the Lance Corporal and another man were showing off by waiving and shouting at occupants of the car. Driver of the car dropped back because of the fear that they may fall on the road.

77. Claimant then attempted to climb on the canvas roof and in the process lost his footing and fell on the road.

78. The trial Judge held the Defendant liable but assessed contributory negligence at 75% which was upheld on appeal. Lord Justice Porter at page 29 stated as follows:

> ***"Finally, on the basis of success under Issues 1 and 2, the claimant appeals against the judge's assessment of 75% contributory negligence upon his part. Mr. Braithwaite made short submissions in this respect. However, he failed to persuade me that the judge was other than right in regarding the claimant as largely the author of his own misfortune. On any view his actions were foolish and dangerous in the extreme.***

He had already sought to discourage Lance – Corporal Fear from pursuing a similar course. It is not known what led to a change of heart on the claimant's own part. However,, no sensible (nor indeed any) reason has been advanced for that change of heart. In my view there are no grounds to interfere with the judge's apportionment.

79. In Barrett's case, the Executrix of the Estate of Terence Barrett claimed for damages. The deceased was a naval officer and while on duty consumed liquor and became drunk and as a result he passed out on coma and became asphyxiated on his own vomit and later died.

80. The Trial Judge held the employer liable and held deceased guilty of contributory negligence and reduced damages by 25%. On Appeal the Court of Appeal held that the employer only became liable after the deceased collapsed because it assumed responsibility when deceased was no longer capable of looking after himself and that the measures taken by the employer fell short of the standard reasonably expected. The assessment on contributory negligence was increased from twenty five percent (25%) to two thirds.

81. Lord Justice Beldan of page 96 paragraph D, E stated as follows:

"The immediate cause of the deceased's death was suffocation due to inhalation of vomit. The amount of alcohol he had consumed not only caused him to vomit, it deprived him of the spontaneous ability to protect his air passages after he had vomited. His fault was therefore a continuing and direct cause of his death. Moreover, his lack of self-control in his own interest caused the appellant to have to assume responsibility for him".

82. In **Rushton's** case:

Plaintiff was employed by the defendants to operate a fibre crushing machine, which consisted of a rotating pan within which were two rotating stones connected by a central pin.

From time to time, in the course of the work, the crushed fibre tended to stick in the grooves along which slid a trap- door at the base of the machine. Through this trapdoor the crushed fibre was discharged into a chute periodically during the day. The machine could be cleaned from above by lifting the cover of the pan, and in that case the machine was stopped and the stones automatically stopped rotating; but the usual method of cleaning the grooves was from below the machine, by opening the trapdoor and putting one's hand in through the door having first stopped the rotation of the stones. The defendants knew that this was the method which their workmen normally used. There was no guard or barrier at this part of the machine, but it was the practice among the defendants' work men to stop the machine before attempting to clean the grooves. When the Plaintiff first started to operate a crushing machine, he received adequate training in regard to using and cleaning the machine and was instructed never to attempt to clean the grooves when the machine was in motion. He also received from the defendants a card with safety instructions and warning him not to touch any part of the machine when it was in motion expect those parts which formed part of his normal job and which he had been instructed to do the foreman or a teacher operative. After the Plaintiff had been employed on the machine for about six months, it was discovered one afternoon that a small piece of metal from the top edge of one of the grooves, separating the groove from the pan with the rotating stones, had broken away. It was decided that it would be safe to continue to use the machine for the remainder of that shift, and the Plaintiff continued to operate the machine, knowing its condition. Later in the afternoon, when the groove required cleaning, he put his left hand into the machine without stopping it and his fingers were crushed."

83. The Court held that the Plaintiff's action was quite deliberate despite all the training and instructions and the course of the accident was wholly attributed to him.

84. I fail to understand on what basis the defence counsel submit that Plaintiff was contributory negligent.

85. What transpired in this case is totally opposite to what happened in **Stapley** and in **Jebson, Barrett** and **Rushton** case for following reason:

(i) In **Stapley**, the employees told the foreman that the roof had some problem the foreman instructed them to "fetch" the roof down and instead of fetching the roof down the employees continued to work under the roof.

(ii) In **Jebson**, the claimant was drunk and was standing on the tailgate while the lorry was being driven. It was obvious that the claimant took the risk himself and if he would have remained at his place in the lorry then he would not be injured.

(iii) In **Barrett**, the deceased consumed liquor during the course of his employment which is not permitted at the work place such as the one the deceased was working for.

(iv) In **Rushton**, the Plaintiff was clearly told that he is to only clean the groove after the machine has stopped and had to do so with a knife that was provided to him by the employer. The Plaintiff was also given written instructions as to how to clean the groove. The Plaintiff by putting his finger in the machine to clean the groove whilst the machine was in operation disobeyed the employer's instruction.

(v) In this instance, the supervisor knowing the grader had problems instructed the Plaintiff to operate the grader and the Plaintiff has given evidence that failure to obey the supervisors instructions will mean he will lose the job which was confirmed by PW3 and PW4.

(vi) If First Defendant would have instructed the Plaintiff to not to operate the grader and despite that the Plaintiff had gone ahead and operated the grade and received injuries then it could have been said that the Plaintiff was contributory negligent.

86. The defendant's by their Counsel also contended in cross examination of PW2 and PW3 that the Plaintiff was not physically forced to operate the grader. PW2 and PW3 explained that Plaintiff was not physically forced to

operate the grader but had no choice but to operate the grader as instructed by his supervisor.

87. I am quite surprised that the defence Counsel used this to support Defendant's claim on contributory negligence. It is quite absurd to even imagine that an employer would physically force an employee to carry out his work if the employee refuses to do so.

88. Defendant's also submitted that the Plaintiff should have remained seated in the grader instead of jumping off.

89. How could Defendant's make such a submission is beyond imagination on the face of PW4's evidence that during cross examination by Defendant's Counsel that if Plaintiff remained seated in the grader and did not jump he would have been seriously injured.

90. In any event, what Plaintiff did was in the spur of the moment coming to reason that it was the only way to save himself from severe injury or death and I find that Plaintiff at that moment made a very rational decision to jump off the grader rather than keep on sitting in it when the grader engine was off and it could not be controlled in any respect.

91. I therefore, have no alternative but to hold that the Plaintiff is not to blame for the accident in any respect and the whole blame should rest upon his supervisor and his employer.

Special Damages

Travelling Expenses

92. Plaintiff gave evidence that after being discharged he had to travel to hospital once a week and the distance from his place to hospital is twelve (12) kilometres and his travelling expenses was more than $400.00 to $500.00.

93. Plaintiff's evidence was that he:

(i) Only claimed $100.00 because his lawyer advised him to do as he did not have any documentary evidence to prove his travelling expenses.

(ii) In cases like this it is apparent that the person who incurs such expenses in a personal injury claim does not keep such documents because they do not appreciate its importance to any claim they may bring for the injuries sustained by them.

(iii) The court should not reject the claim only because the Plaintiff could not produce the documentary evidence for such expenses but must also consider the oral evidence of the Plaintiff as to whether it is credible or not and if the Court finds such evidence is credible that the Court should not hesitate to award damages for claim such as travelling expenses, expenses for medication and expenses for obtaining report.

(v) I accept that the Plaintiff's travelling expenses to and from Taveuni Hospital exceeded $400.00. However, since the Plaintiff only claimed $100.00 and in his statement of claim I will allow him $100.00 for travelling expenses.

Medication

94. Plaintiff gave evidence that after being discharged from hospital he bought pain killers such as panadol, zandu balm to overcome pain but do not have any documentary evidence.

95. In view of what I said of paragraph 91 of this Judgment, I will allow $150.00 for medication.

Other Miscellaneous

96. Plaintiff gave evidence that the miscellaneous expenses is his travelling expenses. Since, Plaintiff has claimed for travelling expenses, I do not think it is appropriate to award miscellaneous damages as no such damage should be claimed by the Plaintiff.

97. Legal practitioner should clearly take note that special damages can only be claimed for what the party has incurred and/or lost (wages) and not something which they can "pluck" from the air.

Police and Medical Reports

98. Plaintiff in the Statement of Claim claims $80.00 for police and medical reports.

99. There was no evidence produced in Court:

(i) That the police carried out any investigation in the matter;
(ii) That the Plaintiff obtained Police Report.
(iii) That the Plaintiff paid anything for medical report.

As such it cannot be allowed.

Loss of Earning and Fiji National Provident Fund

100. It was undisputed evidence of PW3 that Plaintiff's weekly gross wages was $163.24 and he was paid wages while he was admitted at the hospital.

101. Plaintiff retired on 22 March 2013, at the age of fifty five (55).

102. Hence, Plaintiff is entitled to a sum of $27,502.67 for loss of wages and FNPF contributions for the period 9 March 2010 to 22 March 2013, less two weeks when he was admitted and was paid which equates to one hundred fifty six weeks. The said sum is made up as follows:

$163.24 ×156 weeks	=	$ 25,465.44
8% of $25,465.44 (FNPF)		$2,037.23
		$27,502.67

103. Hence, the total claim allowed for special damage is $27,752.67 which is made up as follows:

Travelling expenses:	$ 100.00
Medication expenses:	$ 150.00
Loss of wages and FNPF	$ 27,502.67
	$27,752.67

General Damages

104. Plaintiff claim damage for pain and suffering, loss of amenities of life, loss of future earning and loss of consortium.

105. No evidence have been produced as to which association the Plaintiff belonged to prior to the accident and that he has not been able to continue with any association. As such the Plaintiff's claim for loss of consortium is dismissed.

Pain and Suffering

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

(i) **Amin v. Chand** [2012] FJHC 1015; Action No. 39 of 2008 (13 April 2012).

(ii) **Chand & Anor. v. Amin**; Civil Appeal No. ABU 0031 of 2012 (2 October 2015.

(iii) **Asish Mudaliar v. Rajesh Rama & Anor**; Labasa High Court Civil Action No. 3 of 2012 (4 April 2014).

(iv) **Eta Naqelita v. Ram Kumar**; Labasa High Court Civil Action No. 19 of 2010.

(v) **Nasese Bus Company Limited & Anor v. Muni Chand**, Civil Appeal No. 40 of 2011(8 February 2013).

(vi) **Dre v. Ministry of Health and Anor**. [2009] Civil Action No. 20 of 2007 (24 June 2009)

107. The Fiji Court of Appeal in **Chand's** case cited at paragraph 23(ii) stated as to how damage is to be assessed for pain and suffering in very simple terms as follows:-

*"The assessment of damages under this head depends upon the consequences to the individual plaintiff (**Bresatz v Przibilla** (1962) 108 CLR 541 at 548 cited in Law of Torts by **Balkin & Davis** 5th ed. at 11.28). In **Hail v Rankin** [2001] QB 272 the English Court of Appeal had acknowledged monetary inflation to be considered while making the awards. However the amounts decided on in previous cases can be considered no more than as a guide, and any particular determination must depend on such factors as the*

intensity of the pain felt by the plaintiff and its likely duration (Balkin & Davis (supra) at 11.28).”

108. In **Chand’s** case the Respondent/Plaintiff suffered from disc injury as a result of lifting heavy objects during his employment. The Learned Trial Judge found that the Respondent/Plaintiff has suffered from pain and could not play soccer which was his interest and had problems with his sex life because of back pain. Respondent/Plaintiff was also using crutches and in terms of Medical Officer’s evidence Respondent’s/Plaintiff’s situation would not get better.

109. The Learned Trial Judge awarded $85,000.00 for past and future pain and suffering and loss of amenities of life, which was upheld on appeal.

110. In **Asish Mudaliar’s** case Plaintiff suffered injuries as a result of being crushed between two buses.

The Plaintiff suffered from midshaft femur fracture (thigh bone) on 16 August 2011 when a rod was inserted. The rod was removed on 29 November 2012.

The Court found that Plaintiff suffered pain and suffering, lost amenities of life and injury suffered by Plaintiff was severe. Plaintiff at date of trial (4/4/2014) was 36 years old.

The Court awarded $60,000.00 for pain and suffering and loss of amenities of life.

111. In **Naqeletia’s** case Plaintiff suffered following injuries:-

“1. Laceration upper lip and chin

2. Loose upper incision on the right side

3. Open fracture right radius and ulna, laceration over right forearm (measuring 15cm x 7mm x muscle deep and 10cm x 5xm muscle deep)

4. Close fracture left radius.

The blood investigation were normal limits. The X-ray findings were as follows:-

1. *X-ray Skull - AP - Normal*
2. *X-ray right forearm - fracture radius and ulna*
3. *X-ray left forearm - fracture left radius*
4. *X-ray cervical spine - normal.*

She was treated with antibiotics, analgesics, wound wash and back slab.

She was discharged on 12/9/09 with arrangements made for review in the surgical clinic"

The permanent disability was said to be nineteen per cent (19%). Court awarded Plaintiff $70,000.00 for pain and suffering and loss of amenities of life.

112. In **Nasese Bus Company Ltd's** case Respondent/Plaintiff suffered:-

(i) closed displaced comminuted intra-articular fracture of left ankle;
(ii) closed extensive degloving injury right thigh;
(iii) grade II anterious cruciate ligament injury right knee; and
(iv) multiple abrasions to both upper and lower limbs.

Respondent/Plaintiff was awarded $65,000.00 by the Honourable Trial Judge for pain and suffering which award was increased to $90,000.00 on appeal.

113. In **Tamanibuici v. Prasad & Anor.** Labasa High Court Civil Action No. HBC 34 of 2012 (29 September 2015) the Plaintiff suffered following injuries:-

"(i) Fracture of right femur;
(ii) Fracture of left forearm and ulna of left arm;
(iii) Fracture of right clavicle"

Plaintiff at time of accident was fourteen (14) years old. He had gone through surgery whereby rod was inserted in his right thigh and his leg was put on cast. Plaintiff was admitted on 5 June 2009.

The medical officer's evidence was that Plaintiff's skin and muscle was cut to release tension and ease flow of blood. After this swelling of Plaintiff's right leg increased that he had to go through open reduction surgery because the fracture of right femur was bad and had to be straightened. After this surgery Plaintiff's leg was put on plaster.

Plaintiff was discharged on 5 August 2009, but was re-admitted on 21 September 2009, because fracture had not united. On 29 September 2009, Plaintiff went through another open reduction and internal fixation surgery and was discharged on 1st October 2009.

In total Plaintiff was admitted for seventy one (71) days.

This Court awarded Plaintiff $70,000.00 for past pain and suffering and $10,000.00 for future pain and suffering.

114. In **Attorney General of Fiji v. Broadbridge** [2005] Civil Appeal No. CBV005 of 2003s (8 April 2005) the injuries suffered by the Plaintiff and treatment he received in brief are as follows:

(i) He suffered a fracture forearm and fracture hip joint.
(ii) At Colonial War Memorial Hospital (CWM) a plaster cast was fitted to his hip.
(iii) Court noted that his condition has not properly diagnosed by CWM as it was not discovered at that stage that his hip was dislocated with significant damage to the surrounding area.
(iv) Plaintiff had to undergo surgery in New Zealand.
(v) Plaintiff continued to suffer from chronic pain in the hip and knee joint.

115. The Trial Judge awarded Plaintiff $75,000.00 for pain and suffering which on appeal was reduced to $60,000.00 by Fiji Court of Appeal. The appellant did not challenge the Fiji Court of Appeal decision in this respect.

116. In **Dre's** case the Plaintiff went to Nabouwalu Hospital for treatment of pain in her right ear. The doctor who attended to Plaintiff inserted the needle

below the thumb of the right hand. After a short while Plaintiff was in extreme pain and started crying and subsequently it was discovered that the injection was wrongly inserted with into the artery which resulted in lack of blood and oxygen flow to that part of the body. There was no option but to amputate Plaintiff's right hand. The Court awarded $75,000.00 for pain and suffering and loss of amenities of life.

117. Defendant's counsel may not have realized that we are in the sixteenth year of the twenty first century as he relied on cases instituted and decided in the twentieth (20th) century.

118. It will not do justice if the Courts had to award the same amount of damages for similar injuries that were awarded about sixteen to twenty years ago.

119. Defendants would certainly appreciate that the purchasing power of the dollar has gone down considerably.

120. For the same reason this Court has also disregarded the case of **Singh v. Rentokil Laboratories Ltd**. Civil Appeal No. 73 of 1993.

121. This Court has not considered the case of **Salaitoga v. Anderson**, **Reddy v. A. K. Naicker and Sons Ltd., Nagiri v. Tuikabalau** and **Narayan v. Ministry of Health & Anr** referred to in Plaintiff's submissions as these cases are not reported and Plaintiff's counsel has failed to provide copies of the said cases.

122. In this instance, Plaintiff after jumping from the grader suffered from fracture of distal part of the Tibia and Fibula. Plaintiff's left ankle was put on plaster (cement) and he was admitted for two weeks.

123. PW1 gave evidence that on a scale of one (1) to ten (10) with ten being the highest level of Plaintiff's pain initially would have been at level eight (8) or nine (9) and later would have reduced to five (5).

124. Plaintiff has developed arthritis that the injury suffered by Plaintiff is a contributory factor.

125. PW1 gave evidence it is likely Plaintiff's pain will increase as he grows older.

126. After analysing the evidence produced in Court I assess the amount for pain suffering as follows:

(i)	Past pain suffering -	$ 40,000.00
(ii)	Future pain and suffering	$ 5,000.00
		$45,000.00

Future Income

127. Plaintiff claims that he was also doing farming prior to accident which is now being carried on by his wife.

128. No evidence in the form of bank statements or financial accounts was produced in Court to show how much income Plaintiff generated. As rightly pointed out by the Defendant's Counsel during Plaintiff's examination in chief that Plaintiff has not pleaded for loss of income from farming.

129. Plaintiff also stated that he would have obtained contract for another five (5) years after he retired at the age of fifty five (55).

130. However, during cross examination he admitted that there was no guarantee that he will be given the contract.

131. I cannot assess loss of future income on the basis of mere assumption that Plaintiff would have been employed under the contract.

132. Furthermore, Plaintiff in his evidence stated that according to his religious belief he does not want any monies form Government other than what he worked he was entitled to until he worked.

Loss of Amenities of Life

133. Plaintiff stated he was priest and because of the injuries received by him he is not able to sit or stand to perform religious functions as he used to do prior to accident.

134. I think it just and fair that he be compensated for loss of amenities of life.

135. I award a sum of $3,000.00 for loss of amenities of life.

Interest

136. I think it is just and fair that both on special and general damages be assessed at six percent (6%) per annum.

Cost

137. I have taken into consideration that the trial lasted for three (3) days all witness were called by the Plaintiff, and all parties have filed submissions.

Conclusion

138. This Court holds that:
   (i) Defendants owed a duty of care to the Plaintiff.
   (ii) The Defendants breached their duty of care owed to the Plaintiff.
   (iii) Plaintiff was not negligent or contributed to his injury.

139. Defendants are to pay the Plaintiff a sum of $94,299.36 in special and general damages including interest up to the date of Judgement which said sum is made up as follows:

Special Damages [paragraph 92]	$ 27,527.67
Interest at 6% per annum from 9/3/10 *(date of Accident)* to 3/6/16 *(date of Judgment) (2277 days)*	$ 10,303.64
	$37,831.31

General Damages

Pain and Suffering	$40,000.00

Loss of Amenities of Life	$ 3,000.00	
	$ 43,000.00	
Interest at 6% per annum from 22/2/13 *(date of Writ of Summons)* to 3/6/16 *(date of Judgment)* (*1198 days)*	$8,468.05	
		$51,468.05
Future pain and Suffering		**$ 5,000.00**
Total		**$94,299.36**

Orders

140. I make following Orders:

(i) Defendants do pay Plaintiff the sum of $94,299.36 including interest,

(ii) Defendants, do pay Plaintiff cost of this action assessed in the sum of $7,000.00.

HIGH COURT OF FIJI
SUVA

K. Kumar
JUDGE

At Suva
3 June 2016

Sarju Prasad, Esquire
Office of the Attorney General of Fiji