IN THE HIGH COURT OF FIJI AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 255 of 2006

BETWEEN	:	**KAUFUTI WAITA TAGICAKIBAU**
		PLAINTIFF
AND	:	**THE CHIEF EXECUTIVE OFFICER, PUBLIC WORKS DEPARTMENT**
		FIRST DEFENDANT
AND	:	**NASINU TOWN COUNCIL**
		SECOND DEFENDANT
AND	:	**ATTORNEY-GENERAL OF FIJI**
		THIRD DEFENDANT
BEFORE	:	**Hon. Justice Kamal Kumar**
COUNSEL	:	**Mr D. Prasad and Ms A. Buksh for the Plaintiff**
	:	**Mr R. Green for the First and Third Defendants**
	:	**Mr S. Tinivata for the Second Defendant**
DATE OF JUDGMENT	:	**31 August 2016**

JUDGMENT

Introduction

1. On 20 June 2006, Plaintiff caused Writ of Summons 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 on or about 3 September 2004, when Plaintiff fell into a trench while walking along Navosai Road.

2. On 7 July 2006, First and Third Defendants filed Acknowledgement of Service.

3. On 7 July 2006, Plaintiff caused Default Judgment to be entered against the Second Defendant for failure to file Notice of Intention to Defend which was served on the Second Defendant on 14 August 2006.

4. On 23 November 2006, Second Plaintiff filed Application to set-aside the default judgment (**"Setting Aside Application"**).

5. On 6 December 2006, First and Third Defendants filed Statement of Defence.

6. Setting Aside Application was first called on 6 February 2007, when Default Judgment was set aside by consent and Second Defendant was directed to file Statement of Defence by 20 February 2007.

7. On 20 February 2007, Second Defendant filed Statement of Defence.

8. On 27 February 2007, Plaintiff filed Reply to Statement of Defence of Second Defendant.

9. On 11 June 2007, Plaintiff filed Summons for Directions which was returnable on 12 July 2007.

10. On 12 July 2007, the then Master directed parties to file Affidavit Verifying List of Documents, exchange documents, convene Pre-Trial Conference (**"PTC"**), file Minutes of PTC and adjourned this matter to 13 August 2007.

11. On 13 August 2007, Plaintiff filed Affidavit Verifying Plaintiff's List of Documents.

12. On 13 August 2007, Court granted further time for Second Defendant to file Affidavit Verifying List of Documents and this matter was adjourned to 1 October 2007, when Counsel for the Defendants informed the Court that parties are still talking settlement.

13. On 24 August 2007, Second Defendant filed Affidavit Verifying List of Documents.

14. On 10 October 2007, Master directed parties to hold PTC and filed Minutes of PTC by 29 October 2007, and adjourned this matter to 2 November 2007.

15. On 15 October 2007, Plaintiff filed Schedule of Special Damages.

16. On 2 November 2007, parties were directed to convene PTC and file Minutes of PTC by 26 November 2007. This matter was adjourned to 11 February 2008.

17. On 27 November 2007, Second Defendant filed Application to strike out the action against the Second Defendant pursuant to Order 18 Rule 18(1) of High Court Rule 1988 (**"Striking Out Application"**).

18. On 11 February 2008, the then Master directed parties to file Affidavits and adjourned the Striking Out Application to 19 March 2008 for hearing.

19. On 3 March 2008, Plaintiff filed Affidavit in Opposition to Striking Out Application and on 4 March 2008, Second Defendant filed Affidavit in Reply.

20. On 19 March 2008, the then Master adjourned the Striking Out Application for continuation of hearing to 1 May 2008 on the ground that Counsels were not fully prepared for the hearing.

21. After the Striking Out Application was adjourned for fifth time, the Second Defendant on 23 July 2008, withdrew the Application by consent.

22. On 3 October 2008, Plaintiff filed Order 34 Summons which was returnable on 2 February 2009, when this matter was adjourned to 24 March 2009, due to non-appearance of Defendants Counsel.

23. On 3 December 2008, parties filed Agreed Bundle of Documents.

24. On 24 March 2009, this action was entered for trial and adjourned to 21 April 2009.

25. This action was next called on 22 June 2009, before his Lordship Justice Inoke (as he then was) when it was adjourned to 17 September 2009, for trial.

26. This action was not called on 17 September 2009, for some reason or the other.

27. This action was next called on 10 August 2010, before her Ladyship Justice Wati when it was listed before his Lordship Justice Calanchini to fix trial dates.

28. On 19 August 2010, this action was called before his Lordship Justice Calanchini when it was adjourned to 24 September 2010, for mention and thereafter to 26 November 2010.

29. This action was next called on 10 December 2010 and due to judicial conference and was adjourned sine die.

30. This action was next called on 13 June 2012, (after a lapse of almost one and half years) before his Lordship Justice Balapatapendi (as he then was) when it was adjourned to 14 and 15 November 2012, for trial.

31. On 9 November 2012, Plaintiff's Solicitors wrote to Court that parties are talking settlement, and that they seek adjournment of the trial and as such on 14 November 2012, the trial date was vacated and this action was adjourned to 30 January 2013, for mention.

32. On 30 January 2013, this matter was again adjourned to 22 February 2013, for mention.

33. On 20 February 2013, the Legal Officer for Second Defendant filed Notice of Appointment to act for Second Defendant.

34. On 22 February 2013, this matter was called before his Lordship Justice Balapatapendi (as he then was) when his Lordship listed it for trial on 30 September and 1 October 2013.

35. This matter was then referred to this Court and trial proceeded on 30 September and 1 October 2013.

36. At completion of trial, parties were directed to file Submissions and this action was adjourned for judgment on notice.

Issues to be Determined

37. The issues that needs to be determined are as follows:-

(i) Whether Defendants owed duty of care to Plaintiff?

(ii) Whether Defendants breached any duty of care owed to the Plaintiff?

(iii) Whether Defendants breach caused Plaintiff injuries which resulted in Plaintiff suffering from pain?

(iv) Whether Plaintiff was contributory negligent?

(v) What is the quantum of damages?

Documentary Evidence

38. By consent, following documents were tendered as Exhibits 1 to 9 by the parties:-

(i) Undated Letter from Fiji Roads Authority;

(ii) Medical Report from CWM Hospital dated 13 September 2004;

(iii) Medical Report from CWM Hospital dated 28 February 2005;

(iv) Medical Report from CWM Hospital dated 4 August 2006;

(v) Medical Report from CWM Hospital dated 17 September 2009;

(vi) Medical Report from CWM Hospital dated 5 November 2012;

(vii) Photographs showing Plaintiff's injuries;

(viii) Photographs of the accident scene;

(ix) Medical Report dated 18 January 2013 by Dr. Vaigalo McCaig.

Plaintiffs Case

39. Plaintiff gave evidence herself and called three (3) more witnesses.

40. Plaintiff's first witness was Dr. Alvin De Asa, Orthopedic Surgeon (**"PW1"**).

41. During examination in chief PW1 gave evidence that:-

(i) He specializes in orthopedic surgery and practices from Colonial War Memorial Hospital (**"CWMH"**) and Nasese Medical Centre;

(ii) He graduated as Doctor of Medicine from Manila, Philippines; obtained Orthopedic Residency Training in Manila for four (4) years; obtained Post Graduate Diploma in Sports Medicine from University of New South Wales; have Fellowship in knee injury at Mater Hospital, Sydney, New South Wales;

(iii) In reference to report prepared by him (Exhibit 6) he stated that:-

(a) Plaintiff suffered injury on her right leg and injured her right digital tibia and tibula (shin bone) on right leg;

(b) Upon examination he noted deformation on her right leg which was slightly angulated but the range or motion of right leg was normal and no muscle wasting was noted;

(c) He assessed whole person impairment (**"WPI"**) at 6% by reference to American Medical Association Guidelines 6th edition which is widely accepted guide in Fiji and is used in CWMH and by private practitioners;

(d) There is error in last line of Exhibit 6 as "UEI" should read **"LEI"** (Lower Extremity Impairment).

(iv) For injury suffered by Plaintiff, a long cast would be appropriate which was applied to Plaintiff's right leg;

(v) Once cast applied, patient would be mobilized to non-weight being on affected leg and should be followed up regularly at fracture clinic;

(vi) When cast is applied patient will be able to walk with crutches;

(vii) Minimum period for removal of cast is six (6) months whilst maximum period is eight (8) months;

(viii) With type of injury suffered by Plaintiff, patient will have difficulty climbing bus steps or ladders as fracture is angulated;

(ix) Injury will not be affected by age but by weight gain;

(x) With six percent (6%) WPI, Plaintiff would have difficulty walking or standing for long period.

42. During Cross examination by Counsel for First and Third Defendants PW1:-

(i) Stated that he did not take Plaintiff's weight and agreed that it would be crucial in a long term;

(ii) Stated that he did not have the table with him;

(iii) Stated that fourteen percent (14%) assessment was his assessment and table was used as a guide;

(iv) Stated that there is no mathematical deduction for assessment of LEI at fourteen percent and it was hard to explain and table was not in Court and what the guide does is that it outlines injury or types of injury a person has suffered;

(v) When it was put to him, that his report does not show factors he has taken into account in his assessment, he stated that his assessment was based on physical examination; clinical history and radiographic findings and they base their judgment on severity of injury and its symptoms (mild, moderate or severe) by using these three factors;

(vi) Stated that AMA Guide is only a guide to make their assessment;

(vii) Stated that any other doctor should come to conclusion of six percent (6%) WPI;

(viii) Stated that he did not have x-ray films with him when he was giving evidence;

(ix) Last x-ray on Plaintiff was done in November 2012;

(x) Stated that it was not necessary to have x-ray done everytime a patient is examined;

(xi) Stated that he works as Acting Consultant - Surgical Department at CWMH and after hours as locum at Nasese Medical Centre;

(xii) Agreed that if a doctor uses same procedure as his, he would come to same conclusion on WPI;

(xiii) Stated that there is big difference in assessment between old edition of AMA Guide which is used by CWMH and new edition;

(xiv) In reference to Exhibit 9 he agreed that there can be difference in assessment based on same guide;

(xv) Stated that he assessed Plaintiff's pain by what was told by Plaintiff, her history and presentation;

(xvi) Stated that he did not use any other literature to support his finding and only used AMA Guide;

(xvii) Disagreed that correct assessment on WPI is three percent (3%) as stated by Dr. McCaig and stated that it should be six percent (6%);

43. In re-examination PW1 stated that CWMH used fifth edition of AMA whereas he used the latest edition.

44. Second Defendant's Counsel did not cross-examine PW1.

45. Plaintiff's second witness was Josefa Tukuna of Lot 32, Volavola Road, Navosai, Security Officer at University of the South Pacific (**"PW2"**).

46. PW2 during his evidence in chief gave evidence that:-

(i) He has been residing at Navosai for eighteen (18) years;

(ii) He knows Plaintiff who is related to his wife as Plaintiff's husband and his wife's father are brothers;

(iii) He could recall date of accident (**"DOA"**) when he was still a security officer;

(iv) On DOA there was a ceremony at his cousin's place at Tiko Place along Navosai Road;

(v) On DOA he was on his way to Volavola Road from Tiko Place in the company of his daughter;

(vi) On DOA at 9.30pm he saw Plaintiff fall down in front of him, and at that time he was walking along Navosai Road;

(vii) Plaintiff fell in a trench and was holding her son and crying and then he tried to remove her from the side of the road and put her on the grass;

(viii) There were no lights and no signs;

(ix) He went back to his cousin's house and told Plaintiff's husband that Plaintiff fell and is not able to stand;

(x) They then brought a van, lifted Plaintiff, put her in the van and took her to Tiko Place;

(xi) After that he went home;

(xii) Plaintiff fell in a trench whose depth was up to his elbow and was not covered;

(xiii) There were no signs or warning about the trench;

(xiv) Confirmed that the road showed in Exhibit 8 is Navosai Road and the trench was the same one in which Plaintiff fell;

(xv) He travelled on that road many times and the trench was not fixed at anytime before the accident;

(xvi) The trench was fixed after the accident but could not recall when was it fixed.

47. During cross-examination by Counsel for First and Third Defendants PW2:-

(i) Stated that he did not know how many people stayed at Navosai;

(ii) When it was put to him that there are more than 1000 people or 500 or 200 residing he stated that he could not say;

(iii) He used Navosai Road but could not say about Plaintiff's husband.

(iv) When asked if he measured the depth of the trench he stated that he could not say, but when Court warned him to answer questions properly he stated he measured it with his hand and not a tape. Disagreed that Plaintiff fell in the middle of the road and said that she fell on the side of the road.

(vi) Stated that he carried her from the side of the road to the grass.

(v) Stated that some people came and fixed the trench after the accident, but did not know which department.

48. During cross - examination by Second Defendant's Counsel; PW2:-

(i) Agreed that name of road is Navosai Road, not Navosai Street.

(ii) Stated that Road was tar sealed and the trench was in the middle of the road between his place and where the ceremony was held.

(iii) Stated that for him to go where the ceremony was held he had to cross the trench.

(iv) He left for the ceremony at 6:00pm which was after sunset.

(v) Stated that he saw the trench on his way to the ceremony.

(vi) When asked if could recall where trench was dug before DOA, he said he could not answer.

(vii) When asked if he had kava at the ceremony he said "no" as it was a church service.

49. Plaintiff's third witness was Akariva Tagicakibau of Lovoni Settlement, Tamavua, Retired (**"PW3"**).

50. During examination in chief PW3 gave evidence that:

(i) Plaintiff is his wife and they have been married for twenty (20) years.

(ii) In 2006, he lived at Lovoni settlement in Tamavua.

(iii) He could not recall DOA but knows it was in September, 2004.

(iv) His wife was involved in an accident when she stepped in the ditch dug by water supply department.

(v) The ditch was located along Navosai Road between Nukunuku settlement Road and Ramatau Junction.

(vi) Navosai Road is located in Nasinu area.

(vii) He could recall date accident took place but stated that it was at about 9:30pm.

(viii) At that time he was at a church service at Tiko Place when he was informed by Mr. Joe Tukana about the accident who asked him to go and see his wife.

(ix) His wife had the accident when she fell in the ditch with his one year and five months old son.

(x) When he came to the site he saw his wife, Plaintiff sitting in pain with his son on the left side of Navosai Road.

(xi) He thought injury was not so severe and took her to Tiko Place in a van.

(xii) He put Plaintiff in the van with the help of Joe Tukana.

(xiii) When shown Exhibit 8 he recognised that the road shown was Navosai Road and the place shown on the photographs was where accident happened.

(xiv) After he took her to Tiko Place they realized that Plaintiff had a broken leg.

(xv) He then took Plaintiff to CWMH in a taxi.

(xvi) When he arrived at the scene of the accident, there was no sign or light for the trench.

(xvii) When he arrived at the CWMH he was told by the doctor to take Plaintiff for x-ray.

(xviii) After the x-ray he was told by the doctor that the Plaintiff had a broken bone and she was treated by putting plaster.

(xix) After that he took Plaintiff home by taxi, and he was assisted by the hospital staff to put Plaintiff in the taxi even though he did not ask for their assistance.

(xx) When he reached home he was assisted by family members to take Plaintiff out of the taxi and take her inside the house.

(xxi) Plaster was removed after five months.

(xxii) During the five (5) months Plaintiff required support to go to bathroom and kitchen.

(xxiii) He looked after the Plaintiff for five (5) month after the accident.

(xxiv) He has three children aged 21 years (son), fifteen (15) years (daughter) and twelve (12) years (son).

(xxv) After the accident, Plaintiff had difficulty cleaning the house, changing bed, lifting bed, side board, gardening, lifting buckets and pots, washing in sink and is not able to stand for long.

(xxvi) Plaintiff cannot walk for long.

51. During cross examination by Counsel for First and Third Defendants, PW3:-

(i) Stated that he had lunch with Plaintiff at corner of i-Taukei Land Trust Board.

(ii) Stated that Plaintiff's plaster was removed in the hospital and he could not recall the exact date it was removed.

(iii) He stated that the exact date of the accident was 3 September.

(iv) He stated that he is reside at Lovoni Settlement and not Navosai.

(v) In reference to Exhibit 8, stated that the road was dug by Water Supply Department.

(vi) That he did not see Water Supply Department dig the road but can say so because he is a fitter (plumber) and he knows the main connection was on the left hand side of the road and water supply was connected to new house built on the right hand side of the road.

(vii) Stated that from the hospital he took Plaintiff to Tiko Place at Navosai.

(viii) State that it is the practice of Water Supply Department to put soil back after completing the work and he did not know when the trench was dug or who supervised the work.

(ix) Stated that plaintiff can cook breakfast, clean the house, sweep but cannot do heavy things.

(x) When asked how old was his wife when she had the accident, he stated that he forgot.

(xi) Stated that he does not know his wife's weight before or after the accident.

(xii) Disagreed with the suggestion that the reason why his wife was not doing what she did before the accident and reason she cannot walk or stand for long is that she has caught up with weight.

52. In cross examination by Second Defendant's Counsel, PW3 stated that he did not know how old his wife was but knows she was born in 1982.

53. In re-examination PW3 stated that after the accident he noticed that the Plaintiff has gone bit thinner.

54. Plaintiff gave evidence last.

55. Plaintiff in her evidence in chief gave evidence that:

(i) She is forty one (41) years old and is married to Akariva Tagicakibau.
(ii) She has five (5) children, aged twenty one (21) years, sixteen (16) years, eleven (11) years, five (5) years and five (5) months.
(iii) On 3 October 2004, when she was going to attend a function at Navosai she stepped on a trench, slipped and got injured.
(iv) Time of accident was between 9.00pm to 9.30pm and weather condition was fine.

(v) She was with her small son and nobody else was going with her to the function at Tiko Place.

(vi) She did not see the trench when she was walking because there were no lights or no sign of danger.

(vii) When she fell in the trench she had pain below the knee of her right leg.

(viii) She was assisted by Joe Tukana and he went to get help.

(ix) She was lifted up and put on van and taken to Tiko Place.

(x) She was lifted up and put in the van because she could not walk.

(xi) At Tiko Place she was crying and was in pain.

(xii) She was then taken to CWMH by her husband and her sister in law in a taxi.

(xiii) She went to the emergency department where she was seen by a doctor, was given injection and was sent to x-ray department.

(xiv) After the x-ray the doctor had told her that she had broken bone.

(xv) Her leg was bandaged and she was sent home.

(xvi) He went home by taxi and she was not able to go home by herself because she could not walk.

(xvii) She could not walk for five (5) months and during the time when her bandage was on she got help from her husband, who also did all the housework and looked after the children.

(xviii) She did not go back to hospital but went for traditional massage for one (1) month which helped her.

(xix) She stated the photos in Exhibit 7 was taken when she came back from hospital.

(xx) She removed the bandage herself and after bandage was removed she walked with the help of crutches for five (5) months.

(xxi) Confirmed that Exhibits 3, 4 and 5 are her medical reports.

(xxii) After accident, she feels uncomfortable sometimes, feels helpless, cannot do housework, lift heavy object, play with kids, walk and stand for long.

(xxiii) She could not do those things when she gave evidence.

(xxiv) She has pain in her leg when she lifts heavy object.

(xxv) When she stands for long she can feel her leg being tired.

(xxvi) Before the accident she could do flower gardening and run and now she cannot run but can do flower gardening.

(xxvii) When she attempts to run, she feels risky about her leg.

(xxviii) She is claiming for pain and suffering, interest and costs.

56. During cross examination by Counsel for First and Third Defendants, Plaintiff:

(i) Stated that she does not know her weight at the time of giving evidence or before the accident.

(ii) In 2004, she was on her way to Navosai for the second time.

(iii) When she was walking she saw Joe Tukuna walking towards her.

(iv) She did not know if road was a busy road.

(v) She saw vehicles passing by.

(vi) In reference to Exhibit 8 she agreed that the trench was right across the road.

(vii) In reference to Exhibit 3 she stated that she was taken to hospital at 11:30pm on 3 September 2004, and was seen on in the morning of 4 September, 2004.

(viii) After putting the bandage (cast) doctor told her to rest her right leg.

(ix) Doctor did not tell her to remove the cast.

(x) Stated that the person who massaged her leg is not qualified to practice medicine.

(xi) Stated that doctor asked her to go for review but could not recall how many review dates were given.

(xii) Stated that she did not consult a medical officer before she removed the plaster.

(xiii) Stated that she could not remember on what date she removed the plaster.

(xiv) She has five (5) children and in 2004, she had three (3) children.

(xv) The eldest child was attending senior secondary school, the second child was attending primary school and the third child was not at school.

(xvi) Only her, husband and her children were and are staying together and there were no relatives staying with them.

(xvii) Agreed that at the time of accident her husband was working and she was looking after her youngest child.

(xviii) Agreed that when children left for school she did the housework.

(ix) When plaster was on for five (5) months she stayed with her family.

(x) Agreed that her husband was working and left home for work at 6:00am.

(xi) Disagreed that her husband came late at night and did overtime.

(xii) Agreed that when her husband went to work at 6:00am and children went to school at 8:00am she would be home with her little one and look after the little one.

57. Counsel for Second Defendant did not cross-examine the Plaintiff.

58. In re-examination, Plaintiff stated that she managed to look after the baby when she was injured after her husband left everything near her when she was asleep.

59. Plaintiff closed her case after her evidence.

First and Third Defendants Case

60. First and Third Defendants Counsel called Mr. Raoni Tikoinayavu, Medical Assessor with Ministry of Labour as their only witness.

61. Mr. Tikoinayau in his evidence in chief gave evidence that:

(i) In 2003, he obtained his medical degree from Fiji School of Medicine (**"FSM"**). In 2010, he attended permanent impairment assessment training at Sydney University and in 2012 attendant clinical Occupational Medicine Course at Monash University.

(ii) He had worked for Republic of Fiji Military Force for twenty (20) years and in 2010, he was transferred to Ministry of Labour (**"MOL"**) to clear backlog of medical assessment.

(iii) When he joined MOL he did not know anything about permanent impairment assessment as no formal training was given at FSM for permanent impairment assessment.

(iv) He noticed disparity in assessment as some will say 0% and some will say 25% for same type of case.

(v) To resolve the disparity he asked MOL to get him upskilled and only guideline he was referred to was the schedule in Workmens Compensation Act Cap 94 which had deficiencies and when he asked for assistance he was referred to AMA Guide introduced by one doctor in 2006.

(vi) Agreed that AMA Guide sets international standard.

(vii) There is a modifier which accompanies AMA Guide to factor it to local condition.

(viii) Modifier is based on AMA Guide 5th edition and there is no modifier for AMA Guide 6th edition.

(ix) In Australia doctors use AMA Guide 5th edition with their modifier for 5th edition and they looked at AMA Guide 6th edition but did not agree with it.

(x) Agreed that doctors went to training to use AMA Guide when MOL and Ministry of Health conducted training/course.

(xi) The training/course is conducted by Dr. Dwight Dowder and certificate is given after end of the course.

(xii) He conducted the course in absence of Dr. Dowder.

(xiii) Course is run by MOL and even though consultants are asked to attend the course, Dr. De Asa never attended the course.

(xiv) When asked to comment on the assessment of 6% WPI he stated that where tibia is assessed on alignment as it is 10 to 14 degrees then impairment is assessed at 8% and it is below, that then WPI is assessed at 0%.

(xv) Alignment is measured by using gynometer which given you the degree of mal-alignment.

(xvi) You use the degree and refer to the table in the AMA Guide.

(xvii) In reference to six percent (6%) WPI in Exhibit 6 he stated that the report does not show how 6% WPI was arrived at and he believe that 6% WPI was manipulated as report does not show degree of mal-alignment and the AMA Guide does not show permanent impairment at 6% but only show 8%.

(xviii) In reference to Exhibit 9 (Medical Report dated 18 January 2013) he felt that the opinion given in the report is in correct according to the guide as according to the guide if mal-alignment is less than 10 to 14 degrees than assessment is 0%.

(xix) Agreed that in his professional opinion medical report cannot be relied by Court, when they use AMA Guide.

(xx) In Reference to Exhibit 7 (Photographs) he stated that that normal practice of leaving cast is called Haversin Process (normal repair of bone

tissue) which should be completed in six (6) weeks and cast removed around that period.

(xxi) If cast is to remain for more than six (6) weeks than patient needs to be reviewed periodically.

(xxii) If cast is left for longer period than manipulation cannot be done again, which is taking out cast and re-aligning the bone as there will be tissue dirt.

(xxiii) Likely consequences of tissue dirt is that there will be nasty small, patient will have pain and itchiness.

62. During cross examination Mr. Tikoinayavu:

(i) Stated that he is not an orthopedic surgeon and used to deal with fractured bones when he was a Clinician at CWMH and now only assesses fractured bones and that he writes medical reports for Tribunals, Dispute cases and employees at their request.

(ii) Stated that he does not examine patients at CWMH but at MOL Assessment Clinic.

(iii) Did not accept that orthopedic surgeons are authorised to make permanent impairment assessment but anyone can do the assessment and it is for Courts to decide.

(iv) Stated that he does not agree with Dr. Mc Caig's medical report(Exhibit 9).

(v) Stated when he does assessment, he examines the patient, assesses clinically and looks at x-ray report.

(vi) Agreed that Dr. Mc Caig examined the Plaintiff and did the assessment.

(vii) In Fiji they use AMA Guide 5th edition and not 6th edition because there is modifier for 5th edition and not for 6th edition.

(viii) Stated that there is no circular which says you cannot use AMA Guide 6th edition.

63. During re-examination Mr. Tikoinayavu stated that the modifier would be gazetted soon and doctors are trained to use modifier which training have been going on since 2010.

Second Defendant's Case

64. Second Defendant called Mr. Mosese Yalavanavanua, Engineer as its only witness.

65. During examination in chief Mr. Yalavanavanua gave evidence that:

(i) He is Manager Engineering Service at Nasinu Town Council (NTC).

(ii) NTC does not manage any roads within it's municipality and it manages cleaning services.

(iii) NTC does not manage Streets as well.

(iv) The only Street dedicated to NTC are Mayoral Drive and Atlas Way.

(v) Navosai Road was managed and maintained by Public Works Department (PWD) and Department of National Roads (DNR) and is now managed and maintained by Fiji Road Authority (FRA).

(vi) Approval to dig across the road was given by PWD, and now is given by FRA.

66. Mr. Yalavanavanua was not cross-examined by Plaintiff's Counsel or First and Third Defendant's Counsel.

Whether Defendants owed Duty of Care to the Plaintiff

67. Plaintiff submits that Defendants owed duty of care to the Plaintiff to cover the trench and/or place warning signs or light to warn people using Navosai Road about the possible danger.

68. Defendants submit that no duty is owed by the Defendants to Plaintiff or other road user.

69. First and Third Defendants relied on **Stovin v Wise (Norfolk Country Council, Third Party)** [1996] 3 ALL ER 801.

70. In **Stovin**;

(i) Plaintiff was injured when his motor cycle collided with a car at a junction;

(ii) Plaintiff's view was obscured by a earth bank on an adjacent railway land which was dangerous;

(iii) Highway Authority approached railway company and offered to remove the earth bank at its own cost;

(iv) At time of accident no action was taken;

(v) Plaintiff sued Defendant (owner of car) and Defendant joined public authority as third party;

(vi) Defendant alleged that the Public Authority's failure to have the bank removed was breach of its statutory duty pursuant to Highways Act or was in breach of its common law duty.

(vii) The Trial Judge assessment Highway Authority's liability at thirty percent (30%) which was upheld by Court of Appeal.

(viii) Highway Authority then appealed to House of Lords.

71. Lord Hoffman delivered the leading judgment of the majority (three members) who allowed the Appeal.

72. Lord Nicholas delivered the leading minority judgment (two members).

73. Lord Hoffmann at page 822 at paragraphs b, c; page 823 at paragraph j; page 824 at paragraphs a to j and page 825 at paragraphs a, b stated as follows:

Page 822 paragraphs b and c

"In the case of positive acts, therefore, the liability of a public authority in tort is in principle the same as that of a private person but may be restricted by its statutory powers and duties. The argument in the present case, however, is that whereas a private person would have owed no duty of care in respect of an omission to remove the hazard at the junction, the duty of the highway authority is enlarged by virtue of its statutory powers. The existence of the statutory powers is said to create a 'proximity' between the highway authority and the highway user which would not otherwise exist."

Page 823 para. j, Page 824 para. a to j, Page 825 para. a, b

"This brings me to Ann v Merton London Borough [1977] 2 All ER 492, [1978] AC 728. As this case is the mainstay of Mrs Wise's argument, I must examine it in some detail. The plaintiff were lessees of flats in a new block which had been damaged by subsidence caused by inadequate foundations. They complained that the council had been negligent in the exercise of its statutory powers to inspect the foundations of new buildings. The council said that it owed no duty to inspect and therefore could not be liable for negligent inspection. The House rejected this argument. So far as it held that the council owed a duty of care in respect of purely economic loss, the case has been overruled by Murphy v Brentwood DC [1990] 2 All ER 908, [1991] 1 AC 398. The House left open the question of whether the council might have owed a duty in respect of physical injury, although I think it is fair to say that the tone of their Lordships' remarks on this question was somewhat skeptical. Nevertheless, it is now necessary to ask whether the reasoning can support the existence of a duty of care owed by a public authority in respect of foreseeable physical injury which is founded upon the existence of statutory powers to safeguard people against that injury.

Lord Wilberforce, who gave the leading speech, first stated the well-known two-stage test for the existence of a duty of care. This involves

starting with a ***prima facie assumption that a duty of care exists if it is reasonably foreseeable that carelessness may cause damage and then asking whether there are any considerations which ought to 'negative, or to reduce or limit the scope of the duty or the class of person to whom it is owed or the damages to which a breach of it may arise'. Subsequent decisions in this House and the Privy Council have preferred to approach the question the other way round, starting with situations in which a duty has been held to exist and then asking whether there are considerations of analogy, policy, fairness and justice for extending it to cover a new situation*** *(see e g Caparo Industries plc v Dickman [1990] 1 All ER 568 at 573-574, [1990] 2 AC 605 at 617-618 per Lord Bridge of Harwich). It can be said that, provided that the considerations of policy etc are properly analysed, it should not matter whether one starts from one end or the other. On the other hand the assumption from which one starts makes a great deal of difference if the analysis is wrong.* ***The trend of authorities has been to discourage the assumption that anyone who suffers loss is prima facie entitled to compensation from a person (preferably insured or a public authority) whose act or omission can be said to have caused it.*** *The default position is that he is not.*

This does not, of course, mean that the actual analysis in the Anns case was wrong. It has to be considered on its own merits. Lord Wilberforce had to deal with an argument by the council which was based upon two propositions. The first was that if the council owed no duty to inspect in the first place, it could be under no liability for having done so negligently. The second relied upon Lord Romer's principle in East Suffolk Rivers Catchment Board v Kent [1940] 4 All ER 527 at 540, [1941] AC 74 at 97: a public authority which has a mere statutory power cannot on that account owe a duty at common law to exercise the power. Lord Wilberforce did not deny the first proposition. This, if I may respectfully say so, seems to me to be right. ***If the public authority was under no duty to act, either by virtue of its statutory powers or on any other***

basis, it cannot be liable because it has acted but negligently failed to confer a benefit on the plaintiff or to protect him from loss. The position is of course different if the negligent action of the public authority has left the plaintiff in a worse position than he would have been in if the authority had not acted at all. *Lord Wilberforce did, however, deny the council's second propositions. His reasoning was as follows ([1977] 2 All ER 492 at 501, [1978] AC 728 at 755):*

'I think that this is too crude an argument. It overlooks the fact that local authorities are public bodies operating under statute with a clear responsibility for public health in their area. They must, and in fact do, make their discretionary decisions responsibly and for reasons which accord with the statutory purpose ... If they do not exercise their discretion in this way they can be challenged in the courts. Thus, to say that councils are under no duty to inspect, is not a sufficient statement of the position. They are under a duty to give proper consideration to the question whether they should inspect or not. Their immunity from attack, in the event of failure to inspect, in other words, though great is not absolute. And because it is not absolute, the necessary premise for the proposition "if no duty to inspect, then no duty to take care in inspection" vanishes.'" (***emphasis added***)

74. Lord Nicholas in his dissenting judgment stated as follows:

Page 809 para. f, g

"The liability of public authorities for negligence in carrying out statutory responsibilities is knotty problem. The decision of this House in Anns -v Merton London Borough [1977] 2 All ER 492, [1978] ac 728 articulated a response to growing unease over the inability of public law, in some instances, to afford a remedy matching the wrong. Individuals may suffer loss through the carelessness of public bodies in carrying out their statutory functions. Sometimes this evokes an initiative response that the authority ought to make good the loss. The damnified individual was

entitled to expect better from a public body. Leaving the loss to lie where it falls is not always an acceptable outcome."

Page 809 para. j

"Anns showed that a remedy in the form of an award of damages is possible without confusing the uneasy divide between public and private law. The common law is still sufficiently adaptable. The common law has long recognised that in some situations there may be a duty to act. So concurrent common law duty can carry the strain, without distortion of principle."

Page 812 para. f to j and Page 813 para. a to c

".... there must be some special circumstance, ***beyond the mere existence of the power, rendering it fair and reasonable for the authority to be subject to a concurrent common law duty sounding in damages. This special circumstance is the foundation for the concurrent common law duty to act, owed to a particular person or class of persons.*** *It is the presence of this additional, special circumstance which imposes the common law duty and also determines its scope. Viewed in this way there is no inconsistency in principle between the statutory framework set up by Parliament and a parallel common law duty.*

Statutory powers and proximity

What will constitute a special circumstance, and in combination with all the other circumstances amount to sufficient proximity, defiles definition and exhaustive categorization save in the general terms already noted regarding proximity. ***The special circumstance must be sufficiently compelling to overcome the force of the fact that when creating the statutory function Parliament abstained from creating a cause of action, sounding in damages, for its breach. Factors to be taken into account include: the subject matter of the statute*** *(eg the regulatory power in Yuen Kun-yeu v A-G of Hong Kong [1987] 2 All ER 705 at 713, [1988] AC 175 at 195 was quasi-judicial, with a right of appeal);*

the intended purpose of the statutory duty or power *(in Governors of the Peabody Donation Fund v Sir Lindsay Parkinson & Co Ltd [1984] 3 All ER 529, [1985] AC 210 and Murphy v Brentwood DC [1990] 2 All ER 269 at 276, [1991] 1 AC 398 at 408 public health measures were not intended to safeguard owners of buildings against financial loss);* ***whether a concurrent common law duty might inhibit the proper and expeditious discharge of the statutory functions*** *(such as the protection of children at risk, in X and Ors (minors) v Bedfordshire CC [1995] 3 All ER 353 at 380-382, [1995] 2 AC 633 at 749-751);* ***the nature of the loss*** *(whether physical injury or purely financial)* ***the ability of the plaintiff to protect himself*** *(In Just v British Columbia [1989] 2 SCR 1228 a road user was injured by a rock falling onto his car);* ***the adequacy of the Public law remedies*** *(Rowling v Takaro Properties Limited [1988] 1 All ER 163 at 172 - 173, [1998] AC 473 at 501 - 502 and Jones v Department of Employment [1998] QB 1 at 22, 24 - 25);* ***and the presence or absence of a particular reason why the plaintiff was relying or dependent on the authority*** *(as in Invercargill City Council v Hamlin [1996] 1 All ER 756, [1996] 2 WLR 367 and see the New Zealand Court of Appeal [1994] 3 NZLR 513 at 519, 524 - 525, 530.* ***This list is by no means exhaustive, and each case will turn upon the particular combination of factors present or absent."*** *(****emphasis added****)*

75. It is apparently clear that even though Lord Hoffman and Lord Nicholas reached different conclusion the principle adopted by both of them are almost same.

76. The Courts in Fiji had followed the comment made by both Lord Hoffman and Lord Nicholas in determining issue of liability in respect to public authorities.

77. This Court is of the view that the factors highlighted by Lord Nicholas should be followed to determine whether the public authority concerned owed a concurrent common law duty of care when no such duty is imposed by the respective legislation.

78. In this instance PW2 gave evidence that the trench was dug across Navosai Road by employees of Public Works Department to enable them to connect water supply to a newly constructed property.

79. Hence, in this instance the public authority (PWD) dug the trench to connect water supply to a property.

80. Therefore PWD by its employees had to carry out their duty in such a manner so as to avoid injury to road users including pedestrian and jaywalkers. It was their duty to ensure that the trench was properly covered and if not properly covered that they were obliged to put up warning sign or put temporary safety fence.

81. Under the circumstances of the case I find that First and Third Defendants owed a duty of care to the road users of Navosai Road to carry out their duty in a manner which was not dangerous to the public when a trench was dug across the road to lay water pipes.

82. I must make it clear that no common law duty to fix and maintain trenches or give any warnings or put up danger sign would arise where the trench and pot poles occur due to natural courses or where the legislation negates common law duty of care.

Whether Third Defendant breached duty of care owed to the Plaintiff

83. It is not disputed that employees of PWD dug across Navosai Road to lay water pipes and after laying the water pipes they covered the road leaving a trench as shown in Exhibit 8.

84. It is common knowledge that when such work are carried out warning sign are put on to warn public of the danger and temporary safety fences are put up on the side of the road to avoid the danger to pedestrians from stepping and falling in the trench.

85. The evidence in this case is that the PWD employees finished laying down the pipes, they covered the trench but did not do so fully as shown in Exhibit 8.

86. Under the circumstances the employees of PWD or the DNR should have fully covered the trench to road level or left the danger sign on the side of the road and constructed a temporary safety fence to avoid pedestrian from stepping on the side of the road where the trench was. They failed to do so.

87. This was a necessary on the basis that Navosai Road had no street lights and the road along which community lives and members of the community use the road.

88. I therefore find that that officers of the PWD or DNR breached their duty of care owed to the Plaintiff.

Whether the breach caused the injury to the Plaintiff

89. I find that Plaintiff suffered the injuries after she stepped in the trench.

Whether Plaintiff Contributed to Her Injury

90. 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 contributory negligence is not based on a similar duty of the plaintiff towards the defendant. It was explained by Lord Simons in Nance v. British Columbia Electric Railway Co. Ltd [1951 AC 601, 611; "The statement that, when negligence is alleged as the basis of an actionable wrong, a necessary ingredient in the conception is the existence of a duty owed by the defendant to the plaintiff to take due care, is, of course, indubitably correct. But when contributory negligence is set up as a defence, its existence does not depend on***

any duty owed by the injured party to the party sued, and all that is necessary to establish such a defence is to prove to the satisfaction of the injury that the injured party did not in his own interest take reasonable care of himself and contributed, by this want of care, to his own injury. For when contributory negligence is set up as 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."

91. I fully supported the comment made in **Brodie v Singleton Shire Council and Ghatous v. Hawkesbury City Council** (2001) 206 CLR 572 quoted at paragraph 8.4 of First and Third Defendants submissions which is as follows:

> ***"Pedestrians are more able to see and avoid imperfections in a road surface. It is the nature of walking in the outdoors that the ground may not be as even, flat or smooth as other surfaces. As Culinan J. points out in his reasons in Ghatous, persons ordinarily will be expected to exercise sufficient care by looking where they are going and perceiving and avoiding obvious hazards, such as uneven paving stone, trees roots or holes. Of course, some allowance must be made for inadvertence."***

92. In this instance Plaintiff's evidence was that she was walking along Navosai Road with her year old child to Tiko place.

93. Plaintiff also gave evidence that Navosai Road had no street lights.

94. I accept that First and Third defendants submission that plaintiff should have take precautions to avoid injury to herself, by carrying a torch or some sort of light to guide her, which of course she did not carry with her.

95. Plaintiff also gave evidence that when she was walking along the road she saw PW2 coming towards her which shows that she was not paying full attention to the road when was walking along Navosai Road with her child.

96. I find that Plaintiff contributed to her injury to some extent and as such I assess contributory negligence on her part at twenty five percent (25%).

Special Damages

97. Plaintiff did not provided particulars of special damage in the statement of claim but in the schedule of special damages filed on 15th October, 2007 provided particulars in Special Damages as follows:

(i)	Transporting Cost to CWM on 3rd September, 2004	$ 20.00
(ii)	Police Report	$ 22.50
(iii)	Medical Report	$ 15.00
(iv)	Payment for Fijian massage $50.00 per week for 3 weeks	$ 150.00
(v)	Transporting cost to and from residence; to and from Toorak (for massage @ $9.00 return/day for 3 weeks (21 days)	$ 189.00
(vi)	Payment for plaster	$ 30.00
(vii)	Hire of crutches	$ 120.00
(viii)	House girl at $50. per week for 2 months (8weeks)	$ 400.00
(ix)	Medicine - painkillers at $16. packet for 3 packets	$ 48.00
	TOTAL	**$ 994.50**

98. No evidence was provided to substantiate Plaintiff's claim for massage, transport cost to Toorak for massage and payment of housegirl.

99. In fact it was PW3's (Plaintiff's husband) evidence that he did all the housework when Plaintiff's right leg was on cast and no other person lived with them.

100. I will therefore allow special damages for item listed in paragraph 97. (i), (ii), (iii), (vi), (vii) and (ix) in Schedule of Special Damages amounting to Two Hundred and Fifty Five Dollars and Fifty Cents ($255.50).

General Damages

101. Plaintiff claimed damages for pain and suffering, loss of amenities of life, future earning and loss of consortium.

Pain and Suffering

102. Plaintiff relied on various cases which I have taken into consideration and find to be quite relevant and helpful.

103. In **Dinesh Kumar v. John Elder** HBC 560 of 1996; Court awarded the sum of $45,000.00 as general damages to the plaintiff who sustained fracture of tibia and fibula.

104. In **Edward Narayan v. William Amputch & Rothmans Pall Mall (Fiji) Ltd** HBC 51 of 1993; the Court awarded $60,000.00 for pain and suffering and loss of amenities of life to the plaintiff who sustained fractured leg.

105. In **Anitra Kumar Singh v. Rentokil Laboratories Ltd** Civil Appeal No. 73 of 1991; the Plaintiff sustained multiple fractures including fractured pelvis, the Court awarded $60,000.00 in general damages which the Fiji Court of Appeal concluded that was the appropriate sum.

106. In **Alak Ram v. Ernest Patterson** HBC 210 of 1997; the Plaintiff sustained fractured of tibia and fibula, left radius, ankle and femur. The Court awarded $45,000.00 in general damages for pain and suffering and loss of amenities of Life.

107. In **Deo Ram v. Kanta Singh** HBC No. 102/2001; the Plaintiff sustained injury to his hip when he fell down from a ceiling. He was 43 years at the date of accident and 48 at the date of trial. He was awarded $45,000.00 in general damages.

108. In **Samuel Fong v. John Beater Enterprises Pty Ltd** HBC No. 482 of 2003; Court awarded $33,066.00 in General Damages for Plaintiff who sustained fractured femur and pubic rami.

109. In the case of **Namino v. Jamal Investment Ltd** [2011] FJHC 73; the Plaintiff was seeking damages for injuries he sustained, as a result of being struck on his left leg by a tractor while engaged in measuring timber at the Nabukelevu forest in Serua and as a result of the plaintiff's injury, his movements are restricted and he wears an ankle guard. The plaintiff further stated that when he walks his ankle gets swollen; hence the court awarded general damages in the sum of $30,000.00.

110. In **Taiyab v. Tabua** [2011] FJMC 152; the Plaintiff was a Police Officer that suffered a fracture to his left foot and the court awarded general damages in the sum of $30,000.00 considering the fact that the injuries were persisting.

111. The Fiji Court of Appeal in **Chand & Anor. v Amin**; Civil Appeal No. ABU0031 of 2012 (2 October 2015) 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 edition 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 factor as the intensity of the pain felt the plaintiff and its likely duration (Balkin and Davis (SUPRA) at 11.28)."*

112. After analyzing the evidence produced in Court I assess the amount for pain and suffering as follows:

(i)	Past pain suffering	$30,000.00
(ii)	Future pain and suffering	$ 2,000.00

Loss of Amenities of Life

113. I think it just and fair that Plaintiff be compensated for loss of amenities of life.

114. I award a sum of $2,000.00 for loss of amenities of life.

Interest

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

Cost

116. I have taken into consideration that the trial lasted for two (2) days and First and Third Defendants called one (1) witness and Second Defendant called one (1) witness and Plaintiff called three witnesses.

Conclusion

117. This Court holds that:

(i) First and Third Defendants owed a duty of care to Plaintiff and breached that duty of care which resulted in Plaintiff sustaining injuries;

(ii) The Second Defendant did not owe duty of care to the Plaintiff;

(iii) Plaintiff was contributory negligent;

(iv) Third Defendant is to pay the Plaintiff a sum of $40,278.00 in special and general damages including interest up to the date of Judgment which said sum as follows:

Special Damages	$ 255.50	
Less 25% - Contributory Negligence	64.00	
	191.50	
Interest at 6% per annum from 3/9/2004 (date of accident) to date of Judgment (4381 days)	138.50	**330.00**
General Damages		
Pain and Suffering & Loss of Amenities of Life	$32,000.00	
Less - 25% Contributory negligence	$ 8,000.00	
	$24,000.00	

Interest at 6% per annum from 20/6/2006 (date of *Writ of Summons* to date of *Judgment - 3602 days*)	$14,698.00	**$38,698.00**
Future and pain suffering	$ 2,000.00	
Less 25% Contributory Negligence	750.00	**$ 1,250.00**
		$40,278.00

Orders

118. I make following Orders:

(i) This action against Second Defendant is dismissed and struck out;

(ii) Third Defendant do pay Plaintiff the sum of $40,278.00;

(iii) Third Defendant do pay Plaintiff cost of this action assessed in the sum of $3,5000.00;

(iv) Plaintiff do pay Second Defendant's cost of this action assessed in the sum of $1,500.00.

HIGH COURT OF FIJI
SUVA

.....
K. Kumar
JUDGE

At Suva
31 August 2016

Diven Prasad Lawyers for the Plaintiff

Office of the Attorney-General for the First and Third Defendant