IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 188 of 2017

BETWEEN: **HEMENDRA NATH SHARMA** of Tamavua Village, Suva, Driver.

PLAINTIFF

AND: **EXPORT FREIGHT SERVICES LIMITED** a limited liability company having its registered office at Tamavua-i-wai, Suva.

DEFENDANT

Counsel: Mr. D Singh for the Plaintiff

Mr. B. Solanki for the Defendant

Catch Words

Personal Injury- fort of Statutory Breach- Health and Safety at Work Act 1996 - Health and Safety at Work (General Workplace Conditions) Regulations 2003.- duty of care- visitor- Common Law- Occupiers'Liability Act 1968 Sections 3,4 - volenti non fit injuria

Cases Referred

The White Lion Hotel (A Partnership) v James [2021] EWCA Civ 31, [2021] QB 1153, [2021] 2 WLR 911

The White Lion Hotel (A Partnership) v James [2021] EWCA Civ 31 (15 January 2021),

Baker v Quantum Clothing Group & Ors [2009] EWCA Civ 499 (22 May 2009)

Caswell v Powell Duffryn Associated Collieries Ltd, [1939] 3 All ER 722

Robb v Salamis (M&I) Ltd [2006] All ER (D) 191 (Dec)

Date of Judgment : 22.8.2025

JUDGMENT

INTRODUCTION

[1] This is a claim by the Plaintiff, arising from an accident that occurred on 28 .8. 2014 at the Defendant's premises when a consignment was loaded using a forklift to a truck.

[2] Plaintiff, was a self-employed freight truck driver, attended the Defendant's warehouse to collect goods for delivery to third party.

[3] While cargo was being loaded there was a piece of wood on the bed of freight truck and Plaintiff had requested forklift operator to stop loading and had tried to take it using his hand. Accordingly, loading had stopped to allow Plaintiff to remove wooden part from bed of truck.

[4] Before Plaintiff could take his hand fully forklift operator had released consignment. Plaintiff's thumb was caught between the heavy load of consignment and bed of the freight truck, causing severe injury that resulted partial amputation.

[5] Plaintiff and his assistant stated that he had signalled and verbally communicated, forklift operator to hold the load while lowering to the delivery truck and accordingly it was stopped at a height so Plaintiff had used his hand to take the wooden part lying on the bed of freight truck.

[6] Forklift was operated by an employee of the Defendant and there was no person to co ordinate the loading of goods to delivery, other than visitors who collect consignments. So there was reasonable expectation of Plaintiff being close proximity to the forklift at the time of loading and operator of should take reasonable care of such person.

[7] Forklift operator said he could not see his front as consignment was blocking forklifting . This required a another person to co ordinate proper placement of goods inside a freight truck..

[8] When visibility was covered there was an obligation on the part of the forklift operator to be more careful and take all reasonable precautions to prevent injury .to visitors and or to cargo as well as to freight truck.

[9] So the accident happened due to Defendant failure to implement an adequately safe system for visitors including its failure to provide a safe place for visitors at parking bay, and also , from vicarious liability from the negligence of forklift operator.

[10] Plaintiff pleaded Defendant's failure for duty of care in terms of Occupiers' Liability Act 1968 and common law principles, and also a claim based on Statutory Breach of Health and Safety at Work Act 1996 read with Health and Safety at Work (General Workplace Conditions) Regulations 2003.

[11] The Defendant denies liability, asserting that it provided adequate safety measures, that the Plaintiff was fully aware of the risks due to his experience, and that the accident was caused solely by Plaintiff's own negligence. There

was a yellow line on the ground, but forklift operator admitted that depending on the circumstances visitors to the premises could cross the line and come to the other side.

[12] Forklift operator could reasonably expect Plaintiff to follow consignment to the vehicle as goods were identified by Plaintiff at warehouse and there was no person to direct forklift to the delivery vehicle . In the circumstances, forklift driver was negligent for failure of reasonable lookout when he accidently released the heavy load before Plaintiff could take his had.

[13] Plaintiff had also being negligent in the act of using his hand underneath the consignment but this was done when forklift driver had stopped the lowering and also verbally replied with 'OK'. So Plaintiff's contributory negligence is assessed at 20% considering circumstances.

FACTS

[14] Plaintiff was born on 1.12.1957 and was educated to Form 4 level and was a self-employed truck driver providing delivery of cargo . He had also employed another person to assist in his freight delivery operation.

[15] Plaintiff had over twenty years of experience in the freight delivery as driver and on 28.8.2014 he had driven his delivery truck to Defendant's parking bay and parked it and had handed over necessary documents, to the office in order to collect a consignment. He had then gone to for identification of the goods at warehouse.

[16] After he had confirmed the consignment, from storage this consignment was transported on a pellet using a forklift to the Plaintiff's freight truck parked at parking bay.

[17] When the goods were being transported Plaintiff as well as forklift driver had noticed that there was a loose wooden part hanging from the pallet.

[18] When back doors of fright truck was opened for loading, Plaintiff had seen a loose wooden part on the bed of the truck. Plaintiff had used his hand to remove this wooden part , after stopping loading operation.

[19] According to Plaintiff he instructed the forklift operator to stop lowering the consignment , until he removed the wooden piece on the bed of the truck, and the driver nodded in agreement and had also stated 'OK' and had also stopped loading of cargo to the floor. By this time part of pellet and cargo ,was inside vehicle .

[20] Plaintiff stated that , without warning, the forklift driver lowered the pallet, crushing Plaintiff's left thumb. He said that he was turning back side to forklift when he used his left hand to remove piece of wood lying on the bed of the truck.

[21] At that time, the plaintiff had his back to the forklift and was positioned near the load but forklift operator had without asking from Plaintiff had placed the cargo with the pellet on the bed of the truck and Plaintiff's thumb got crushed in between bed of the freight truck and pellet where cargo loaded. Plaintiff had screamed with pain.

[22] After he screamed in pain, the driver lifted the pallet but then left shaking his head without talking to Plaintiff or observing what was the reason for Plaintiff's scream or the condition of Plaintiff.

[23] Forklift drive had not informed about the accident to Defendant . Plaintiff had left in a vehicle for treatment immediately. Plaintiff was taken to hospital by a third party and, and his left thumb was partially amputated three days later.

[24] Since the accident, Plaintiff has been unable to grip properly with his left hand, cannot perform tasks like buttoning clothes without pain, and is unable to drive heavy vehicles such as trucks or undertake hard labour. He closed his business, sold his truck, and now works as a part-time taxi driver earning $30–$40 daily.

[25] Forklift operator in his evidence admitted the incident but denied his negligence. He also admitted that there were no danger signs or barricades or other means to restrict movement of visitors who come to premises for collection of cargo. He said that there were signs at the gate providing warning to the site.

[26] Forklift operator as well as Delivery Clerk of Defendant stated that yellow line on the ground marks the area where customers were required to move. But forklift operator said that visitors are allowed to go beyond yellow line depending on the circumstances and there were no security or other person to guide such movements.

ANALYSIS

[27] Plaintiff pleaded causes of action under;

a. Occupier's Liability Act 1968
b. Common Law
c. Statutory Breach of duty of care under Health and Safety at Work Act 1996 read with Health and Safety at Work (General Workplace Conditions) Regulations 2003.

Negligence under Common Law and Occupier's Liability Act 1968

[28] Section 3 of Occupiers' Liability Act 1968 states

" Preliminary

3 (1) The provisions of sections 4 and 5, shall have effect, in place of the rules of the common law, to regulate the duty which an **occupier of premises owes to his or her visitors** in **respect of dangers due to the state of the premises or to things done or omitted to be done on them**.[1]

(2) The provisions of sections 4 and 5 shall regulate the nature of the duty imposed by law in consequence of a person's occupation or control of premises and of any invitation or permission he or she gives or is to be treated as giving, to another to enter or use the premises, but they shall not alter the rules of the common law as to the persons on whom a duty is so imposed or to whom it is owed; and accordingly for the purpose of those provisions the persons who are to be treated as an occupier and as his or her visitors are the same as the persons who would at common law be treated as an occupier and as his or her invitees or licensees.

(3) The provisions of sections 4 and 5 in relation to an occupier of premises and his or her visitors shall also apply in like manner and to the like extent as the principles applicable at common law to an occupier of premises and his or her invitees or licensees would apply, to regulate—

(a) the obligation of a person occupying or having control over any fixed or movable structure, including any vessel, vehicle or aircraft; and

(b) the obligations of a person occupying or having control over any premises or structure in respect of damage to property including the property of persons who are not themselves his or her visitors." (emphasis added)

[29] Accordingly, there is a duty owed by the Defendant to plaintiff in terms of Section 3 read with Sections 4 of Occupiers' Liability Act 1968 . There is no dispute as to this fact in the submissions of Defendant or reply to Plaintiff's submission.

[30] Section 4 of Occupiers Liability Act 1968[2] states

" Extent of occupier's ordinary duty

4(1) **An occupier of premises owes the same duty, the common duty of care, to all his or her visitors, except in so far as he or she is free to and does extend, restrict, modify or exclude his or her duty to any visitor or visitors by agreement or otherwise.**

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

[1] Analogous to Section 1 (1) of UK Occupiers Liability Act

[2] Analogous to section 2(1) to (5) of UK Occupiers' Liability Act 1957

(3) The circumstances relevant for the present purpose include the degree of care and of want of care, which would ordinarily be looked for in such a visitor, so that, for example, in proper cases—

(a) an occupier must be prepared for children to be less careful than adults; and

(b) an occupier may expect that a person in the exercise of his or her calling, will appreciate and guard against any special risks ordinarily incident to it, so far as the occupier leaves him or her free to do so.

(4) In determining whether the occupier of premises has discharged the common duty of care to the visitor, regard is to be had to all the circumstances, so that, for example—

(a) where damage is caused to a visitor by a danger of which he or she had been warned by the occupier, the warning is not to be treated, without more, as absolving the occupier from liability, unless in all the circumstances it was enough to enable the visitor to be reasonably safe; and

(b) where damage is caused to a visitor by a danger due to the faulty execution of any work of construction, maintenance or repair by an independent contractor employed by the occupier, the occupier is not to be treated, without more, as answerable for the damage if in all the circumstances he or she had acted reasonably in entrusting the work to an independent contractor and had taken such steps, if any, as he or she reasonably ought in order to satisfy himself or herself that the contractor was competent and that the work had been properly done.

(5) The common duty of care does not impose on an occupier any obligation to a visitor in respect of risks willingly accepted as his or her by the visitor, and in this respect, the question whether a risk was so accepted shall be decided on the same principles as in other cases in which one person owes a duty of care to another."(emphasis added)

[31] In UK Court of Appeal decision of ***The White Lion Hotel (A Partnership) v James*** [2021] EWCA Civ 31, [2021] QB 1153, [2021] 2 WLR 911 (decided on 15 .1. 2021), discussed the analogous provision in UK Occupiers' Liability Act 1968 and stated ,

"Discussion and Conclusion

The claim is brought pursuant to the provisions of section 2 of the 1957 Act. The relevant provisions for the purpose of this appeal begin at section 1(1)[3], which provides that section 2[4] **replaces the common law rules** and regulates the duty which an occupier of premises owes to visitors in respect of **dangers due to the state of premises or to things done or omitted** to be done to them. A simple but important point; this is a statutory scheme.

The first question for the court is whether the judge was correct to find that the deceased was owed a duty of care by the appellant pursuant to section 2 of the 1957 Act and, if so, whether that duty was breached. It is only after addressing sections 1, 2(1) and 2(3) of the Act, and determining the nature and extent of any breach under section 2, that the court can proceed to section 2(5), which represents a defence." (emphasis added)

[32] Defendant conducts freight services as denoted in its name. Plaintiff had come to its warehouse in order to collect a cargo and due to operation of forklifts the warehouse and parking bay and area in between became dangerous for visitors.

[33] Plaintiff had come with documents to collect a cargo to for a factory. So Plaintiff was a visitor to the premises of Defendant.

[34] It is also not disputed that Plaintiff had entered the warehouse after handing over of the documents to the office of the Defendant and it had three forklifts to be used hence the premises was dangerous to the visitors when there forklifts were used depending requirement. There was a duty of care owed by Defendant . This obligation is both statutory as well as in common law.

[35] Accordingly Defendant owed a duty of care to Plaintiff who had entered its premises for collection of a cargo and this duty was breached by Defendant as well as forklift operator, for reasons stated later in this judgment.

[36] According to paragraph four of the Statement of Defence the ' *injury suffered by the Plaintiff was due to his own negligence*..' So defendant is relying on Section 4(5) of Occupiers' Liability Act 1968 when it sought to absolve itself from liability.

[3] Analogus to Section 3(1) of Occupiers' Liability Act 1968
[4] Analogous to Section 4 of Occupers' Liability Act 1968

[37] Halsbury's Laws of England[5] Situations in which a Duty of Care Arises (2) Duty of Occupier (i) Duty to Visitors states- under . Common duty of care, states,

> "The common duty of care is a duty to take such care as in all the circumstances of the case is reasonable to see that the visitor will be reasonably safe[6] in using the premises for the purposes[7] for which they are invited or permitted[8] by the occupier to be there[9]. The relevant circumstances include the degree of care, and of want of care, which would ordinarily be looked for in the visitor,.."

[38] There is no dispute that Defendant who was operating a freight storage facility owed a duty of care to its visitors including Plaintiff who came to collect a commercial consignment for a factory. It involved dangerous operations including use of forklifts in its usual operations.

[39] Accident happened at parking bay which is not a restricted area for visitors for obvious reasons but an inherently dangerous forklift operated on the parking bay when loading of consignments to freight trucks.

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[5] Halsbury's Laws of England > Negligence (Volume 78 (2025)) > 2. Situations in which a Duty of Care Arises > (2) Duty of Occupier > (i) Duty to Visitors

[6] See *McGivney v Golderslea Ltd [1997] Lexis Citation 4699*, in which there was no breach of the duty in the Occupiers' Liability Act 1957 s 2(2) in failing to remove a pane of glass which complied with the regulations when it was installed and to replace it with more up to date safety glass, and Swinton Thomas LJ stressed the importance of the statutory wording that the care was 'reasonable'; considered in *Edwards v Sutton London Borough Council [2016] EWCA Civ 1005*, *[2017] PIQR P11*, *[2016] All ER (D) 90 (Oct)*.

[7] 'When you invite a person into your house to use the staircase, you do not invite him to slide down the banisters': see *The Carlgarth [1927] P 93* at 110, CA, per Scrutton LJ; cited by Coulson J in *Geary v JD Weatherspoon plc [2011] EWHC 1506* at [1], *[2011] All ER (D) 97 (Jun)*. See also *Walker v Midland Rly Co (1886) 55 LT 489*, HL (hotel guest entering service room). However, a visitor does not become a trespasser by reason only of a small and inadvertent encroachment (*Braithwaite v South Durham Steel Co Ltd [1958] 3 All ER 161*, *[1958] 1 WLR 986*; *Public Transport Commission of New South Wales v Perry (1977) 14 ALR 273* (railway passenger awaiting train, had a fit and fell on track)); nor does a child who strays upon an alluring object (*Gough v National Coal Board [1954] 1 QB 191*, *[1953] 2 All ER 1283*, CA (slowly moving truck)); nor does a visitor who is acting reasonably in search of lavatory accommodation (*Gould v McAuliffe [1941] 2 All ER 527*, CA (adult); *Pearson v Coleman Bros [1948] 2 KB 359*, *[1948] 2 All ER 274*, CA (child)).

[8] For the purposes of the Occupiers' Liability Act 1957 s 2, persons who enter premises for any purpose in the exercise of a right conferred by law must be treated as permitted by the occupier to be there for that purpose, whether they in fact have the occupier's permission or not: s 2(6). Such persons will include police entering with search warrants, enforcement officers and inspectors with statutory rights of entry and, in certain circumstances, employees of public undertakings. Section 2(6) does not extend the range of persons to whom a duty is owed but merely enacts that if a person is using a right for the purpose for which it is granted, even though the person is not invited or permitted to be on the defendant's premises, the common duty of care is owed to the person, as a visitor; but no duty is owed under the Occupiers' Liability Act 1957 to a person using a public right of way: *Greenhalgh v British Railways Board [1969] 2 QB 286*, *[1969] 2 All ER 114*, CA. Note that a duty may now be owed to a person using a public right of way under the Occupiers' Liability Act 1984: see para 40.

[9] Occupiers' Liability Act 1957 s 2(2). See *Harvey v Plymouth City Council [2010] EWCA Civ 860*, *[2010] All ER (D) 328 (Jul)*, in which the defendant council's implied licence for the claimant to enter the land for general recreational activity did not extend to cover any form of activity, however reckless. See also *Cook v Swansea City Council [2017] EWCA Civ 2142*, *[2017] All ER (D) 110 (Dec)* (it was not reasonable to impose a duty of care that would require the council to grit its unmanned car parks whenever icy conditions were reported).

[40] Defendant had three operational forklifts at that time and they were used *inter alia* for loading of consignments to delivery trucks parked on the parking bay.

[41] It is admitted fact that forklifts operations are dangerous and parties to this action including Plaintiff were fully aware of this, despite not having any danger signs on the premises. Plaintiff stated that he used to come to the same premises for collections of cargo several times in a week and he had been a freight truck driver for more than ten years and his total exposure to the freight was more than twenty years.

[42] Plaintiff came to premises of Defendant, with required documentation for collection of consignment stored with Defendant's warehouse and accordingly he is a visitor to the premises.

[43] Plaintiff had handed over the documents relating to consignment to Defendant's Delivery Clerk, after that Plaintiff had gone to warehouse to identify the cargo according to the documents. Forklift driver also admitted that he had seen the Plaintiff at warehouse.

[44] Delivery Clerk of Defendant admitted that there were no instructions given to forklift operator to warn outsiders not to come close to it or any signs of danger on the premises.

[45] It is proved that forklift operator was required to liaise, with Plaintiff in order to securely load cargo to freight truck .

[46] Plaintiff in his evidence admitted that he had experience with freight delivery using forklifts and forklifts are dangerous when operating in a premises. So he was aware of the dangers and he had not got injured severely before this incident and had taken precautions before this incident.

[47] Plaintiff's truck assistant in his evidence stated that Plaintiff had guided the forklift to the truck. This can be accepted as no person from Defendant was involved after loading of consignment to the forklift at warehouse till it was placed on the truck of Defendant.

[48] Loading operation also required opening of the truck in order to place the cargo inside and also forklift should be operated with caution for safety of the visitors as well as not to damage consignment and or vehicles including freight truck.

[49] It is also important not to damage delivery truck and also adequate space be available for the loading Considering the circumstances of the case Plaintiff cannot wait in the office while the good were being loaded , as Defendant had not employed a person to coordinate with forklift driver to safe loading of cargo for delivery.

[50] So it is inevitable that Plaintiff or his assistant needed to open the delivery compartment of the truck and also inspect loading of the consignment safely in order to transport them in safe condition and after inspection of the same and safe delivery the duty of the Defendant ends.

[51] Forklift driver in his evidence admitted that a visitor to the premises of Defendant required to follow the yellow line and '*It starts from the point of entry the gate and takes you right to the Male Washroom and Office and Customs waiting area*.' He admitted that depending on the circumstances a person can go beyond yellow line.

[52] According to the facts in this action Plaintiff did the documentation delivery and clearance of the goods from warehouse and also inspected the goods at warehouse and also had directed the forklift to the freight truck. So Plaintiff cannot be confined to yellow line and must go beyond it to warehouse where forklifts operate and his presences was also required at the time of loading. This was the manner Defendant operated its business and there was no evidence of any risk assessment done in order to identify the risks posed to the visitors and mitigatory measures taken .

[53] It is also admitted there were no security or other monitoring of movements of outsiders who come to warehouse and there was no evidence any yellow line in warehouse and Plaintiff had gone for identification of cargo and this was the usual practice.

[54] After identification of cargo the cargo was lifted with the pellet by forklift. Forklift driver admitted seen Plaintiff at warehouse. So in the application of test of probability to the analysis of evidence it is probable that Plaintiff had guided the forklift to his vehicle Plaintiff's assistant had seen Plaintiff guiding the forklift to his freight truck.

[55] The evidence of forklift operator that he did not see Plaintiff after sighting him at warehouse cannot be accepted. After identification of the items it was probable that forklift driver talk to Plaintiff and he guiding his consignment to freight truck and also open it to allow placement of consignment on the bed of the truck. So forklift operator was fully aware of the presence of Plaintiff close to his forklift operation

[56] Plaintiff had opened the back of the delivery truck to place the consignment inside. So forklift driver should reasonably expect Plaintiff or his assistant near the back side of truck where loading happened.

[57] So the evidence of forklift operator that he did not see Plaintiff when he commenced loading of the consignment cannot be accepted.

[58] He also stated that front visibility was blocked due to cargo . His vision in front may get block depending on the size of consignment and the height at the time of lifting or loading, but again if the visibility in front get blocked

due to consignment , that is the time the operator should be more careful as to the persons nearby.

[59] Even if I am wrong , the manner of loading truck and the forklift and the consignment it is unlikely that visibility was covered throughout loading process and Plaintiff was standing on the ground , by the side of forklift, which cannot get blocked if carful.

[60] So at the time of loading or when the goods were lifted if visibility got covered at a particular instance it is forklift driver who should take precautions, at that instance as it was a special knowledge that only he had at that moment. So he must take all reasonable means to prevent any accident to third parties including Plaintiff and cannot state that he did not see Plaintiff at that time.

[61] So even if one accept forklift operator's evidence on this fact that he did not see Plaintiff he owed a duty of care to ensure that such operation was conducted in safe manner and make sure that there was no one near the forklift before cargo with the pellet and its weight fully released to the bed of the truck.

[62] Plaintiff had asked forklift driver to stop placing the pellet on the floor of the truck as there was a piece of wood on the bed of the truck . Plaintiff had also signaled and verbally asked to stop loading and forklift driver had complied with that this. This evidence of Plaintiff was denied by forklift operator in his evidence, but his version of the event cannot be accepted as to what had happened in the analysis of evidence including the subsequent conduct of the forklift operator,

[63] It is improbable with knowledge and experience of a person such as Plaintiff to use his hand beneath if the loading of consignment did not stop.

[64] Forklift operator's evidence that he was not asked to stop loading by Plaintiff can be accepted considering immediate reaction or conduct of forklift driver after accident where he had not met Plaintiff and gone with his head shaking. This is an indication of some fault or neglect on the part of him and self-denial . So, he did not want to meet the victim due to his negligence.

[65] If the accident was not due to his fault, normal instinct was to face the victim immediately and to inquire the injury caused and to ask how it happened and that he did not see or why such a thing was done without informing him of it. If there was no negligence on his part he must take whatever measures to mitigate circumstances, and not to depart from scene of accident and also not to inform this incident to Defendant's officials.

[66] Forklift operator had also not informed about this accident to Defendant's office and this shows again his conduct to prove that he was aware of Plaintiff being present close to forklift operation and he was going to remove a wooden part from bed of the truck.

[67] Apart from that , Defendant had no proper system to detect such a serious accident and no proper monitoring or supervision of forklift operation which was a dangerous. This also proves that the premises was not safe for visitors .

[68] So the subsequent conduct or the behaviour of forklift operator is relevant for the analysis of evidence and proof of negligence.

[69] He had shaken his head and had not face the Plaintiff this is also a corroboration of Plaintiff's version that he had informed to forklift operator to stop loading and he had complied with that instructions before he had used his hand to remove the wooden piece on the bed of the truck.

[70] No reasonable person would insert a hand while cargo is being lowered as the consequences are self-evident, despite not having such danger signs on the premises.

[71] What Plaintiff had done in this instance was negligent despite forklift operator had stopped the loading as the load was inside the freight truck but the gap between the pellet was narrow and could expose his hand to danger in case of a mistake of forklift operator or other cause.

Can Defendant rely on Section 4(5) of Occupiers' Liability Act 1968.

[72] UK Court of Appeal decision applying analogous UK provision in the case of *The White Lion Hotel (A Partnership) v James* [2021] EWCA Civ 31 (15 January 2021), after discussing previous decisions on the application of Section 2(5) of UK Occupiers' Liability Act 1957 (identical to Section 4(5) of Occupiers' Liability Act 1968) held,

> The defence of *volenti non fit injuria* was always a defence available to the occupier of the property and section 2(5) expressly preserves it. The editors of Clerk & Lindsell on Torts, 23rd Edition, 11-43 recognise this. At [36] of Geary, Coulson J accepted that the statutory offence has been confirmed to be indistinguishable from the common law defence of volenti.
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> In *Nettleship v Weston* [1971] 2 QB 691 at 701 Lord Denning expressed the doctrine thus:
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> "Now that contributory negligence is not a complete defence, but only a ground for reducing the damages, the defence of volenti

> non fit injuria has been closely considered, and, in consequence, it has been severely limited. Knowledge of the risk of injury is not enough. Nor is a willingness to take the risk of injury. Nothing will suffice short of an agreement to waive any claim for negligence. The [claimant] must agree, expressly or impliedly, to waive any claim for any injury that may befall him due to the lack of reasonable care by the defendant …."
> The maxim presupposes a tortious act by the defendant. The test is a high one.
>
> If the defence is to succeed it must be shown that the deceased was fully aware of the relevant danger and consequent risk. In Morris v Murray [1991] 2 QB 6 Stocker LJ said that he would not go so far as to say that the test was objective."

[73] Accordingly, the burden was with Defendant to prove that Plaintiff had taken such a high risk of injuring himself such as self harm. Plaintiff had asked forklift operator to stop its operation before he approached to take the wooden piece from the bed of freight truck.

[74] The Section 4(5) of Occupiers' Liability Act 1968, required Defendant to prove that Plaintiff 'willingly accepted the risk'. The short answer to this issue is that Plaintiff had never accepted risk of injury and that was the reason he verbally as well as signal of hand , had communicated to the forklift operator and he had also replied 'OK' and had stopped lowering the pellet in order to allow Plaintiff to remove the wooden piece from the bed of freight truck. So Plaintiff had taken measures to prevent harm and did not expect forklift operator to offload the cargo before he asked him to commence loading.

[75] According to the system of operation that was on place at the time of accident, forklift driver could not load properly the consignment inside Plaintiff's delivery truck without direction or assistance of Plaintiff and or his assistant. Before loading forklift operator must ensure that there is sufficient empty space in order to place the pellet with cargo. Also he should do that carefully without damaging the cargo as well as the truck and or any goods already inside it.

[76] As the consignment was for commercial use and substantial movement of such consignment after placing on the bed of the truck is not usually done . So placement of pellet on flat floor is important and this is to ensure the goods are not damaged at transport. So it is practically not possible to be carried out without directions of Plaintiff or his assistant.

[77] The removal of wooden piece was required so that consignment was properly places on the bed of the freight truck so its weight is equally distributed on the floor.

[78] So there was a duty of care to take proper lookout . This was more considering that there was a loose wooden part on the pallet and there was also wooden part on the bed of the freight truck.

[79] Forklift driver was negligent in not having a proper lookout when consignment was released on the thumb of Plaintiff causing serious injury to it, and this cannot be considered as Plaintiff 'willingly accepted a risk' when he tried to remove the wooden piece using his hand.

[80] It is noted that Plaintiff had also verbally communicated and signaled to forklift operator to stop loading before he used his left hand to remove the wooden piece on the bed of the freight truck.

[81] In UK Court of Appeal decision *The White Lion Hotel (A Partnership) v James* [2021] EWCA Civ 31 (15 January 2021), held,

> 'For the reasons given, I do not read Tomlinson or Edwards as being authority for a principle which displaces the normal analysis required by section 2 of the 1957 Act: the analysis undertaken by the judge at [63] of his judgment. What a claimant knew, and should reasonably have appreciated, about any risk he was running is relevant to that analysis and, in cases such as Edwards and Tomlinson, may be decisive. In other cases, a conscious decision by a claimant to run an obvious risk may, nevertheless, not outweigh other factors: the lack of social utility of the particular state of the premises from which the risk arises (the ability to open the lower sash window); the low cost of remedial measures to eliminate the risk (£7 or £8 per window); and the real, even if relatively low, risk of an accident recognised by the guilty plea. This was a risk which was not only foreseeable, it was likely to materialise as part of the normal activity of a visitor staying in the bedroom."
>
> Further held'
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> "For the reasons given, I do not accept the appellant's primary contention. There is no absolute principle that a visitor of full age and capacity who chooses to run an obvious risk cannot found an action against an occupier on the basis that the latter has either permitted him so to do, or not prevented him from so doing. Subject to the opinions of King LJ and Elisabeth Laing LJ, I would dismiss this ground of appeal."

[82] Similarly, both forklift operator as well as Defendant could foresee the danger to the visitors by allowing them to instruct the forklifts at the loading bay without supervision. Defendant could easily employ a person to keep visitors away when forklifts operate on parking bay area where visitors move freely. This is more applicable when loading of heavy consignments to freight trucks.

[83] Defendant's position that Plaintiff was fully negligent cannot be accepted in the analysis of evidence.

[84] In UK Court of Appeal decision of ***The White Lion Hotel (A Partnership) v James*** [2021] EWCA Civ 31 (15 January 2021), analogous Occupiers' Liability Act provision was relied to a person who had fallen from window of a hotel . In that case person had sat on windowsill after opening a window. The court held , that there was no absolute principle that a visitor of full age and capacity who had chosen to run an obvious risk could not have found an action against an occupier on the basis that the occupier had either permitted him to do so or had not prevented him from doing.

[85] In ***The White Lion***(supra) sitting on a sill of a window was highly dangerous act by the occupant without intervention of employee of the hotel .So the contributory negligence was assessed instead of absolving negligence on the part of hotel owners.

[86] Defendant was negligent in allowing three forklifts to be operated without sufficient monitoring at the time of loading of goods to the delivery vehicle and this required Plaintiff to monitor and guide forklift operation. This exposed Plaintiff to danger. So Defendant had breached duty of care towards visitors including Plaintiff under Occupiers' Liability Act 1968.

[87] Defendant was also vicariously liable for negligence of forklift operator as stated earlier .

[88] Plaintiff was also negligent in using his had using his hand at that moment as soon as forklift stopped lowering pellet to the bed of the truck. For this I apportion 20% contributory negligence.

TORT of NEGLIGENCE and STATUTORY BREACH

[89] Plaintiff in the statement of claim pleaded alternatively under paragraph 5(c) , Statutory Breach.

[90] Halsbury's Laws of England [10] under "*Breach of statutory duty and negligence"* stated[11]

[10] Halsbury's Laws of England Statutes and Legislative Process (Volume 96 (2024)) 2. Acts of the United Kingdom Parliament (6) Operation of Acts (iv) Functions of the Court > B. Sanctions and Remedies for Breach of Statutory Duty

[11] .(Halsbury's Laws of England Statutes and Legislative Process (Volume 96 (2024))2. Acts of the United Kingdom Parliament(6) Operation of Acts(iv) Functions of the Cour tB. Sanctions and Remedies for Breach of Statutory Duty

"The tort of breach of statutory duty has a relationship to the tort of negligence, and the same act may amount to the commission of both torts[12], though the incidents of the two torts are not necessarily the same[13].

It may be that, by an anomalous development of case law, negligent contravention of a statute gives rise to liability for the tort of negligence as distinct from the tort of breach of statutory duty[14].

It may constitute negligence at common law if a person who is under a statutory duty contravenes a duty of care arising otherwise than under the statute (that is at common law), where the statutory provisions are **merely part of the setting giving rise to the common law** duty[15]. The courts have drawn a distinction between 'policy discretion' conferred by statute and 'operational powers' so conferred. The latter involve the carrying out, rather than the taking, of policy decisions. **If they are carried out negligently then a person suffering damage will be entitled to recover by suing in negligence**[16].

A criminal breach of a statutory duty may be used as evidence of negligence in a civil action in some cases where a duty to take

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[12] This may arise either because the enactment expressly imposes a duty to exercise reasonable care (see eg the Occupiers' Liability Act 1957 s 2; and negligence vol 78 (2025) para 32 et seq) or because a duty of care is implied.

[13] In *Caswell v Powell Duffryn Associated Collieries Ltd* [1940] AC 152 at 168, [1939] 3 All ER 722 at 732, HL, Lord Macmillan stated as a general proposition that 'if the plaintiff can show that there has been a breach of the statute he has established the existence of negligence'. However there is no certainty that Parliament intended to require the presence of negligence to establish breach of statutory duty: the statutory requirement may impose strict liability. In the absence of any indication that a foreseeability test is being imposed by the enactment in question, such a test is not to be taken as applied: see Larner v British Steel plc [1993] ICR 551 at 562, [1993] 4 All ER 102 at 112, CA, per Peter Gibson J ('It would … seem wrong to me to imply a requirement of foreseeability, as the result will frequently be to limit success in a claim for breach of statutory duty to circumstances where the workman will also succeed in a parallel claim for negligence; thus it reduces the utility of the section') [ie the Factories Act 1961 s 29 (repealed) (duty to provide a safe place of work)]. Cf Hammond v Vestry of St Pancras (1874) LR 9 CP 316 at 322 per Brett LJ ('It would seem to me to be contrary to natural justice to say that Parliament intended to impose upon a public body a liability for a thing which no reasonable care or skill could obviate. The duty may notwithstanding be absolute: but, if so, it ought to be imposed in the clearest possible terms').

These provisions apply to an Act or enactment of the United Kingdom Parliament (see para 220).

[14] The basis of this liability appears to be the suggestion that the mere existence of a statutory duty raises a duty of care of the kind postulated by the tort of negligence, and that this is apart from, and additional to, the duty to comply directly with the requirements of the statute. The alleged liability has been recognised in a long line of authorities culminating in Murphy v Brentwood District Council [1991] 1 AC 398, [1990] 2 All ER 908, HL, where the House of Lords restricted its scope by overruling its own previous decision in Anns v Merton London Borough Council [1978] AC 728, [1977] 2 All ER 492, HL. In consequence, if it exists at all the liability is now probably limited to injury to the person or to health. Cf Caparo Industries plc v Dickman [1990] 2 AC 605 at 617, [1990] 1 All ER 568 at 573, HL; Larner v British Steel plc [1993] ICR 551, [1993] 4 All ER 102, CA.

[15] See eg *Stovin v Wise (Norfolk County Council, third party)* [1994] 3 All ER 467, [1994] 1 WLR 1124, CA.

[16] See Lonrho plc v Tebbit [1991] 4 All ER 973, [1992] BCLC 67; on appeal [1992] 4 All ER 280, [1993] BCLC 96, CA.

> care exists otherwise than by virtue of the Act, for example on a highway[17], or operating a railway[18]. Such a breach may also shift the burden of proof[19] and exclude the defence of volenti non fit injuria[20]. (emphasis added)

[91] So if the conduct of statutory breach had direct consequence such as failure to provide a safety features that could prevent or reduce injury or damage to the victim such breaches can be considered as breach of duty of care . Eg failure to provide safety gear or equipment with protective mechanisms such as Residual Current Device , Unsafe exposure to hazardous material or equipment.

[92] UK Supreme Court decision of ***Baker v Quantum Clothing Group & Ors*** [2009] EWCA Civ 499 (22 May 2009) distinguished the burden under Common Law and Statutory Breach and held

> "At common law, the burden remains on the claimant throughout and he must show that the employer has failed to take reasonable care to avoid the risks of harm which he ought reasonably to have foreseen might arise in the circumstances. **The hallmark of liability at common law is that the employer must be shown not to have acted reasonably.** Reasonableness pervades the whole concept of common law liability. If the employer has acted reasonably, he will avoid common law liability. It might be reasonable for an employer to conclude that a particular risk is so slight or of such little consequence if it occurs that he can properly do nothing to eliminate or reduce it. He might reasonably decide to do nothing because a responsible body of professional or official opinion has suggested that the degree of risk in question is acceptable.
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> However, under the statute, the adjective **'reasonably' serves only to qualify the concept of practicability**. Reasonableness

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[17] See eg Clarke v Brims [1947] KB 497, [1947] 1 All ER 242, where there was a failure to carry a rear light on a car when required by statute, and it was held that there was no cause of action for the breach of statutory duty which was a public duty only, any prima facie case of negligence at common law arising from the breach being displaced by the evidence in the case. As to negligence on the highway see generally negligence vol 78 (2025) para 51 et seq.

[18] North Eastern Rly Co Directors etc v Wanless (1874) LR 7 HL 12; Woods v Caledonian Rly Co (1886) 23 SCLR 798; Williams v Great Western Rly Co (1874) LR 9 Exch 157 (gates open at level crossing where the relevant Act enjoined they should be closed); Blamires v Lancashire and Yorkshire Rly Co (1873) LR 8 Exch 283 (duty to provide communication with guard). See also Thomas v British Railways Board [1976] QB 912 at 923, [1976] 3 All ER 15 at 20, CA, per Lord Denning MR (content of common law duty in negligence was analogous to the co-existing statutory duty); and railways and tramways vol 86 (2023) para 340.

[19] David v Britannic Merthyr Coal Co [1909] 2 KB 146, CA; affd [1910] AC 74, HL. The effect of the Civil Evidence Act 1968 s 11 (convictions as evidence in criminal proceedings: see civil procedure vol 12A (2020) para 1609) is that proof in civil proceedings that the defendant has been convicted for an offence involving negligence casts on the defendant the burden of disproving negligence in relation to that incident: see Wauchope v Mordecai [1970] 1 All ER 417, [1970] 1 WLR 317, CA; and civil procedure vol 12 (2020) para 698; civil procedure vol 12A (2020) para 1609.

[20] Baddeley v Earl of Granville (1887) 19 QBD 423. As to the volenti principle see para 713

> of conduct does not stand as the hallmark by which statutory liability is avoided as it does at common law. The focus of the defence by which liability is avoided, once it has been shown that the place of work was unsafe, is practicability - qualified by reasonableness. Under the statute, the employer must first consider whether the employee's place of work is safe. If the place of work is not safe (even though the danger is not of grave injury or the risk very likely to occur) the employer's duty is to do what is reasonably practicable to eliminate it. Thus, once any risk has been identified, the approach must be to ask whether it is practicable to eliminate it and then, if it is, to consider whether, in the light of the quantum of the risk and the cost and difficulty of the steps to be taken to eliminate it, the employer can show that the cost and difficulty of the steps substantially outweigh the quantum of risk involved. I cannot see how or where the concept of an acceptable risk comes into the equation or balancing exercise. I cannot see why the fact that a responsible or official body has suggested that a particular level of risk is 'acceptable' should be relevant to what is reasonably practicable. In that respect, it appears to me that there is a significant difference between common law liability where a risk might reasonably be regarded as acceptable and statutory liability where the duty is to avoid any risk within the limits of reasonable practicability.
>
> I turn to consider whether it was reasonably practicable for employers in the knitting industry, such as the defendants to these claims, to eliminate the risk of hea

[93] The statement of claim pleaded breached under Health and Safety at Work Act 1996 read with Health and Safety at Work(General Workplace Conditions) Regulations 2003.

[94] There is no dispute that Defendant's work workplace was covered under Health and Safety at Work (General Workplace Conditions) Regulations 2003[21].

[95] Section 10(1) of Health and Safety at Work Act 1996 states;

> "**[HSW 10] Duties of employers and self-employed persons to non-workers**
> 10 (1) Every employer shall ensure that persons not in his or her employment or contracts of service are not exposed to risks to their health or safety arising from the conduct of his or her undertaking while they are at his or her workplace."

[21] Health and Safety at Work(General Workplace Conditions) Regulations 2003. Came in to forced on 1.7.2003 and only exclusions are contained in Section 3 (1) of Health and Safety at Work Act 1996 and not applicable to Defendant's work place.

[96] The above section 10(1) is contained in Part 2 of Health Safety at Work Act 1996 and according to Section 15 of the Act, under Part 2 do not affect civil liability and it reads;

> **"[HSW 15] Civil liability not affected by Part 2**
> **15** Nothing on this Part shall be construed as-
> (a) Conferring a right of action in any civil proceedings in respect of any contravention, whether by act or omission, of any provision of this Part;
> (b) Conferring a defense to an action in any civil proceedings or as otherwise affecting a right of action in any civil proceedings; or
> (c) Affecting the extend (if any) to which a right of action arises or civil proceedings may be taken with respect to breaches of duties imposed by or under the associated health and safety legislation."

[97] From the above provision it is clear that apart from part 2 rest of the provisions are not expressly excluded from civil liability.

[98] Health and Safety at Work(General Workplace Conditions) Regulations 2003 were made in terms of Section 62 of Health and Safety at Work Act 1996.

[99] Regulation 57 of Health and Safety at Work (General Workplace Conditions) Regulations 2003 states.

> **"(4)** All storage containers, **pallets** and other equipment used for handling, transporting or storing goods, materials, substances and equipment shall be regularly inspected and properly maintained in a safe condition."(emphasis added)

[100] In this action it is admitted that pellet was defective and there was a piece of wood hanging on the pellet and this was seen by Plaintiff as well as forklift driver. This also affect the balance of the goods in transportation and requirement for Plaintiff to see how the cargo were placed on the bed of the freight truck.

[101] Regulation 22 of Safety at Work (General Workplace Conditions) Regulations 2003 deals with identification of dangerous activities and risk assessment of such actions. It reads,

> **"[HSW 13,410] Hazard identification and risk assessment**
> 22 (1) **The employer shall identify** any confined space associated with the performance of work and **any foreseeable hazard associated with working in the confined space.**

(2) The employer shall display in a prominent place at or near the means of access, details of all such hazards including details of all types of material or matter stored in or contained in the confined space area.

(3) The employer shall ensure, before any work which involves entry into a confined space is commenced for the first time, **that a risk assessment is undertaken** by a competent person.

(4) A risk assessment undertaken for the purposes of sub regulation (3) shall at least include an assessment of the following—

(a) if the work can be carried out without the need to enter the confined space;

(b) the nature of the confined space and the work required to be carried out;

(c) the various ways in which the work could be carried out,

(d) the **risks associated with the method of work selected;** the plant to be used, and any potentially hazardous condition that may exist inside the confined space; and

(e) the need for emergency and rescue procedures."

[102] There was no evidence of any kind of risk assessment done by Defendant. Analysis of evidence show that Plaintiff was close to forklift operation where he could use his hand to remove a wooden piece from his truck bed. It cannot be accepted that forklift operator was unaware where Plaintiff stood at the time of loading. Plaintiff cannot suddenly appear and cause such a severe injury. .

[103] Defendant's position was that there was a yellow line on the ground and this showed the area where visitors needs to stay. But in evidence forklift operator said visitors can go beyond the yellow line depending on the circumstances. It was also clear that there were no yellow line in the vehicle bay and there was no restriction to enter this vehicle bay or move about in that as this is the same place Plaintiff parked his vehicle before clearance of goods from warehouse.

[104] Forklift operator also stated the safe distance between forklift operation and visitors, was three meters and this distance was not followed by him as well as Plaintiff in this instance.

[105] Regulation 23(f) of Safety at Work (General Workplace Conditions) Regulations 2003 states,

"(f) that all potentially ,hazardous services, **including process services, normally connected to confined space are positively isolated** in order to prevent-

i) the introduction of any material, contaminant, agent or condition harmful to a person in the confined space; and

ii) the activation or **energizing of any equipment or services that may pose a risk to the health or safety** of a person in the confined space."(emphasis added)

[106] Defendant had not isolated the operation of forklift and it was allowed to operate to the general parking bay where visitors frequent .

[107] In this action there no safety measure except a yellow line without any sign board or instructions as to the conduct of persons and operation of forklifts being warned.

[108] In UK house of Lords decision *Caswell v Powell Duffryn Associated Collieries Ltd*, [1939] 3 All ER 722 held, (Per Lord Macmillan)

> "Consequently a civil action for damages in respect of an accident to a miner alleged to be due to a breach of statutory duty on the part of his employers must, in my opinion, be based upon negligence, and be subject to the general principles of law which govern actions of damages for negligence. Indeed, under the Workmen's Compensation Act 1925, s 29(1), it is not permissible to take proceedings otherwise than under that Act in respect of an accident to a workman unless the injury is alleged to have been due to the personal negligence or wilful act of the employer or of some person for whose act or default the employer is responsible.
>
> In such an action as that which is now before your Lordships it is therefore incumbent on the plaintiff to prove that the defendant owed a duty to the deceased workman, that the defendant failed to fufil that duty, and that the death of the workman was attributable to that failure of duty on the part of his employers. The Coal Mines Act 1911, does, however, materially assist the plaintiff in such a case. **It absolves him from proving the existence and the nature of the employers' duty, for it imposes and defines the duty**. **If the plaintiff can show that there has been a breach of the statute he has established the existence of negligence.** It remains for him only to prove that the accident was due to that negligence."

[109] In UK House of Lords decision *Robb v Salamis (M&I) Ltd* [2006] All ER (D) 191 (Dec) the claim was based solely on breach of statutory breach and there was a direct link between the said breach of statutory duty and injury caused . In that case there was contributory negligence on the part of the claimant . It held,

> "26. Regulation 4(2) refers to the working conditions which exist in the premises or undertaking where the work equipment is to be used. These words must be interpreted broadly, bearing in mind that the question is whether the work equipment is suitable. The employer must take account

of work that has to be done in the premises by others than those for whom the work equipment is used or provided, such as that done by the stewards referred to by the sheriff in his finding of fact 12. It was recognised long ago that the employer must take into account what in *Hindle v Birtwistle* [1897] 1 QB 192, 195 Wills J referred to as "the contingency of carelessness". That was a case about the duty to fence all dangerous parts of machinery under section 5 of the Factory and Workshop Act 1878: see now regulation 11 of the Work Equipment Regulations.

27.In *John Summers & Sons Ltd v Frost* [1955] AC 740, 753, referring again to the duty to "securely fence" every dangerous part of machinery, Viscount Simonds said that it was elementary that it is necessary to consider not only the risk run by a skilled and careful man who never relaxes his vigilance. At pp 765-6 Lord Reid quoted authority to the same effect, including Lord Justice Clerk Cooper's observation in *Mitchell*: see also *Close v Steel Company of Wales Ltd* [1962] AC 367.

28. In this case the suspended ladders could be removed. Once removed they would have to be replaced if they were to be used for the purpose for which they were provided. Carelessness in their replacement was one of the risks that had to be anticipated and addressed before the defenders could be satisfied that the suspended ladders were suitable and that fixing of the ladders to the bunks by clamping or otherwise was unnecessary.

..... The employer is liable even if he did not foresee the precise accident that happened: *Miller v South of Scotland Electricity Board* 1958 SC (HL) 20, 34, per Lord Keith of Avonholm. As Lord Reid said in *Hughes v Lord Advocate 1963 SC* (HL) 31, 40, **the fact that an accident was caused by a known source of danger but in a way that could not have been foreseen affords no defence.**

Further held,

32. Before I leave this aspect of the case, however, there is one other matter that I should mention by way of a footnote. The Extra Division was referred to *Griffiths v Vauxhall Motors Ltd* [2003] EWCA Civ 412 **in support of the proposition that a risk assessment was relevant to the identification of what the employer should have done:** p 534. Lord Penrose said in para 109 that he had reservations about some of the comments that were made in that case about the assumptions that the employer is to make when he is considering what is required of him by regulation 4. In para 29 of his judgment Clarke LJ said that the assumption is that the work equipment will be properly operated by properly trained and instructed personnel. In para 47 Judge LJ said that in his judgment work equipment is not to be regarded as unsuitable for the purposes of the Work Equipment Regulations when injury results from inadequate control of or mishandling of the equipment which would otherwise have been safe for use by the employee seeking damages for breach of statutory duty. I think that Lord Penrose was right to draw attention to the problems that these passages might cause if they were to be taken too literally. For the reasons that I mentioned earlier, account must be taken of the risk of mishandling by the careless or inattentive

worker as well as by the skilled worker who follows instructions to the letter conscientiously every time and strives never to do anything wrong. The solution to the problem that these passages raise is to be found in the defence of contributory negligence." (emphasis added)

[110] So proof of breach of Statutory Duty by Defendant proves breach of duty of care statutorily imposed to Defendant. These are specified actions or standards accepted statutorily and breach can be dealt under specified statures and also relevant for proof of negligence on the part of Defendant, but Plaintiff must also prove that such negligence had caused the injury or damage to Plaintiff.

[111] In this action there is no evidence of risk assessment conducted by a competent person.

[112] In the statement of claim Plaintiff had pleaded failure to provide adequate system for supervision of forklift operator and also questioned the competency of the operator .

[113] In the evidence forklift operator said that he had necessary safety gear and Defendant had safety meeting. There was a yellow line but there was no such separation on the parking area.

[114] In this case it is not practically possible to fence the operation of forklift as it needs to deliver goods to freight truck. It is also clear that doing such loading in parking bay of the Defendant used for visitors to park vehicles posed a serious threat of injury to visitors including Plaintiff but the manner in which the injury happened in this action was also due to contributory negligence on the part of Plaintiff which I have discussed earlier.

[115] So in my mind alternate cause of action based on Statutory Breach needs no further elaboration considering circumstances of this case and the manner in which the injury caused to Plaintiff, and already negligence proved through actions of Defendants, employee, forklift operator. Defendant was also negligent as parking area was unsafe when forklift operated.

Quantum of Damages

[116] The Plaintiff suffered a permanent disability, pain, and functional limitations affecting his occupation and daily activities. His dominant right hand remains intact, but the amputation of his left thumb has significantly reduced his gripping ability and forced him to cease heavy vehicle operations including delivery truck driving. It is important to have all fingers functional when driving heavy vehicles such as delivery trucks. So the evidence of Plaintiff can be accepted and not disputed by Defendant. So self employment as delivery truck

driver stopped and he became a taxi driver instead. So the income had decreased.

[117] Plaintiff's employment prior to accident as self employed freight truck driver was comparatively lucrative and he had engaged in the same work for more than twenty years and he said he visited Defendant more than twice a week. This shows that he had build a good commercial client base by that time and his income . He could not drive heavy vehicles due to amputation after injury and Neuroma developed .

[118] Due to the accident on 3.9.2014 following was observed on the medical report

a. Partially amputated left thumb
b. Abnormal sensation/hypersensitive due to neuroma[22]
c. Evidence of mussel wasting
d. 13 % impairment of whole person according to AMA guide line

[119] Plaintiff had '*sustained traumatic amputation to his left thumb*'. This was a sever pain and that the pain even continues due to Neuroma considering severe pain and suffering general damage of $50,000

[120] For this interest of 6% granted from date of writ 29.6.2017 to date of judgment.

[121] Loss of income. According to Plaintiff he was earning about $3,000 per month as a self-employed delivery truck driver and he had provides bank statements from 1.8.2014 to 1.10.2014. During this time he had deposited two cheques and they can be accepted as income he had received for the consignments delivered. These were received prior to the injury and most immediate receipts to his account. It is not sufficient to provide only two months prior to accident without sufficient reason for restriction of such a short period of time. It would have been proper to provide statements from at least six months to one year for assessment of income, but considering the nature of the employment and its potential to grow with economic development are factors that can taken in to consideration.

[122] Plaintiff was a self-employed person who was engaged in collection and delivery of freight from warehouses to factories. He got injured while loading fabric consignment belonging a commercial entity. Plaintiff stated that he visited these sites at least 3-4 times a week. He had his own freight truck with

[22] Neuromas are benign nodular tumors that arise from a nerve. Neuromas are non-neoplastic masses of connective tissue, Schwann cells, and regenerated axons that can develop anywhere in the body. Although there are various types of neuromas, the term most commonly refers to traumatic neuromas, which develop as an injured nerve starts to heal in an uncontrolled manner, resulting in a lump of unorganized axon fibers and non-neural tissue growth. Traumatic neuromas can be caused by any type of nerve injury, including surgical trauma, blunt force trauma, nerve transection, or chronic inflammation. Other neuromas can occur secondary to syndromes (eg, neurofibromatosis) or true neoplastic processes (eg, acoustic neuroma or Morton neuroma).
https://www.ncbi.nlm.nih.gov/books/NBK549838/ (19.8.2025)

back and its back side had facility to transport cargo enclosed. With that kind of facility and experience of Plaintiff had potential for growth.

[123] After injury he was reduced to a Taxi Driver and his evidence that that income was reduced can be accepted. Taxi fares are paid mostly by cash and it is not possible to assess such income without some approximation.

[124] Plaintiff in his oral evidence stated that as taxi driver he received about $ 30-40 income per week. In my mind this should be more and witnesses may tend to give such values for their own benefit as an interested party to this action.

[125] Considering circumstance of the case it is clear that Plaintiff had given up more lucrative self employment as freight delivery person after the injury to his left thumb. There is medical evidence of neuroma which also affects his ability to drive heavy vehicles. So Plaintiff had settled to as taxi driver. So considering evidence before me and impairment of 13% the loss of income per month is assessed as $2,000. Plaintiff was 56 years old at the time of accident had at least more than five years to be self employed as freight truck driver. So loss of employment is assessed as $2,000X12 X5 = $120,000

[126] Considering his continuing paid and neuroma condition for future medical contingencies, $5,000 awarded.

[127] Plaintiff had sought gratuitous payment for nursing care provided by his wife. Plaintiff had sought for six months, There is no evidence such a long period of time he was provided with special care. Considering the nature of the injury and time he was hospitalized $500 allowed for this.

[128] Plaintiff was prescribed antibiotics and pain relive medication in terms of document medical report of 4.3.2015.(document 2 in Plaintiff's Documents). Plaintiff is still having pain due to neuroma condition that had developed. So for medication $500 is allowed despite not having provided receipts for purchases. Plaintiff had also sought travelling expenses considering the circumstances $ 300 allowed.

[129] Since there is contributory negligence of 20% this amount is deducted.

Calculation

General Damages for pain and suffering	$50,000
Interest at 6% from 29.6.2017 to 19.8.2025	$24,427.00 (approx.)
Loss of income is	$120,000
Future medical expense	$5,000
Special Damages	
Gratuitous care	$500
Medical expense	$500
Travelling	$300

Total	$1300
Interest at 3% from date of accident 28.8.2014 to 19.8.2025 (approximately)	$425.00
Total	$201,152.
Less 20% for contributory negligence	$40,230.(approx.)
Total damage	$160,922 (approx.)

[130] Cost of this action is summarily assessed at $3000.

FINAL ORDERS;

(a) Judgment for the Plaintiff against the Defendant in the sum of **$ 160,922**.

(b) Costs is assessed summarily at $3000 to be paid by Defendant to Plaintiff within 21 days from today.

.....
Deepthi Amaratunga
Judge

At Suva this 22nd day of August, 2025.

Solicitors
Daniel Singh Lawyers

Solanki Lawyers