

IN THE COURT OF APPEAL, FIJI
[ON APPEAL FROM THE HIGH COURT OF FIJI]

CIVIL APPEAL NO. ABU 0019 of 2014
(High Court of Labasa; Civil Action No. 39 of 2011)

BETWEEN : FIJI FOREST INDUSTRIES LIMITED

Appellant

AND : RAJENDRA MANI NAIDU

Respondent

Coram : Basnayake JA
Prematilaka JA
Jameel JA

Counsel : Mr. A. Ram and K. Ratule for the Appellant
Mr. A. Sen for the Respondent

Date of Hearing : 16 August 2017

Date of Judgment : 14 September 2017

JUDGMENT

Basnayake, JA

[1] I agree with the reasoning and conclusions arrived at by Jameel, JA.

Prematilaka, JA

[2] I have read in draft the judgment of Jameel JA and agree with Her Ladyship's reasons and conclusions.

Jameel, JA

Introduction

- [3] This is an appeal from the judgement of the High Court dated 18 February 2014 granting the relief sought by the Plaintiff-Respondent (**‘the Respondent’**), by awarding him a sum of \$119,138.00 together with costs in a sum of \$5000.00 summarily assessed. The damages awarded comprised of general damages, interest on general damages, special damages and interest on special damages, loss of future earnings and loss of future FNPF.
- [4] The Respondent filed Statement of Claim dated 2 November 2012 and Writ of Summons dated 28 November 2011. He claimed that the Defendant - Appellant (**‘the Appellant’**) had been negligent and breached its duty to provide a safe work place, and that *res ipsa loquitor* applied. He claimed general damages, special damages, interest, costs of action, and loss of FNPF. The Respondent claimed that a result of the Appellant’s negligence, he had suffered damages, pain, loss of amenities of life, and loss of earning capacity. He also claimed special damages of \$1740.00 for Transport and Medication. In the alternative, the Respondent pleaded compensation under the Workmen’s’ Compensation Act (Cap 94), to be calculated with reference to his wages and percentage disability. He claimed that it was an implied term of his contract of employment that the employer would provide and maintain a safe system of work, effective supervision of same, and would not expose the Plaintiff to risk of damage or injury of which the employer, ought to have known.
- [5] The Appellant filed a Statement of Defence dated 29 February 2011 denying negligence, and pleaded total, or in the alternative, contributory negligence of the Respondent.
- [6] The main matters for determination by this court are whether the Appellant was negligent by failing to provide a safe system of work and proper supervision, whether the Respondent was guilty of contributory negligence and the damages awarded by the High Court are exorbitant. The Respondent suffered injuries which required the amputation of the last finger of his right hand and fractures of the third and ring finger, resulting in 53% impairment of his right hand and 29% Whole Person Impairment.

Pleadings in the High Court

- [7] The Appellant pleaded that its factory was regularly supervised by Factory Inspectors, who had not reported defects or non-compliance. It maintained that the Respondent had been instructed by the Supervising Operator on the proper use of the sanding machine, and that the accident was caused solely due to the negligence of the Respondent, who failed to follow instructions given. It denied that the Respondent was required to engage in any dangerous activity alone, or that he was required to clean the machine but had to only assist the Operator. In the alternative, the Appellant pleaded that the Respondent's conduct had contributed substantially to his injuries and that the doctrine of *res ipsa loquitor* had no application to the circumstances of this case.
- [8] The Respondent in reply stated that the Appellant's defence that the Respondent had failed to follow established guidelines, and that he had previous experience on the sanding machine was false. On the other hand, he claimed that the Appellant's admission that the boards inserted ought to move in only one direction, amounted to an admission of negligence on the part of the Appellant.

The evidence of the Respondent

- [9] On behalf of the Respondent, he, witness Vijay Kumar who had previously worked as a Sanding Machine Operator for 15 years in the Appellant's factory prior to his retirement, and Dr. Jaoji Vulibeci testified.
- [10] The Respondent's evidence was that he was 41 years of age at the time of the accident, having previously worked as a Mechanic for 18 years in a different institution, but had no formal qualifications. He was employed as a casual labourer at the Labasa factory of the Appellant, and was paid \$118.83 per week, after a deduction of \$10.32 as FNPF contribution. He had completed three weeks of work at the Appellant's factory when the accident occurred on 11 November 2009. On the day in question, he reported for work at 4.30 p.m. for the evening shift. For the first time, he was told to work as an assistant to

Ponsamy Narayan ('**Ponsamy**') the Operator of the Sanding Machine. Ponsamy told him to summon a fitter, who came and fixed sand paper into the machine. The fitter worked on the machine for over an hour, and told the Operator Ponsamy to start the machine. The plywood boards were 8'x 4' and 16 inches in thickness. Each board was about 50 kg in weight and had to be individually carried and placed inside the machine. He carried the board to the machine and Ponsamy then told him to push the board from the back. In cross- examination he stated that after the fitter had checked the machine, Ponsamy helped him to put (place) the board in the machine, but that it was he who pushed it into the machine alone. He testified that "when board was placed in roller, Ponsamy went to switch on and told me to push the board". In cross – examination, he maintained that he was not warned of the possibility of the board pushing back if not pushed from the sides.

The evidence of the Appellant

- [11] On behalf of the Appellant, Ponsamy Narayan, (Sanding Machine Operator), Dr. Taloga. Orthopaedic Surgeon, and Tabua Kaukimoce, the Human Resource Officer of the Appellant testified. Ponsamy had worked for 15 years as a Sanding Machine Operator in the Appellant Company. He testified that the machine would eject the board if there is dust inside, and if the machine is clean there is a 100 percent guarantee that it will not throw back, and that the machine was not defective. Ponsamy admitted that when the Respondent pushed the board in, he had one hand on the board and other the switch of the machine adjuster, and he switched on the machine from that position. Thus, although Ponsamy was supposed to be assisted by the Respondent, at the time in question, he had moved away from the machine and was concentrating on switching on the machine, and he allowed the Respondent to perform the main part, with Ponsamy assisting the Respondent, rather than *vice versa*.
- [12] Although both the Respondent and Ponsamy may have lifted the board together, the evidence indicates that it was not pushed by two persons together, leaving the Respondent with no alternative but to push alone from the back. The evidence revealed that the board was ejected due to the machine containing dust. On an examination of the

totality of the evidence, the Respondent's version of the sequence of events is more credible, and establishes the negligence of the Appellant. Thus, the High Court was correct in its analysis of the evidence before it, and in accepting the evidence of the Respondent in preference to that of Ponsamy.

Judgment of the High Court and the Judge's evaluation of the evidence

- [13] The findings of the High Court will be summarized initially and dealt with under the separate grounds of law urged by the Appellant.
- [14] The Appellant's position was that the machine was not defective. Ponsamy stated that it could be the dust in the machine that caused the rejection of the board. This establishes the Respondent's claim that the appellant failed to effectively clean and maintain the equipment and therefore failed to provide a safe workplace and system, and failed to give instructions to the Respondent. Thus, the High Court's finding that the Appellant had failed to provide a safe and proper system of work, or to provide proper and adequate instructions, and exposed the Respondent to risk of injury which it ought to have known or foreseen, is borne out by the evidence and is correct.
- [15] The High Court found that the rejection of the board by the machine which was under the control of the Appellant brought the conduct of the Appellant within the evidentiary rule of *res ipsa loquitor*. For the reasons that will be set out below, this is not a correct finding, in the circumstances of this case. However, this does not impact on the finding of the High Court that the Appellant was negligent.
- [16] The High Court found that the Respondent was not guilty of contributory negligence. In arriving at this conclusion, the High Court also relied on the principle laid down in the case of **Mohamed Amin v Vishwa Chand & Courts(Fiji) Limited**, [2012] FJHC1015, that the allegation of contributory negligence re-enforces the breach of duty and negligence on the part of the Appellant to take reasonable care to supervise and train the

Respondent. On the evidence before it, the finding by the High Court that the Respondent was not guilty of contributory negligence, is correct.

Grounds of Appeal

[17] The grounds of appeal pleaded by the Appellant are as follows: -

1. *That the learned trial judge erred in holding that the Defendant:*
 - a) *failed to provide a safe and proper system of working;*
 - b) *failed to supervise and take precaution;*
 - c) *exposed the Plaintiff to risk of damage or injury;*
 - d) *the Defendant was negligent;*

and failed to properly and/or adequately evaluate all the evidence as to liability.
2. *The learned trial judge erred in law and in fact in holding that the supervisor DW3 did not give instructions when he had done so.*
3. *The learned trial judge erred in law and in fact in interpreting the course of events wrongly.*
4. *The learned trial judge erred in law and in fact in concluding as to liability through a misunderstanding of the actual process of sanding ply boards.*
5. *The learned trial judge erred in law and in fact in holding in paragraph 6.10 that the documents did not attribute fault to the Plaintiff when the report did not address the issue of fault at all.*
6. *The learned trial judge erred in law and in fact in holding that 'no training' and 'no supervision' and in implying that the former resulted in the latter.*
7. *The learned trial judge erred in law and in fact in holding that the sanding machine was defective when there was no evidence to base the conclusion on.*
8. *The learned trial judge erred in law and in fact in holding at paragraphs 6.11 and 6.18 that Section 10 and 36 of the Factories Act were breached when: -*
 - (a) *The same was not pleaded;*
 - (b) *No moving parts needed to be guarded.*

9. *The learned trial judge erred in law and in fact in holding that the machine was dangerous and that the danger was foreseeable and avoidable when such finding was against the weight of the evidence and the pleadings did not assert the same.*
10. *The learned trial judge erred in law and in fact in holding that res ipsa loquitor applied in this instant case when the same was inapplicable and there was no evidence that the sanding machine was designed to take the board and not eject it. Neither did the defendant have to disprove its negligence.*
11. *The learned trial judge erred in law and in fact in holding that there was no contributory negligence and holding that pleading contributory negligence by the Defendant re-enforced the Defendant's breach when the same was pleaded in the alternative.*
12. *The learned trial judge erred in law and in fact in holding that DW 3's evidence was not believable and yet believing the Plaintiff's evidence when the Plaintiff was found to be unreliable and not credible.*
13. *The learned trial judge erred in law and in fact in holding that the Plaintiff was entitled to \$60,000 for pain and suffering and loss of amenities when the same was: -*
 - (i) *not comparable with other awards,*
 - (ii) *exorbitant in all the circumstances of the case;*
 - (iii) *and the Plaintiff's evidence as to the extent of pain and suffering was not believed in light of contrary medical reports and behaviour in court.*
14. *The learned trial judge erred in law and in fact in holding that the Plaintiff was entitled to a multiplier of 8 when a lower multiplier ought to have been used.*
15. *The learned trial judge erred in law and in fact in not taking into consideration that the Plaintiff was a casual labourer who gave evidence that the work was intermittent and not regular.*
16. *The learned trial judge erred in law and in fact in holding that the Plaintiff had altogether lost his capacity to work when the evidence was otherwise.*
17. *The learned trial judge erred in law and in fact in holding that in not taking into account that compensation by way of weekly salaries had been paid to the Plaintiff.*

[18] In the Respondent's Notice dated 3 April 2014, the Respondent seeks an order from this Court in respect of the matters set out below: -

1. *That the Judge erred in law and in fact in not awarding the appropriate damages under the various heads as claimed and made the awards extremely conservatively in all the circumstances of the case having regard to the very serious nature of the injuries.*
2. *That the learned trial judge erred in law in not allowing the Respondent's claim for care giver assistance, disfigurement of hand, future nursing care and supplementary income when there were (sic) sufficient evidence adduced by the respondent of his losses"*
3. *Further and in the alternative, the learned Judge erred in failing to take into consideration the change in socio-economic living conditions before making the appropriate award.*
4. *That the [Respondent] reserves the right to alter or add further Grounds of Appeal on availability of the copy record."*

The grounds of appeal, analysis of evidence and the applicable law

[19] Seventeen grounds of appeal have been pleaded, however multiple grounds will be considered together as they relate to a single issue of law.

Safe workplace

[20] The first to fourth grounds of appeal are whether the High Court erred in holding that the Appellant failed to properly evaluate all the evidence as to the appellant's liability, give instructions and failed to maintain a safe workplace. The evidence revealed the total absence of training, instructions or guidance to the Respondent. Witness Vijay Kumar who testified for the Appellant confirmed that there was no training given before using the machine, and that two persons are needed to push the board. There was no signage near the machine. The machine had rejected the board only once before. The evidence of both parties was that there was no training. The photographs which were shown to the witness in evidence depicting what the Appellant described as the 'correct' way of

feeding the board into the machine, were produced only at the trial. Thus, the High Court was correct in finding that the Appellant failed to give the Respondent proper instructions. I am satisfied that the learned Judge has carefully analyzed the evidence and arrived at the correct finding that the Appellant failed to provide safe and proper workplace. This ground of appeal is therefore dismissed.

[21] The fifth ground of appeal was whether the High Court erred in holding that the documents did not attribute fault to the Plaintiff when the report did not address the issue of fault at all. This document is the Occupational Health and Safety (OHS) form which had to be completed and sent by the Appellant to the Ministry of Labour. The High Court observed that this document which was issued shortly after the date of the accident did not attribute fault to the Respondent. This was an observation in the context of the High Court having to determine which version of the sequence of events that preceded the accident is more credible. It was not a finding that can be the basis of a ground of appeal. This ground of appeal is therefore dismissed.

[22] The sixth ground of appeal was whether the High Court erred in holding that “no training” and “no supervision” was provided and in implying that the former resulted in the latter. The Appellant contended that the High Court was wrong in ‘equating’ the absence of training to mean the absence of supervision. One aspect of supervision is training. The evidence of the Respondent reveals a complete lack of instructions to, and training of the Respondent. It was admitted that where the sanding machine was located, there were not even signs or any visual instructions that could have given the workman a clue on what was expected from him when working on the sanding machine. Witness Vijay Kumar gave evidence for the Respondent. He had been employed at the Appellant Company for 30 years of which, he had worked on the sanding machine for 10 years. He confirmed that he too was not given any training before using the sanding machine, and that two persons are needed to push the board in. In these circumstances and on the other evidence available to it, the finding of the High Court that the Appellant had failed to provide instructions and training and therefore guilty of negligence, was correct in law. This ground of appeal is therefore dismissed.

Content and Nature of the employer's duty of care

- [23] The judgment in Wilsons and Clyde Co v English [1938] A.C. 57, para.9-005(cited in Balkin & Davis 5th ed. at 26.25) is regarded as the seminal case that laid down the content of the duty of the employer to provide a safe system of work. The court held that the duty of the employer is personal and non-delegable. This comprises effective supervision and maintenance of machinery and equipment.
- [24] The employer's duty of care is personal and not discharged simply by the appointment of a competent person to carry out the necessary tasks. In this context, the employer's duty of care concerns not only the work of his employees, but also all such acts as are normally and reasonably incidental to a day's work. Davidson v Handley Page Ltd. [1945] 1 All E.R. 235. However, the degree of care and foresight required from an employer will vary with the circumstances of each case. Hamilton v Naroof (WA) Pty Ltd (1956) HCA 42, (cited in Balkin & Davis, supra at .4).
- [25] The mere fact that an employee disobeys an order does not necessarily deprive him of the protection of his employer's duty, although he may be guilty of contributory negligence. Rands v McNeil [1955] 1 Q.B. 253 cited in Winfield and Jolowitz Tort, 19th ed. at 9-019), though there was no finding of a breach of duty in that case.
- [26] The duty of care imposed on the employer requires him to take reasonable care to not only provide adequate and reasonable equipment, but to also ensure effective maintenance, and the more complex and dangerous the machinery, the more frequent must be the inspection. Murphy v Philips (1876) 35 LT 477, Baxter v St. Helena Hospital Management Committee, The Times February 14, 1972, (cited in Winfield and Jolowitz Tort, supra at 9-022).]
- [27] Bearing in mind and applying these principles to the facts of this appeal, this court finds that the evidence in this case did not establish that the Respondent disobeyed instructions.

Therefore, the duty of protection continued, and the breach of that duty by the Appellant amounts to negligence.

- [28] In regard to the content of the duty of the employer, the Common Law rule is that an employer does not warrant the safety of plant and equipment in respect of latent defects which could not have been discovered by the exercise of reasonable care by persons for whose negligence he is answerable. Davie v New Merton Board Mills [1959] A.C.604, (cited in Winfield and Jolowitz Tort supra at 9-01). However, the benefit of this rule will not protect the Appellant in this case as the evidence of the appellant's witness was that the rejection of the board occurred due to dust collection in the machine. This was known to have previously caused the machine to reject the board. In addition, the machine was under its control, because the Respondent was not an independent contractor, thus making the Appellant liable. The rejection of the board by the machine had no nexus to the non-compliance with instructions given to the Respondent. The machine rejected the board due to lack of effective cleaning and maintenance. In this case the evidence revealed that there was no effective maintenance, and the finding of the High Court that the Appellant was negligent, was correct in law.

Was the machine defective?

- [29] The seventh ground of appeal was that the High Court erred in holding that the sanding machine was defective, when there was no evidence to base the conclusion on. The High Court did not find that the machine was defective, and therefore the seventh ground of appeal is without basis and is dismissed.

Was the machine dangerous?

- [30] The eighth and ninth grounds of appeal are whether the High Court erred in law in finding that the sanding machine which injured the Respondent was dangerous in terms of the Factories Act (Cap 99), that the moving parts needed to be guarded, and that the danger was foreseeable and avoidable. The Appellant states that the High Court erred in

holding in paragraphs 6.11 and 6.18 of the Judgment that the Appellant had breached sections 10 (Safe workplace) and 36 (dangerous parts of a machine) of the Factories Act, when this had not been pleaded, and when no evidence was given that moving parts of the machine needed to be guarded.

[31] This ground was not pleaded in the Statement of Claim, but in the written submissions filed in the High Court, he claimed the Appellant had breached sections 10, 34 and 36 of the Factories Act and section 12 of the Health and Safety Act 1966. Besides the fact that there was no legal basis to consider this matter, in this context, it is useful to remember the distinction between a Public Law remedy for breach of a statutory provision by a public authority, and a private law right to sue for breach of a statutory provision by a private entity.

[32] Thus, although the Appellant was subject to the Factories Act, the Respondent's case in the High Court was not based on a civil remedy in tort for breach of the provisions of the Factories Act, nor was there any evidence that the machine was 'dangerous' within the meaning of section 36 of the Act. The issue for determination before the High Court was not whether the Appellant was in breach of the Factories Act. Instead, the matter for determination was whether the Appellant had breached the duty of care imposed on it under the Common Law, as an employer. Thus, the reference to and the finding of the High Court under the Factories Act was not correct.

[33] This point has been explained by Lord Browne Wilkinson in **X (Minors) v Bedfordshire County Council** [1995] 2 A.C. 633 at 731, and cited in **Vatukoula Joint Venture & Emperor Gold Mining Co. Ltd v Deo** [2008] FJCA 121 at paragraph 2.

"The basic proposition is that in the ordinary case a breach of statutory duty does not, by itself, give rise to any private law cause of action. However, a private law cause of action will arise if it can be shown, as a matter of construction of the statute, that the statutory duty was imposed for the protection of a limited class of the public and that Parliament intended to confer on members of that class a private right of action for breach of the duty."

- [34] The on-going debate on whether a civil action in tort can be based on breach of a statutory provision, need not be dealt with in depth in this case, because that was not the basis of the Respondent's action in the High Court. However, to place the matter beyond doubt in this case, it is sufficient to note that the preponderance of authority yet tends to hold that although the Common Law duty of care has been incorporated into statute, nevertheless it was not the intention of Parliament to provide a foundation for a civil action, unless the claimant can show he falls within the specific class Parliament intended to cover, and there are specific words to that effect. **Morrison Sports Ltd v Scottish Power UK Plc.** [2010] UKSC 379

Res Ipsa Loquitur

- [35] The tenth ground of appeal is whether *res ipsa loquitur* applies in the circumstance of this case. The Appellant contends that the High Court was in error in holding that it applied in this case. *Res ipsa loquitur* is an evidentiary rule that enables the court to infer negligence from the circumstances in which the accident occurred, if there is no explanation for it. However, for the reasons set out below, the rule did not apply to the facts of this appeal. This ground of appeal is therefore dismissed.
- [36] In **Fontaine v. British Columbia (Official Administrator)** [1998] 1 S.C.R. 424, the Supreme Court of Canada held as follows: -

Res ipsa loquitur, or "the thing speaks for itself", has been referred to in negligence cases for more than a century. In Scott v. London and St. Katherine Docks Co. (1865), 3 H. & C. 596, 159 E.R. 665, at p. 596 and p. 667, respectively, Erle C.J. defined what has since become known as res ipsa loquitur in the following terms: There must be reasonable evidence of negligence.

"But where the thing is shewn to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care."

18 These factual elements have since been recast (see Clerk & Lindsell on Torts (13th ed. 1969), at para. 967, quoted with approval in *Jackson v. Millar*, 1975 CanLII 20 (SCC), [1976] 1 S.C.R. 225, at p. 235, and *Hellenius v. Lees*, 1971 CanLII 18 (SCC), [1972] S.C.R. 165, at p. 172):

*The doctrine applies (1) when the thing that inflicted the damage was under the sole management and control of the defendant, or of someone for whom he is responsible or whom he has a right to control; (2) the occurrence is such that it would not have happened without negligence. If these two conditions are satisfied it follows, on a balance of probability, that the defendant, or the person for whom he is responsible, must have been negligent. There is, however, a further negative condition: (3) there must be no evidence as to why or how the occurrence took place. If there is, then appeal to *res ipsa loquitur* is inappropriate, for the question of the defendant's negligence must be determined on that evidence.*

If the facts are known, the inference is impermissible and it is the task of the court to review the facts and to decide whether they amount to the plaintiff having satisfied the burden of proof which is upon him.” (emphasis added).

- [37] In this case, the evidence revealed that the accident occurred due to lack of effective maintenance by the Appellant. Therefore, it was not open to the High Court to have held that “the Appellant had not disproved negligence”. In view of the availability of evidence which established that it was the presence of dust in the machine that caused it to reject the board which injured the Respondent, the High Court erred in arriving at the finding that *res ipsa loquitur* applied. This ground of appeal is therefore dismissed.

Contributory negligence

- [38] The eleventh and twelfth grounds of appeal are that the High Court was in error in holding that the Respondent was not guilty of contributory negligence. The Appellant pleaded contributory negligence on the basis that the Respondent failed to follow the instructions given to him to hold the board from the side and push. The evidence was that there was no training and no instructions given to the Respondent.

[39] An examination of the evidence of Ponsamy, who was supposed to be only assisted by the Respondent, revealed that this is not what happened. Ponsamy had only one hand on the board, and his other hand was on the switch whilst looking backwards to see if the board was feeding in properly. His only instructions to the Respondent was to push the board in. This, together the absence of signage and the fact that the Respondent was wearing safety equipment at the time, totally negates contributory negligence on the part of the Respondent. The injuries suffered by the Respondent were a direct result of the negligence of the Appellant in maintaining and ensuring the implementation of a safe and effective system of work. Thus the finding of the High Court that the Appellant was negligent and had breached the duty of care that it owed to the Respondent, and that the Respondent was not guilty of contributory negligence, is correct.

General Damages - Pain and suffering and loss of amenity

[40] The thirteenth to seventeenth grounds of appeal are that the quantum of \$60,000.00 awarded for pain and suffering was exorbitant and not comparable to similar awards.

The High Court made the following awards: -

General damages	\$60,000
Interest on General damages	4800.00
Special Damages	532.00
Interest on special damages	\$56.00
Loss of future earnings	\$ 49,450.00
Loss of future FNPF	\$4300.00
Total	\$119, 13.00

[41] After the accident, the Respondent did not receive immediate medical attention. His injured hand was wrapped in a dustcoat by the factory workers, and he lay on the floor unattended, was taken to the hospital half an hour later, and was in severe pain throughout. Despite medication, pain continued. He was examined by a Doctor upon

admission, but not seen by a Doctor for three days, during which period he was given no pain killer. During this time, he was unable to bathe or change his clothes. After 5 days in hospital, his hand was operated under local anaesthesia. He was hospitalised for two weeks, during which time his wife, brother and sister helped him. The medical evidence reveals the extent of pain and trauma in the aftermath of the accident, and he continued to suffer pain even at the time he gave evidence, almost four years after the accident.

- [42] It is undisputed that the Respondent's hand was thrown against the unsawn boards and the small finger on his right hand was badly injured, and required amputation. His index and third finger were also seriously injured and rendered permanently non-functional.
- [43] He had to attend the clinic for three years after the accident, and was given pain killers even at that time. After being discharged from hospital, he continued to need assistance to attend to basic tasks, such as buttoning his clothes and showering.
- [44] Dr. Jaoji Vulibeci, Consultant Surgeon attached to the Labasa Hospital testified on behalf of the Respondent. His assessment of impairment was based on the "Guides to the Evaluation of permanent impairment" of the American Medical Association. On this basis, he opined that the Permanent, Whole Person Impairment suffered by the Respondent was 23%. His evidence was that the Respondent had suffered severe pain and it will be difficult for him to engage in manual work, as well as to work as a Mechanic, which was his job. He will not be able to use a digging (garden) fork, as he has no fingers, and his hand will eventually be of no use with age. The evidence indicates that the Respondent has may also have suffered some disfigurement of his hand, and will be handicapped by the lack of the full use of his hand. Dr.Vulibeci, testified that the ankylosis (complete immobility) suffered due to the amputation of the fingers, will worsen with age. The Respondent was in severe pain, and because the trauma was to the dominant hand, the suffering is greater. The Respondent had undergone physiotherapy for three years after the accident. He testified that he could not say whether the Respondent will be able to train his left hand on a permanent basis. Dr .Vulibeci agreed with the assessment of Dr. Taloga, whose Report dated 3 December 2012, certified that

the Respondent had suffered a permanent whole person impairment of 29%. This medical evidence was not challenged, and Dr. Taloga's Report was obtained on the initiative of the Appellant, and he testified on behalf of the Appellant. Unlike in the case of the loss of a leg, which can be replaced, the likelihood of replacement of a hand or fingers incapacitated is almost negligible.

- [45] The medical report of Dr. Vulibeci revealed the gravity of the injuries suffered, and states as follows: -

"Rajendra sustained multiple lacerations over his fingers and evidence of crush tissue over the right fifth finger and over the proximal interphalangeal joint of the 3rd and 4th finger.

X ray showed commuted fractures of middle phalanx of 3rd, 4th and 5th finger with joint involvement.

Rajendra had wound wash of his wound to clear out dead tissues and repair the skin which can be repaired instantly.

The 5th finger however was amputated as the blood supply was not adequate.

He was treated with antibiotics and physiotherapy before being discharged on 19/11/09.

Rajendra has been attending clinic regularly. Hand specialist had seen his fingers and advised no need for operation but needs extensive physiotherapy.

A final examination was done on 27/7/10 with the following findings:

"History

Pain almost everyday especially at night

Physical Examination

Amputation of 5th finger at metacarpal head

*4th finger - fixed flexion at 30 degrees -PIP
DIPJ normal*

3rd finger - fixed flexion at 30 degrees -PIP

MCPJ no flexion

DPJ normal

1st and 2nd - normal movement.

Calculation for the Permanent Impairment was done using the 5th Edition of "Guides to the Evaluation of Permanent Impairment" by the American Medical Association.

The Permanent Impairment Percentage = 23%".

- [46] Dr. Taloga, Orthopaedic Surgeon who testified for the Appellant was shown the Medical Report of the Respondent and he described the Respondent as 'partially disabled', and stated that the Respondent did not complain of pain when he examined him. Dr. Taloga's Report revealed that the Respondent's hand had suffered 53% hand impairment. His diagnosis was that the Appellant had suffered Ankylosis, which is complete immobility of the fingers. It had affected his ring finger, middle finger and thumb of the right hand, Ankylosis on the ring finger was 75 degrees, in the middle finger it was 90 degrees, and in the index finger it was 55 degrees. This, taken in conjunction with the amputation of the small finger, rendered the Respondent's right hand, his dominant hand, almost non-functional and 53% impaired.
- [47] As a Mechanic, the Respondent is completely dependent on the total functionality of his hands. Even if he were to train his left hand fully, nevertheless in view of the 53% impairment of his right hand, it can be reasonably presumed that whether casual or permanent, the Respondent's prospects of future employment are bleak by any standard, as a Mechanic cannot function effectively with one hand. The ability of the Respondent to earn a livelihood through the skills or aptitude he had before the accident incapacitated him, has been severely affected, and the permanent impairment caused to his hand has rendered him almost unemployable. This must be properly compensated.
- [48] In regard to the quantification of damages, the Respondent relied on the cases of Sheik Mohamed Amin v Vishva Chand and Courts Fiji Civil (s Action 39 of 2008 (13 April 2012), Eta Nageletia v Kumar (2012) FJHC 29, Dre v Ministry of Health and AG

[2009] FJHC 129, and Nasese Bus Co. Ltd v Chand (ABU 40 of 2011) (08 February 2013). The applicability of these judgments to this appeal will be considered below.

[49] The Appellant on the other hand contends that the cases relied on by the Respondent are not applicable, and that the Respondent should be awarded damages on the lines of the 'comparable' cases of Singh v Domalco Limited [2000] FJHC 197 and Nisha v Eastern Apparels Company Limited [2001] FJHC 221 (7 August 2001), because the injuries suffered by the claimants in the cases relied on by the Respondent are different from the injuries suffered by the Respondent in this case. The Appellant submits that in assessing damages to be awarded, the authorities relied on by the Appellant are more relevant, and comparable to the nature of the injuries suffered by the Respondent. The Respondent on the other hand, states that those judgments are over a decade old and are not realistic.

[50] In Shankar v Naidu [2001] FLR 358 at 364, the Court of Appeal stated that: -

The consequences of injuries sustained in an accident no doubt depend to a considerable extent on the nature of those injuries but the consequences also reflect the particular effect which those injuries have on the individual who suffers them. Mental and emotional effects although more difficult to assess and to translate into monetary terms are also injuries which are to be taken into account.

A comparison therefore between the sums awarded in individual cases is only of value if it takes into account all of the consequences both present and future physical mental and emotional in terms of the circumstances of the individual whose condition and future prospects are under consideration."

[51] The guidelines to be followed in determining compensation for pain and suffering and loss of amenities in cases of personal injuries, were recently laid down by the Supreme Court in The Permanent Secretary for Health and Another v. Kumar [2012] FJSC 28 where at p. 37 of its judgment, the Supreme Court held as follows:

"[37] There are three guiding principles in measuring the quantum of compensation for pain and suffering and loss of amenities. First and foremost, the amount of compensation awarded must be fair and should compensate the

victim of the injury in the fullest possible manner, bearing in mind that damages for any cause of action are awarded once and for all, and cannot be varied due to subsequent eventualities, some of which could not even be anticipated at the stage a court makes an award. Hence, an award of damages should not only be fair, but also assessed with moderation, even though scientific accuracy is impossible. The second principle is that the sum awarded must to a considerable extent be conventional and consistent. Thirdly, regard must be had to awards made in comparable cases, in the jurisdiction in which the award is made. However, it is also open for a court to take into consideration a comparable award made in a foreign jurisdiction, particularly in cases where the type of injury is not very common, provided that the court takes into consideration differences in socio-economic and other relevant conditions that might exist between the two jurisdictions

[52] In Naseese Bus Company (supra) the Court of Appeal followed the guidelines laid down in Kumar (supra), and proceeded to enhance the award of the lower court. The ratio in Kumar (supra) requires that the court be mindful that damages in cases of personal injury are to be determined by anticipating eventualities that may not have been lurking in the immediate background. The ‘comparison’ that the awarding court is required to make, is not to be interpreted to be confined only to the nature of the injuries suffered, but must also include the effect of the injury on the claimant.

[53] The correct approach in respect of awards in precedents, was described by the court in Naseese Bus Company & Virendra Nair v Chand (supra), by which Calanchini, P stated that: -

“A 1994 decision cannot be relied upon as a reliable guide for the award of damages to be assessed at a trial in 2010.

[54] I now proceed to consider the authorities relied on by the Appellant to determine the suitability of their applicability to this case. In Singh v Domalco (supra) the Plaintiff, a carpenter by profession, had the ring finger and little finger of his left hand amputated as a result of an accident. The medical evidence confirmed that his hand impairment was 8%. The court took the view that this did not take away his capacity to work, or continue to be employed, and awarded \$42, 175.00 as general damages (Pain and suffering - \$25,000.00, Interest on Pain and suffering- \$2175.00 and loss of earning capacity-

\$15,000.00). This court is not inclined to follow the precedent laid down in that case, as even the percentage of impairment is not comparable.

- [55] In **Nisha v Eastern Apparels Company Limited** (supra), a material cutter in a garment factory had the little finger of her left hand amputated as a result of a workplace accident. She was earning \$35.59 per week. She was 26 years of age at the time of the accident. The Court used a multiplier of 12 and, and awarded \$22, 208.16 as general damages. The circumstances of the Plaintiff in that case are not comparable with the Respondent in this case, and this court is not inclined to follow the precedent laid down therein.
- [56] In computing general damages for pain and suffering, the Learned Judge of High Court had agreed with the submissions of Learned Counsel for the Respondent that the injuries in the case relied on by the Appellant are not comparable with the injuries suffered by the Respondent. However, the learned Judge then proceeded to state that the cases of **Nisha v Eastern Apparels Company Limited** (supra) and **Singh v Domalco** (supra) were decided more than a decade ago, thus indicating his inclination to follow the more recent awards.
- [57] The principles laid down in **Kumar** (Supra) were followed by the Court of Appeal in **Mere Finau Labaivalu v Pacific Transport Co. Ltd** Civil Appeal No. ABU 0059 of 2014 (26 May 2017), when it increased the quantum of general damages awarded by the High Court.
- [58] The Respondent submits in his written submissions that whilst a medical assessment may describe the functionality of a limb in the form of a percentage, it is not indicative of the actual permanent disability of a person. I understand this to mean that the percentage of disability alone is not the correct basis for calculation of damages. What must be considered is the degree of incapacitation of the limb, and its impact on the future of the victim. In this case the assessment of Dr. Taloga was that the total hand impairment was 53% and Upper Extreme Impairment was 48%. Thus, the right hand was effectively and permanently disabled and the injury had rendered the hand almost non-functional.

[59] The Respondent relied on the judgement in Eta Naqelitia v Ram Kumar [2012] FJHC 29, in which the High Court awarded \$70,000 for pain and suffering when the total disability was 19%. In this case, the total percentage of disability of the Respondent is 29%.

[60] In Dre v Ministry of Health (supra), the claimant was a weaver by training. She suffered gangrene in her hand due to medical negligence. Her main source of income was from the sale of a special type of mat that she wove, using her hands. The medical evidence assessed her incapacity is 57% total permanent disability. However, for the purposes of deciding her future earning capacity, the court determined that her disability is 90%, because the type of work that the Plaintiff was doing prior to the injury, required the use of her dominant hand. This shows that the effect of the nature of the injury will vary based on the source of pre-injury income. She was awarded \$70,000.00 as general damages, (out of which \$ 11,340.00 was for loss of future earnings).

[61] It is useful to quote from the judgment of in Dre v Ministry of Health, (supra) because the court referred to a series of previous cases and stated as follows:-

"[49] In Suruj Narayan (supra), the plaintiff suffered a wound to his ankle in the workplace in 2003. He was treated at the Labasa Hospital without due care which resulted in his leg being amputated because of infection. Like here, the plaintiff suffered severe pain before amputation but less post-op. Justice Byrne awarded \$70,000 for pain and suffering and loss of amenities of life in a judgment delivered in 2008.

'[50] In Kotoiwasawasa & Another v Govind & the Attorney General [Civil Action 192/2000], the Plaintiff suffered an injury to her leg in a motor vehicle accident in 1996 which resulted in amputation of her leg below the knee. Justice Pathik awarded \$95,000 for pain and suffering in a judgment delivered in 2003. His Lordship has conveniently summarised the awards that His Lordship had made over the years, for which I am grateful, and re-list them here for convenience:

- a. Sharma v Prasad [HBU 40/88, Civ Appeal 73/91] – amputation of leg - \$100,000.*
- b. FSC & Anor v Subramani & Anor [HBU47/93] – loss of both eye sight- 75 % - \$37,500.*
- c. Salaitoga v Anderson [Civ Appeal 26/94] – severe head injury - \$85,000.*

- d. *AG & Dr Elliot v Sharma* [Civ Appeal 41/93] – loss of leg - \$50,000.
- e. *AG v Waqabaca* [Civ Appeal 18/98] – cerebral palsy – loss of all bodily function - \$85,000.
- f. *Flour Mills of Fiji Ltd v Raj* [2001] FJCA 35 – loss of right arm - \$85,000”

In Flour Mills of Fiji Ltd v Raj (supra) the Plaintiff's right arm required amputation above the elbow and he has been left with severe limitation of movement in his left hand and arm, his disability being assessed by a medical witness at 100% loss of working capacity. The trial Judge's assessment of \$85,000 for pain and suffering was upheld by the Fiji Court of Appeal.”

- [62] In this case, since the Respondent is a Mechanic and has no other known skill or training, the loss of more than 50% of the use of his dominant hand, could be equated to a substantial loss of working capacity.
- [63] The Appellant submitted in its written submissions tendered to this Court (paragraph 3.51) that “*The onus is on the Plaintiff to try rather than acting as if his life is over*”. However, this is not a fair submission considering the nature of the work the Respondent was engaged in prior to the accident, taken together with the medical evidence which confirmed 53% permanent impairment of his right, dominant hand.
- [64] In Sheik Mohamed Amin v Vishwa Chand and Courts (Fiji) (supra) Calanchini, P held that: -

“in line with recent awards I consider a sum of \$85,000 as general damages for non-pecuniary loss in the form of past and future pain and suffering and loss of amenity / enjoyment of life as reasonable compensation”.

The Appellant claims that this case is not relevant as it pertains to a back injury. However, the principles laid down therein are relevant to the determination of damages in regard to pain and suffering, and this Court is inclined to follow the principles laid down in determining damages due to the Respondent in this appeal. That sum of \$85, 000.00 was awarded in 2012.

[65] In regard to this submission, this court takes the view that the assessment of damages must be done in the context of the skills that the Plaintiff is left with as a result of the accident. Thus, a fashion model whose face is badly disfigured as a result of an accident cannot be treated similarly to an athlete, for whom facial disfigurement may not have grave consequences. It is not enough to simply compare injuries. Injuries must be viewed in the context of the claimant's pre-accident employment, and all the other concomitant factors that will be material to the victim's future life. Accordingly, the Respondent as a Mechanic who has a permanent disability of more than 50% of the use of his dominant right hand cannot be regarded as 'similarly' circumstanced as others merely because they too suffered injuries to their hands or fingers.

[66] Therefore, the damages awarded by the High Court were not exorbitant in all the circumstances of the case. This court considers it reasonable in all the circumstances to enhance the award of general damages for pain and suffering and loss of amenity to \$90, 000. A sum of \$90, 000.00 in 2017 should not therefore be regarded as unreasonable. This matter will be discussed in detail below.

General Damages – Loss of future earnings

[67] The rationale for awarding damages for loss of future earnings is to compensate the claimant for diminution in earning capacity occasioned by the injury. The predicted future loss of income is based on the prediction of the sum the claimant would have earned, if not for the injury suffered.

[68] In his written submissions, the Respondent relied on the following passage in Charlesworth on Negligence, 6th Edition, which reflects position followed by most courts in quantifying awards of damages in cases of personal injury. It states as follows: -

“... The normal method of assessment used by the courts is first to calculate as accurately as possible the net annual loss suffered, which is usually based on an average of the plaintiff’s pre-accident ‘take -home pay’ as the multiplicand. Next a figure for a multiplier has to be chosen which will be appropriate in all the circumstances having regard to such matters as the age, pre-accident -stage state of health, the past work record and the important factor that the Plaintiff will be receiving a lump sum payment, which it is expected to be invested.” (emphasis added)

- [69] The Appellant submitted that in assessing future earnings, the High Court ought to have used the multiplier of 4, and not 8. It claimed that the Respondent had not totally lost his capacity for work. This court is unable to agree with that submission. The Respondent contended that he was 41 years of age at the time of the accident, and was expected to be able to work until the age of 55. This Court considers it possible for the Respondent to have been able to work as a casual labourer until the age of 65, and this court considers it reasonable to use the multiplier of 11. This matter will be discussed in detail below.
- [70] Although the Appellant contended that the Respondent had not lost his ‘capacity’ for work, this also ignores the reality that until the Respondent trains his left hand, if that is indeed possible, he will yet probably, remain unemployable and continue to suffer financial loss. Thus, the contention of the Appellant that the Respondent has not lost his capacity to work is a misconception both in fact and law.
- [71] The Appellant submits that the award of damages to the Respondent ought to have been done bearing in mind that he was a casual labourer. This court takes the view that the damages for pain and suffering, and for loss of future earnings too, cannot be determined based on the status of an employee that is, whether he was a casual or permanent. It must depend on the pre-accident status of the claimant, and consequences to the individual plaintiff (**Bresatz v Przibililla** (1962) 108 CLR 541 at p.548, per Windeyer J; cited in *The Law of Torts* by Balkin & Davis 5th ed. At 11.28), and on the likelihood of re-employment, whether casual or permanent.

[72] The fact that the claimant is a casual worker is not a criterion that must be allowed to work to the prejudice of the Respondent. On the other hand, it is significant to bear in mind that a casual labourer such as the Respondent is more likely to be prejudiced by physical incapacitation because re-employment is dependent on his being physically fully-functional at all times, so that he may readily secure 'casual' employment whenever the opportunity arises. In other words, he must be in a state of constant readiness. Unlike in the case of a person who uses his intellectual skills to generate income, and who may not be severely prejudiced by the loss of a finger or even injury to a more important limb, in the case of a labourer, his body and functional limbs can be regarded as the 'tools of his trade'. Thus, any injury that reduces the possibility and choice of work, is a factor that must necessarily be considered in awarding damages.

[73] Although cases in which victims suffered similar injuries will be relevant, they will not be determinative of the quantum of damages for loss of future earnings due in all cases. In determining the quantum of damages, the consequences of the injury to the Plaintiff is the most vital factor. This is because similar injuries might have dissimilar consequences for different persons. Thus, the court must have regard to the totality of the medical evidence before it, and the particular consequences for the victim and claimant, and not confine the assessment of damages to the external nature of the injuries alone, for reasons that will be explained below.

[74] In paragraph 33 of its Written Submissions filed in the High Court, the Appellant contended that: -

"the Plaintiff was employed only as a casual labourer by the Defendant. As such the Plaintiff cannot claim that he would have remained in the permanent employment of the Defendant for the next ten years".

[75] The test is not whether the Respondent will remain employed by the Appellant. The relevant question would be whether there was the likelihood of the Respondent securing employment as a casual labourer in any place. The Appellant relied on the case of **Prasad v Kumar** [2008] FJHC 368 in which the court used the multiplier of 4 in respect of a casual labourer who was 44 years of age at the time of the accident, and urged that this be

followed by the High Court too. The Appellant contended that because the Respondent was “*a casual labourer with no guarantee of work he would not have worked throughout the rest of his working life*”.

[76] This submission is too sweeping. Whilst as a general proposition it may be true that a casual labourer can have no guarantee of work, it is significant for a Court in determining damages for loss of future earnings arising from injury to bear in mind that the existence of the injury certainly impacts on the ability to find even casual employment in the future. Accordingly, there is no legal justification to use a lower multiplier purely on the basis that the claimant is a casual labourer.

[77] The evidence was that the Respondent earned \$118.83 per week. The loss of future income in this case is premised on the assumption that the Respondent could have worked as a casual labourer until he reached the age of 65, had he not suffered injury. There was no evidence of any factor that was particularly relevant which could drastically reduce the potential working life that he had left, except of course the uncertainties and vicissitudes of life faced generally by any person. Therefore, in this case, the court is willing to assume that the Respondent could reasonably expect to work as a casual labourer until the age of 65, and considers it reasonable to use the multiplier of 11.

Special Damages

[78] In **Jefford v Gee** (supra), at 1208 Lord Denning described Special damages as follows:-

“Special damages mean the actual pecuniary loss suffered by a plaintiff up to the date of trial owing to the wrongful act of the defendant. In principle, a plaintiff should be awarded interest on the sum which represents that loss as from the date it was incurred.”

[79] The Respondent claimed \$1350 as Special damages for transportation and \$390.00 for medicine. The High Court did not allow these sums in full. In paragraph 101 of its written submissions filed in the High Court, the Appellant has conceded that a sum of \$532.50 is

due. This amount was awarded by the High Court, and this court will not interfere with that award. Interest on this will apply from 9 November 2009 (date of the cause of action) to 16 May 2013 (date of service of writ).

Respondent's Notice

[80] The Respondent's claim for supplementary income from farming was not pleaded, and was introduced only in the evidence of the Respondent. There was no evidence of past earnings from gardening or extra work the Respondent claimed he used to engage in. Although the Respondent states in paragraph 58 of his written submissions filed in the High Court that his claim of \$36,400.00 for loss of supplementary income went unchallenged, this is not borne out by the record. In cross - examination (p. 192 of the record of the High Court) when questioned he admitted he had not engaged in vegetable farming for two years, and when asked whether he claims loss for vegetable farming, he gave no answer. When it was suggested to him in cross- examination that he claim was false, once again he gave no answer.

[81] Under the head of supplementary income, when he testified in court, he claimed he had suffered loss of income from the sale of vegetables. This was not pleaded, and there was no acceptable evidence in that regard. This has been dealt with above.

In **Rawaitale v Tropic Forest Joint Venture Co. Ltd.** [2011] FJHC 281 it was held that:-

[67] The bare statements are not sufficient when a person is claiming special damages. The court should not be called on to assume that the plaintiff suffered such a loss, and also cannot assess a figure in the absence of satisfactory proof of special damages. It is incumbent on the claimant to call evidence supporting their claims. They cannot simply rely on what is stated in the written submission and expect to be awarded those sums."

In these circumstances, the learned Judge did not err in not awarding damages under that head, and this ground of appeal is dismissed. Thus, in the absence of evidence, there is

no legal basis to award damages for loss of supplementary income claimed. Therefore, the claim contained in paragraph 2 of the Respondent's Notice is refused.

[82] The first issue raised in the Respondent's notice was that the Learned trial judge did not award damages under the different heads claimed, and that the awards made were conservative, and without regard to the serious nature of the injuries.

[83] In paragraph 8 of the Statement of Claim the Respondent stated as follows:-

"That as a result of the accident and the resulting injuries, the Plaintiff suffered loss and damage, pain and suffering, loss of amenities of life and loss of earning capacity."

[84] The unchallenged medical evidence was that eventually, with age, his hand would be of no use, and eventually, even his entire arm could be of no use, and the medical evidence taken in its entirety indicates that there has been disfigurement of his hand as well. The judgement of the High Court does not reveal that adequate consideration has been paid to these important factors which have every possibility of causing future pain and suffering, loss of amenities and loss of future earnings to the Respondent. In these circumstances, this court finds that the sums awarded by the High Court under these heads was inadequate. On a consideration of all the evidence, and the finding that the Respondent was not contributorily negligent, this court substitutes a sum of \$90,000 in place of the sum of \$60,000 awarded as general damages by the High Court.

[85] The second issue raised in the Respondent's Notice is that the learned trial judge erred in law in not allowing the Respondent's claim for care-giver assistance, disfigurement of hand, future nursing care and supplementary income when there was sufficient evidence adduced by the Respondent of his losses. There was no evidence that the Respondent needed long- term nursing care. It is true that he had suffered loss of amenities by having suffered the loss of the total use of his hand, but this does not equate to requiring continuous future nursing care. Therefore, the learned Judge did not err in refusing damages under that head.

- [86] The third issue raised as an alternative to the in the Respondent's Notice was that the learned Judge erred in failing to take into consideration the change in socio-economic living conditions before making the appropriate award. In regard to this issue, there was no special evidence relating to any specific socio-economic conditions which the learned failed to consider in arriving at the award. Therefore, this court finds no basis to consider this issue.
- [87] The Respondent was 41 years of age at the time of the accident, and was paid until he was 44 years of age. The 'retirement age' referred to in the judgements relied on by both parties refers to a retirement age when there is a formal contract of employment and a specific retirement age. It will not apply in that manner in respect of a casual labourer because there is no such definite retirement age. Therefore, it is reasonable to presume that he could have been employed as a casual labourer up to the age of 65, and therefore to have had about 21 years of working life left, if not for the injuries suffered. On this basis, this court revises the award for future earnings as follows: -

wages per week- $118.3 \times 52 \times 11 = 67,970.00$.

In place of the sum of \$49,450.00 awarded under the head of loss of future earnings, this court substitutes a sum of 67, 970.00 as loss of future earnings.

Interest on the damages awarded

- [88] In regard to damages for pain and suffering and loss of amenities, as well as the time from which interest must be awarded by the court, Lord Denning MR in **Jefford v Gee** [1970] 1 All ER 1202 at 1209 laid down as follows:-

“(iii) Pain and Suffering and Loss of Amenities

When the compensation payable to a plaintiff is not for actual pecuniary loss but for continuing intangible misfortune, such as pain and suffering and loss of amenities (which cannot fairly be measured in terms of money) then he should be awarded interest on the compensation payable. But such interest should not run from the date of the accident: for the simple reason that these misfortunes do not occur at that moment, but are spread indefinitely into the future: and they cannot possibly be quantified at that moment, but must of necessity be quantified later.

It is not possible to split those misfortunes into two parts; those occurring before the trial and those after it. The Court always awards compensation for them in one lump which is by its nature indivisible. Interest should be awarded on this lump sum as from the time when the defendant ought to have paid it, but did not: for it is only from that time that the plaintiff can be said to have been kept out of the money. This time might in some cases be taken to be the date of letter before action, but at the latest it should be the date when the writ was served. In the words of Lord Herschell, interest should be awarded "from the time of action brought at all events". From that time onwards it can properly be said that the plaintiff has been out of the whole sum and the defendant has had the benefit of it. Speaking generally, therefore, we think that interest on this item (pain and suffering and loss of amenities) should run from the date of service of the writ to the date of trial. This should stimulate the plaintiff's advisers to issue and serve the writ without delay - which is much to be desired. Delay only too often amounts to a denial of justice. [Emphasis added]

[89] In the final analysis, the Appellants have succeeded on grounds 7, 8 and 9. The issues raised in the Respondent's Notice are determined as set out above. Subject to this variation, the judgement of the High Court is affirmed.

[90] The Law Reform (Miscellaneous Provisions) (Death and Interest) Act (Cap 27) as amended by Decree No. 46 of 2011 recognises two types of interest namely; pre-judgment and post-judgment. This Court is not precluded from awarding interest on damages from the date of the service of writ to the date of judgment. Accordingly, I make the following orders:-

The Appellant is ordered to pay the Respondent a sum of \$90,000.00 as general damages, and the sum of \$4050.00 being interest at the rate of 2% (being half of the rate specified by Section 4 of the Law Reform (Miscellaneous Provisions) (Death and Interest) Act (Cap 27) as amended by Decree No. 46 of 2011, in respect of post-judgment interest) payable from 28 November 2011 (date of the service of writ) to 18 February 2014 (date of judgment).

[91] The Appellant is ordered to pay the Respondent a sum of \$532.50 as special damages and a sum of \$43.00 being interest at the rate of 2% on special damages (being half of the rate specified by Section 4 of the Act in respect of post-judgment interest) payable from 9 November 2009 (date of the cause of action) to 18 February 2014 (date of judgment).

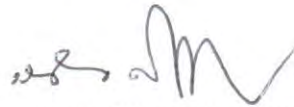
[92] There will be no interest awarded on the damages awarded for loss of future earnings, as the Plaintiff has not been kept out of his money. (Jefford v Gee (supra) at p.1909, para (b), per Lord Denning, MR.)

[93] For the reasons set out above, the judgment of the High Court is revised and made up as follows: -

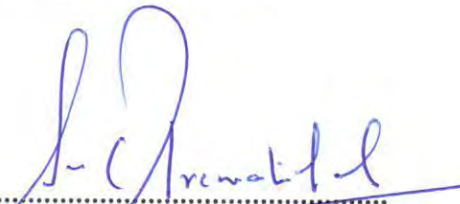
General Damages	\$ 90,000.00	
Interest on General damages (@ 2%p. a)	\$4050.00	From 28.11.2011 to 18.02.2014
Special Damages	\$532.50	
Interest on Special Damages (@ 2%p. a)	43.00	From 09.11.2009 to 18.02.2014
Loss of future earnings	\$67,970.00	No interest due
Loss of future FNPf	\$ 5903.00	No interest due
Total	\$ 168,498.50	

The Orders of the Court are:

1. *The appeal of Fiji Forest Industries (the Appellant) is dismissed.*
2. *The Respondent is awarded damages in a sum of \$168,498.50 together with interest in terms of section 4 of the Law Reform (Miscellaneous Provisions) (Death and Interest) Act (Cap 27) as amended by Decree No. 46 of 2011, from the date of judgment until payment in full.*
3. *The Appellant is ordered to pay to the Respondent costs of \$ 3000 summarily assessed.*



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Hon. Mr. Justice E. Basnayake
JUSTICE OF APPEAL



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Hon. Mr. Justice C. Prematilaka
JUSTICE OF APPEAL



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Hon. Madam Justice F. Jameel
JUSTICE OF APPEAL