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

CIVIL APPEAL NO. ABU 0051 of 2018
(Lautoka High Court Civil Action No.HBC 40 of 2014)

BETWEEN : **COURTS (FIJI) LIMITED**

Appellant

A N D : **DHIMANT PATEL**

Respondent

Coram : **Basnayake, JA**
Lecamwasam, JA
Almeida Guneratne, JA

Counsel : **Mr R. R. Gordon for the Appellant**
Mr E Maopa for the Respondent

Date of Hearing : **9th May, 2022**

Date of Judgment : **27th May, 2022**

JUDGMENT

Basnayake, JA

[1] I agree with the reasons, conclusions arrived at and orders proposed by Guneratne JA.

Lecamwasam, JA

[2] I agree with the reasons, conclusions arrived at and orders proposed by Guneratne JA.

Almeida Guneratne, JA

[3] This is an appeal against the Judgment of the High Court dated 11th May, 2018.

[4] By that judgment the High Court determined that the Respondent (a customer who had been on a shopping spree) suffered injuries at a shopping complex (owned by the Appellant) on account of the negligence of the Appellant and awarded general and special damages to the Respondent in consequence thereof.

[5] The Judgment is at pages 8 – 34 of the Copy Record and the grounds of appeal urged against it are at pages 1 – 7 of the said Record.

[6] The finding of negligence was based on the breach of (as held by the learned Judge) its common law and statutory duty of care towards the plaintiff (Respondent) in failing to duly comply with the provisions of the Health and Safety Work Act No. 4 of 1996 (HSW Act) in not having taken reasonable care to ensure that the premises were safe for the plaintiff to move about and do his shopping, when maintenance work of the escalator was in progress with an open manhole, sans sufficient signs, warnings and protective measures in place.

[7] The Judge also held that the defendant (Appellant) failed to prove contributory negligence on the plaintiff's part.

[8] I pause here to say that, the reference to contributory negligence was on account of the fact that the plaintiff had been wearing a pair of sunglasses when he had been roaming at the shopping complex.

[9] The essential primary facts necessary for a determination of this appeal I have referred to above (contained in the conclusions reached by the learned Judge at page 24 of the Copy Record).

[10] Having done so I shall now proceed to my determination taking first the grounds of appeal, the written submissions of the respective parties, the oral submissions made at the hearing, finally considering and ascertaining them as against the Judgment of the High Court to reach my determination in seeing whether the said Judgment bears scrutiny, *in toto* or to what extent that it does.

The Grounds of Appeal (pages 1 – 7 of the Copy Record)

[11] I found that there are as many as 16 grounds of appeal urged therein.

A Note to lawyers in drafting grounds of appeal

[12] In that regard I found that the said grounds, to say the least were prolix and I say that, not only when lawyers draft and file pleadings in the original courts, but also when drafting and urging grounds of appeal in the Appellate Courts.

[13] However, Mr Gordon, on his feet highlighted the essential aspects this Court was required to make a determination on.

The said essential aspects learned Counsel for the Appellant (Mr Gordon) stressed on

[14] I summarise the said aspects or issues as follows:

(i) That, the action of the Respondent (Plaintiff) was not sustainable without reference to the concept of vicarious liability;

(ii) That the legislative basis on which the action was based *prima facie* being the HSW Act of 1996 the same could not have had any application to a consumer visiting a premises, not being "*a workman*" as contemplated in the said Act;

(iii) That, therefore the consequential award of damages (general and special damages) could not have been awarded (a) for the aforesaid reasons; and (b) on the evidence led at the trial (mainly the medical evidence).

[15] Mr Maopa's submissions were basically in the form of a direct opposition to Mr Gordon's aforesaid submissions.

[16] In the background of what I have recounted above I proceed to make my determination with my reasons as follows in response to and in consideration of the submissions made by respective Counsel to the questions at issue.

Appellant's contention based on the absence of a plea on vicarious liability and the absence of an action based on an Occupiers Liability Act to have come under a statutory breach of duty

The argument on vicarious liability

[17] Taking first the argument based on vicarious liability, this is not a case where negligence is alleged on the part of an employee (such as a driver of a vehicle owned by his employer the Appellant).

[18] To start with, there is no pleading in the Appellant's Statement of Defence that any employee of the Appellant had anything to do with the manhole in the premises in question.

[19] On the basis of that fact alone any argument based on vicarious liability goes out of reckoning.

The argument based on the action not being based on the Occupiers Liability Act (OLA) to have come under a statutory breach of duty on which the learned Judge made his determination.

[20] Whatever the learned Judge might have said in the course of his Judgment (when he is seen making reference to the HSW Act), in his conclusion he did not place reliance on the (OLA). (vide: at page 24 of the Copy Record).

[21] As I saw in that conclusion, the learned Judge based his conclusion on the basis that the Appellant (Defendant) *"had not taken reasonable care to ensure that its premises was safe for the plaintiff (Respondent) to move about and do his shopping, when the maintenance work of the escalator was in progress with an open manhole, sans sufficient signs, warnings _ _ _ in place to avoid such a calamity _ _ _"*

[22] As seen from that judicial exposition I find on my reflections that the same has nothing to do with any statutory duty and a breach of it but rather a duty of care and a breach of that duty expected from an owner of premises owed to a customer visiting such premises. Clearly therefore, the trial Judge's approach was based on common law principles. Accordingly, the arguments based on the judge's misinterpretation of the several provisions in the HSW Act are rendered redundant and/or irrelevant.

What are the applicable principles applicable in such a context?

[23] In keeping an open manhole, did it amount to negligence on the established facts as recounted by the learned High Court Judge?

[24] I have no hesitation in agreeing with the learned Judge with the conclusion he reached thereon in my consideration of the said legal issue, whether on the propositions

enunciated in the English decision in **Wagon Mound (No.1)** (1967 AC 617 on the criterion of "*reasonable foresight*" or on the test of "*direct consequences*" (vide: the English decision in the **Re Polemis** [1921] 3 KB 560.

[25] In my view, on the criterion of "*reasonable foresight*" or the test of "*direct consequences*" I hold that negligence on the part of the Appellant stood established.

[26] I could not find any reason to change my view on the other authorities cited by the parties in their written submissions and my own research having gone through the more recent English decision in **Page v. Frailt** [1995] 2 AllER 736 as well.

The Resulting position on the aspect of Negligence of the Appellant

[27] Thus, the negligence on the part of the Appellant stood established as found by the learned Judge (as being a finding of fact). Sitting as an appellate Court Judge, I am not inclined to interfere with that finding in the absence of any misdirection and/or non-direction. Accordingly, I affirm the said finding on primary negligence.

Re: the issue raised on contributory negligence

[28] This was based on the aspect of the Respondent visiting the premises in question to do his shopping wearing sunglasses.

[29] The learned Judge rejected that defence which I view as a qualified defence to the plaintiff's claim, without consideration as might have been hoped by the Appellant the learned Judge disposing of that by merely saying that "*the defendant failed to prove contributory negligence on the plaintiff's part.*" (page 24 of the Copy Record).

[30] On that I saw merit in the submissions of the learned Counsel for the Appellant when he submitted that the learned Judge had not given his mind to that aspect.

[31] I agree with that contention for the following reasons:

(a) There was no evidence of anyone else falling into the manhole;
(b) Thus, there was some causal link between the Respondent falling into the said manhole and him visiting the premises wearing sunglasses.

[32] Those reasons, which, respectfully, the learned Judge failed to address on, I regard as non-directions.

[33] Consequentially that failure inevitably has had an impact on the award of damages.

The Award of Damages

[34] Thus, in consequence, what is left to be determined is the award of damages in the light of the argument of the Appellant's Counsel that there was contributing negligence on the part of the Respondent.

[35] On that, for the reasons I have articulated above, I hold that the Respondent in traversing and/or roaming in the premises in question wearing sunglasses amounted to a contributing factor.

What effect would that have had on the award of damages ordered by the High Court?

[36] Before embarking on that, I felt it necessary to touch on the aspects of contributory negligence and the elements which feed that concept – viz:-

(a) The link between the act of the Respondent in visiting the premises of the Appellant wearing sunglasses and there being an open manhole in the premises unprotected. (vide: the principles laid down by **Lord Ellenborough in Butterfield v. Forester** (1809) East 60.

(b) The Rule relating to risk – that is, where the claimant must prove that the risk he was taking (going into the premises wearing sunglasses) was a risk the defendant was under a duty to guard against, for here, the defendant is required to show that the harm sustained by the claimant belongs to that general class of perils to which the claimant was exposed to by his own negligent conduct. (vide: **Jones v. Livox Quarries** (1952) 2 QB 608).

[37] Taking the aforesaid aspects into consideration while I affirm the learned Judge's finding on negligence, in regard to his rejection of the defence of contributing negligence I depart from with the consequence that, the award of damages made by the learned Judge demands to be changed.

[38] In that regard, I gave my mind to the following aspects in the case.

Nature of the injuries sustained by the Respondent and the link to the Awards of Damages

[39] Learned Counsel submitted that the Respondent had suffered only an ankle injury. Counsel referred to what is averred in the Respondent's Statement of Claim (page 43 of the Copy Record) and drew this Court's attention to the medical evidence.

[40] I did not feel the need to refer to the evidence led on the averments in the Statement of Claim and the medical evidence in detail and go through and analyse the same with a fine tooth comb in as much as, Mr Gordon in somewhat of a conciliatory nature submitted that, even if on the liability issue this Court rejects his contentions, at least on the quantum of damages this Court ought to reduce the same by cutting it at least in half and advanced the following reasons for saying so:

(i) on account of the learned High Court judge's, finding that there was no contributory negligence which was a misdirection;

(ii) there being no evidence of "*pain and suffering*" there was no basis to award special damages;

(iii) consequently therefore, there was no basis to have awarded a sum of $11,000.00.

Respondent Counsel's counter submissions thereon

[41] Mr Maopa (for the Respondent) on the other hand submitted that:

(a) the learned Judge made use of several similar cases and relied heavily on a judgment of this Court, viz: **Fiji Industries Ltd –v- Rajendra Mani Naidu** per Justice Jameel (Justices Basnayake and Prematilaka agreeing, 0019 of 2014, 14th September, 2017.

(b) therefore, although there is no cross-appeal by him this Court ought to enhance the quantum of damages rather than reduce it.

Mr Gordon's reply submissions

[42] Mr Gordon while not crossing swords with Mr Maopa's aforesaid submissions, submitted in his reply that, on his submissions on the issue of contributory negligence, the quantum of damages had to be reduced for which he referred us to what is reflected in the evidence of the Respondent's evidence.

On the Reply submissions I have re-capped in paragraph [42] above

[43] Re: What is reflected in the evidence of the Respondent (Supplementary Copy Record)

(a) "*I walked straight and would be from here to a bit further than that door, and I think there was a pillar there, I turned right, and then I walked on a bend and then I fell into a void, which is a pit" (Question by Counsel) "And Mr Patel, at that time you were wearing dark glasses?"*

(b) Answer by the Respondent was "*yes*" (page 31 of the Supplementary Copy Record).

(c) Questioned further by Counsel *"Mr Patel _ _ _ you saw the open pit, you were curious as to what the open pit was, and with your dark glasses you misjudged it, and fell into the open pit."*

(d) Respondent's answer was "*That's absolute nonsense; no*" (page 35 of the Supplementary Copy Record).

[44] Although the Respondent denied the said suggestion by Counsel on the theory of misjudgment, I am of the view that, the answer of the Respondent was evasive in objective reasoning and was not acceptable.

[45] Consequently, I hold the view that, the learned Judge had not addressed that fact in his Judgment which I regard as a non-direction.

Assessment on the question of damages in consequence of my determination on contributory negligence

On General Damages

[46] The learned Judge awarded a sum of FJD$11,000.00.

[47] Consequently, being faced with the task of looking for a basis to apportion an appropriate quantum, having looked at the Law Reform (Contributory Negligence) Act of 1946 (as amended), particularly Section 3 thereof, the basis there being "*to such extent as the Court thinks just and equitable*" while I am not inclined to agree with Mr. Gordon's argument that it should be cut in half, reading that section as conferring a discretion on Court, I exercise that discretion and hold that it would be "*just and equitable*" to reduce the

quantum of general damages awarded cutting it by 25% (which will bring down the award to a sum of FJD$8,250.00.

On Special Damages

[48] On that, the learned Judge held thus:

> *"The plaintiff in his statement of claim pleaded and prayed for $893.00 as special damages. Out of this amount only $788.00 has been substantiated by documentary proof (vide – paragraph 27.e.). During four months of his treatment and recovery he may have possibly spent more on Doctors, Medicines and care givers as he stated in his evidence. The amount he claims appears to be actual and reasonable. The Court is satisfied that the plaintiff is entitled to claim special damages in a sum of $788.00".*

[49] Having perused the evidence on Record (Medical as well as the Respondent's evidence – vide: at pages 25 and 27 of Supplementary Copy Record on medical evidence and moneys paid to the Doctors, in the light of the nature of the injuries and the period of the injuries sustained by the Respondent (vide: page 40 of the Supplementary Copy Record), I am of the view that the award for special damages made by the learned Judge was a fair and equitable assessment, which was in a sum of FJD$788.00.

On the Rates of Interest and Costs awarded

[50] Although the Appellant has raised grounds of appeal (viz: Grounds 20 and 21) on the rates of interest applied and costs awarded, they were not addressed and pursued either in their written submissions or in the oral submissions.

[51] Accordingly, I shall refrain from going into those matters except to apply the rates of interest applied by the learned High Court Judge at paragraph 32K of his judgment on the revised aggregate sum of damages in the sum of $9,058.00 (nine thousand and fifty eight dollars) which the Respondent would be required to calculate and demand payment of the total amount which the Appellant is ordered to pay within 14 days of such demand.

Summary of the Issues

[52] Before I propose my Orders I summarise the issues in this appeal as follows:

(i) I agree with the learned High Court Judge's finding that there was negligence on the part of the Appellant (in allowing an open manhole on his premises near an escalator which was under repair unprotected).

(ii) I disagree with the learned Judge's finding that there was no contributory negligence on the part of the Respondent (walking into the premises wearing sun-glasses, roaming about wearing the same, thus taking a risk with his natural vision and eye co-ordination (as submitted by Mr Gordon, wearing dark glasses "*for style*" and not for any other reason (not refuted by Mr Maopa).

Final Determination

Some final Reflections on the aspects of Contributing Negligence

[53] It was Lord Atkin who put it thus:

> *"….if the (Claimant) were negligent but his negligence was not a cause operating to produce the damage there would be no defence …"*
> (**Caswell v. Powell Duffryn** etc. [1940] AC 152 at 165, HL).

[54] However, His Lordship continued and had said:

> *"…. I find it impossible to divorce any theory of contributory negligence from the concept of causation."* (supra)

How the Courts sought to mitigate the harshness of the doctrine of contributory negligence

[55] Going through the judicial annals in the aftermath of that "*Atkinion view*", one sees how the judicial mind in England had sought to mitigate the harshness of the doctrine of contributory negligence (See: **Stepley v. Gypsum Mines Ltd** [1953] AC 663, HL per Lord Porter).

[56] Even before the case of **Caswell v. Powell** (supra) there had been in the wings the decision in **Davies v. Mann** [1842] 10 M & W 546 in which it had been held that, "*notwithstanding his own negligence, the claimant could recover damages because the defendant, had he been driving properly, could still have avoided the consequences of that negligence*."

[57] That decision appears to have been when the "*last opportunity rule*" was introduced.

[58] Of course, as "*Clerk and Lindsell on Negligence*" point out,

> *". . . the Courts are no longer concerned with the subtleties and refinements of the last opportunity rule and the like. In order to decide whether the claimant's negligent conduct is contributory, one applies exactly those rules of causation."* (at page 309).

Conclusion

[59] For the aforesaid reasons I conclude and propose my orders as follows.

Orders of Court

1) The appeal is dismissed on the issue of negligence and the award of special damages.

2) *The appeal is allowed on the issue of contributory negligence to the extent that the general damages awarded is cut by 25% reducing the award made by the High Court from FJD$11,000.00 to FJD$8,250.00.*

3) *On the resulting quantum of damages (general and special - $8,250.00 and $788.00 respectively aggregating to a sum of $9,058.00 (nine thousand and fifty eight dollars) the Appellant is ordered to pay to the Respondent together with interest at the rates ordered by the learned High Court Judge and compliance with what has been stated in paragraphs [51] of this judgment. The sum so payable shall be in addition to the order for costs awarded by the High Court in the sum of $1,150.00 (one thousand one hundred and fifty dollars) in its final Order No. 5 (at page 34 of the Record of the High Court).*

4) *In view of this Court's determination on contributory negligence I make no order for costs in this appeal.*

Hon. Justice E. Basnayake
JUSTICE OF APPEAL

COURT OF APPEAL
FIJI

Hon. Justice S. Lecamwasam
JUSTICE OF APPEAL

Hon. Justice Almeida Guneratne
JUSTICE OF APPEAL