

IN THE HIGH COURT OF FIJI AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 339 of 2007

BETWEEN : **JANARDAN GOUNDAR**

PLAINTIFF

AND : **H. G. LEACH (FIJI) LIMITED**

DEFENDANT

BEFORE : **Hon. Justice Kamal Kumar**

COUNSEL : Mr D. Singh for the Plaintiff
: Mr R. Naidu for the Defendant

DATE OF HEARING : 6, 7 October and 6 November 2015

DATE OF JUDGMENT : **20 October 2016**

JUDGMENT

Introduction

1. On 30 July 2007, Plaintiff caused Writ of Summons to be issued with Statement of Claim claiming for special damages, general damages, interest and costs arising out of injuries sustained by the Plaintiff in an accident on or about 23 February 2007, when Plaintiff was hit by a roller at Naboro Rubbish Dump which Writ of Summons was amended on 4 April 2008, to change Defendant's name.
2. On 10 August 2007, Defendant filed Acknowledgement of Service.
3. On 24 August 2007, Defendant filed Statement of Defence.
4. On 8 March 2008, Plaintiff filed Reply to Statement of Defence.
5. On 4 April 2008, Plaintiff filed Amended Writ of Summons changing the name of the Defendant.
6. No action being taken after 4 April 2008, Registry on 10 January 2011 (after a lapse of two years and nine months) issued show cause notice under Order 25 Rule 9 of High Court Rules which was returnable on 11 March 2011.
7. On 9 March 2011, Plaintiff filed Notice of Intention to Proceed and Affidavit Verifying Plaintiff's List of Documents.
8. On 11 March 2011, Defendant was directed to file Affidavit Verifying List of Documents within fourteen (14) days and parties were directed to hold Pre-Trial Conference ("**PTC**") and file Copy Pleadings and Order 34 Summons and this action was adjourned to 9 June 2011.
9. On 9 June 2011, parties were directed to file Minutes of PTC before 10 July 2011, and this action was adjourned to 15 August 2011, and thereafter was adjourned to 27 October 2011.
10. On 27 October 2011, Plaintiff was directed to file Minutes of PTC by next call date failing which action was to be struck out and this action was adjourned to 1 February 2012.
11. On 30 January 2012 and 31 January 2012, Plaintiff filed Minutes of PTC and Copy Pleadings respectively.

12. On 31 January 2012, Plaintiff filed Summons to enter Action for Trial which was returnable on 15 February 2012, when Counsel for the Defendant raised her concern in respect to Defendant's name.
13. On 1 February 2012, this matter was referred to Registry to issue Notice of Adjourned Hearing before a Judge.
14. The Summons was adjourned to 29 March 2012.
15. On 29 March 2012, Counsel for Plaintiff informed Court that Plaintiff intends to file Application to amend Defendant's name when the Learned Master struck out Summons to Enter Action for Trial and adjourned the matter to take its normal course.
16. On 10 May 2012, Plaintiff filed Summons to Amend Writ of Summons which was returnable on 6 June 2012, when parties were directed to file Affidavits and the Application was adjourned to 20 July 2012, for hearing.
17. On 11 July 2012, Defendant filed Application seeking extension of time to file Affidavit which Application was granted to 20 July 2012, and the Application to Amend Writ of Summons was adjourned to 26 July 2012, for hearing.
18. On 26 July 2012, the Learned Master granted Leave for Plaintiff to amend Writ of Summons with cost of the Application to be costs in the cause.
19. On 31 July 2012, Plaintiff filed Amended Writ of Summons.
20. On 28 August 2012, Defendant filed Statement of Defence.
21. Thereafter no action was taken until 30 October 2013, (a lapse of more than one (1) year) when Plaintiff filed Notice of Intention to Proceed ("**NIP**").
22. Plaintiff did not take any action after filing NIP and on 5 March 2014, filed another NIP.
23. Registry issued show cause notice which was returnable on 31 March 2014, but was not called until 12 June 2014, when the Learned Master treated the show cause notice as Summons for Directions and directed Plaintiff to file Copy Pleadings and Order 34 Summons in six (6) weeks.

24. On 9 July 2014, Plaintiff filed Amended Minutes of PTC, Amended Copy Pleadings and Order 34 Summons which was returnable on 7 August 2014, and this action was referred to Registry to allocate to a Judge.
25. On 12 September 2014, this action was called in this Court when Plaintiff was directed to file Amended Copy Pleadings incorporating Amended Minutes of PTC, pay hearing fee and this action was adjourned to 5 and 6 May 2015 for trial.
26. On 4 May 2015, Plaintiff filed Application to vacate trial date which Application was returnable on 5 May 2016, when trial dates were vacated and this action was adjourned to 6 and 7 October 2015, for trial.
27. The trial proceeded on 6 and 7 October 2015, and on 7 October 2015, Defendant by its Counsel sought an adjournment on the ground that its witness Dr. Taloga was not available due to surgery being performed by him.
28. By consent this action was adjourned to 6 November 2015, for continuation of trial.
29. The trial was completed on 6 November 2015, when parties were directed to file Submissions and Reply to Submissions by 21 December 2015, and this matter was adjourned for Judgment on Notice.
30. Parties complied with directions for filing of Submissions.

Issues to be Determined

31. The issues that need to be determined are as follows:-
 - (i) Whether Defendant owed duty of care to Plaintiff?
 - (ii) Whether Defendant breached any duty of care owed to the Plaintiff?
 - (iii) Whether Defendant's breach caused Plaintiff injuries which resulted in Plaintiff suffering from pain?
 - (iv) Whether Plaintiff was contributory negligent?
 - (v) What is the quantum of damages?

Documentary Evidence

32. By consent, following documents were tendered as Exhibits P1 to P3 and D1 by the parties:-
- (i) Permanent Impairment Assessment Report dated 2 October 2015, of Plaintiff by Dr. Ronal Kumar (P1).
 - (ii) Bundle of medical and consultation expense receipts (P2).
 - (iii) Bundle of receipts for travelling expenses (P3).
 - (iv) Permanent Impairment Assessment Report dated 11 October 2015, by Dr. Taloga to Sherani & Co. (D1).

Plaintiff's Case

33. Plaintiff gave evidence himself and called three (3) witnesses.
34. Plaintiff's first witness was Ronal Kumar of 10 Vunivalu Road, Toorak, Suva, Surgical Registrar ("**PW1**").
35. PW1 during evidence in chief gave evidence that:-
- (i) He is employed as Surgical Registrar at Colonial War Memorial Hospital ("**CWMH**") and have in practice for eight (8) years.
 - (ii) He did Post-graduate Diploma in Surgery at Fiji School of Medicine (now Fiji National University).
 - (iii) He worked at Lautoka Hospital as Medical Intern, Medical and Surgical Registrar and at Nadarivatu Health Center as Medical Officer.
 - (iv) He examined the Plaintiff on 2 October 2015, between 2.30pm to 6.00pm and prepared report dated 2 October 2015 (Exhibit P1) which has his signatures at the bottom of the report.
 - (v) He completed the report by getting history from Plaintiff, examining Plaintiff, X-ray reports, CT Scan reports and looking at hospital PATIS (Patient Information System).
 - (vi) PATIS is a computer programme used by hospital which contains brief report of patients treatment, diagnosis, admission date, records of radiology and blood test reports.
 - (vii) He was not informed of and there is nothing in the folder in respect to any previous injury suffered by the Plaintiff.

- (viii) PATIS report shows that the Plaintiff suffered from open fracture of pelvis, urethra tear and left closed femur fracture.
- (ix) Open fracture of pelvis is division of syndesmosis of the pubic symphysis with separation of sacroiliac joint.
- (x) Pubic symphysis is where two (2) sides of pubic are held in the joint by the ligaments and the sacroiliac joint is where pelvic bone unites vertebrate bone at the back.
- (xi) Other injury was fracture of left femur and urethral tear.
- (xii) When asked to explain “fracture of femur” he stated that there was no documentation on this injury.
- (xiii) In reference to last paragraph of page 1 of Exhibit 1 he stated that fracture of femur means break in the context of the bone and to stabilize it a rod is put inside the bone.
- (xiv) Laparotomy means surgical approach to open into and examine abdominal contents which require a large incision in the anterior abdominal wall.
- (xv) Suprapubic Catheter is one of the means to divert urine from a tube that drains into the abdominal wall and that is done because of Urethral tear (which will not allow patient to pass urine normally).
- (xvi) He has been trained by Labour Department to do permanent impairment assessment and all doctors do not go through this training.
- (xvii) Training is based on AMA Manual (version 5) and Fiji Work Care Guide on injury impairment assessment.
- (xviii) Urethral Structure is pipe like structure. Any trauma can lead to narrowing of urethra and in Plaintiff’s case he had a severe narrowing because of urethral tear.
- (xix) End-End Urethroplasty is when structure segments is cut and healthy ends are joined/fixed by stitching.
- (xx) Cystoscopy is done by putting a camera through urethra to examine the urethra and urinary bladder.
- (xxi) Erectile Dysfunction (under heading “Current Complain” of Exhibit P1) means inability to get a sustained penile erection and inability to engage in any sexual activity.

- (xxii) Fecal incontinence means unable to control bowel motions.
- (xxiii) Gait derangement under the heading "Examination" in Exhibit P1 is one of the components as part of lower limb assessments. Gait refers to mobility type and description.
- (xxiv) When asked how he arrived at eighty percent (80%) he stated that Table 17.5 AMA (5) gives wheelchair dependent at eighty percent (80%).
- (xxv) Thigh circumference of 43cm (right) and 42cm (left) in Table 17.6 could be wastage of muscle.
- (xxvi) Three (3) centimeter discrepancy in the calf circumference means muscle atrophy on the calf.
- (xxvii) Agreed that muscle atrophy is muscle wasting due to immobility or lack of activity and that total muscle atrophy is twenty one percent (21%).
- (xxviii) When asked to explain "Range of Motion" of ten percent (10%) in Exhibit P1 he stated that those are range of motion for hip internal rotation and like other range of motion has to be done in a certain way.
- (xxix) When asked to shed more light on that he stated that normal expected internal rotation would be between forty (40) degrees to sixty (60) degrees. In AMA (5) there is specific values for different degree of movement and angles are measured by using goniometer which shows degree of movement.
- (xxx) When it was suggested that it is correct in saying that movement in his right and left hip are restricted he disagreed and stated that left hip is restricted and assessment on right hip is done as a comparison.
- (xxxii) Agreed that external rotation, flexion and extension appeared to be normal on right hand side (Page 3 - Exhibit P1).
- (xxxiii) In reference to degree of deficiency on the left hand side, he stated that those are the impairment AMA Guide (5) allows.
- (xxxiiii) Thirty percent (30%) lower extremity range of motion is according to the Guide and is total range of motion of the hip.
- (xxxv) Ankylosis refers to fusion or restriction of movement in certain direction which he assessed at fifteen degrees (15%) and is assessed at twelve percent (12%) lower extremity.
- (xxxvi) DBE means Diagnosis Based Estimate.

- (xxxvi) Coccyx is last vertebral bone and in x-ray report the normal corrective of coccyx is lost and as per report coccyx is mal-united at 120 degrees.
- (xxxvii) Agreed that it is the tail bone.
- (xxxviii) Agreed that person will have difficulty in sitting and standing because of the mal-union.
- (xxxix) Mal-united coccyx in a person may cause pain and numbness around pelvical area if the nerves are compromised.
- (xl) Bilateral Rami is part of pubic bone that was fractured.
- (xli) Ischium is also part of pubic bone and in Plaintiff's case was broken or fractured and has united at about two centimeters (2cm) separation and whole permanent impairment for vertebra is assessed at ten percent (10%).
- (xlii) Plaintiff was given eight percent (8%) whole permanent impairment for urinary system because at the time of examination Plaintiff stated that he was on urine Alkalinizers and Antibiotics.
- (xliii) Alkalinizer is medication to make urine neutral.
- (xliv) Erectile dysfunction was assessed at twenty percent (20%), WPI from table 13-21 of AMA Guide.
- (xlv) Forty eight percent (48%) WPI assessed as shown on last page of Exhibit P1, is gained by the working shown on the report and is the combination of lower limb, vertebra, urinary system and erectile dysfunction.
- (xlvi) When asked if Plaintiff will need future surgical operation, he stated that Plaintiff may need operation if he develops problems with his urethra again or if there is a need to take out the rod from his left femur and apart from that at the time of Plaintiff's examination he did not think Plaintiff needs any operation at the time of giving evidence.
- (xlvii) Agreed that at the moment Plaintiff's ability to earn has been effected.
- (xlviii) When asked if his report considered pain and suffering and loss of amenities of life he stated that the Guide does not allow him to assess for pain and suffering.

36. During cross-examination PW1:-

- (i) Stated that he is both Orthopedic Registrar and Surgical Registrar (SR).

- (ii) Stated that difference between Orthopedic Registrar (OR) and Orthopedic Surgeon (OS) is that OR is at training and OS is post training and he is OS.
- (iii) Stated that him being SR does not make him a specialist and he is training to become a specialist.
- (iv) Stated that training is not same as done by Labour Department (LD) as LD does not conduct surgical training and the training he is doing will add Master in Surgery to his qualification.
- (v) Stated that training by LD in permanent impairment assessment gives certification in Part 1 and 2 of permanent impairment assessment and he did the training in 2013.
- (vi) Stated that Report dated 2 October 2015 (Exhibit 1), is based on his training and accreditation as assessor of impairments and that is how every other assessor who has training in permanent impairment assessment, does the assessment.
- (vii) Stated that since he had done his training in 2013, he has done two (2) or three (3) permanent impairment assessments per week and he is one of the accredited assessors for the hospital.
- (viii) Stated that he gave evidence in Court before, but it was not on permanent impairment assessment and he gave evidence on reports he prepared.
- (ix) Stated that the original folder of Plaintiff was not available when he did the report, but a follow up folder from 12 June 2008, was available and assessments done are on current impairments that are present.
- (x) When it was suggested to him that he did assessment on current impairment present and what patient revealed to him, he stated that he questioned patient, examined him, looked at his report and investigations which include CT Scan and X-ray before writing his report.
- (xi) Confirmed that he reviewed folders, CT Scan and examination and agreed that all forms part of the report that gives forty-eight percent (48%) WPI.

- (xii) Stated that he had X-ray of Plaintiff that was done on 2 October 2015, which is not submitted in evidence together with his report.
- (xiii) Did not agree with the suggestion that the current report will be incomplete without folder and X-ray report.
- (xiv) Stated that his report is not a medical report but permanent impairment assessment report and that the report is full permanent impairment assessment of Plaintiff even though folder and X-ray report is not attached to the report.
- (xv) Stated that he did not think that table should have been attached to the report for assessment purposes as all are available in AMA Guide (5) but agreed that reference made to Guide in his report should have been attached to the report because it was not only medical issue but legal as well.
- (xvi) Stated that he did not consider full report and referred to PATIS which included diagnosis done at CWMH.
- (xvii) Stated that he did not see Plaintiff with injuries but relied on injuries in PATIS.
- (xviii) Stated that book fracture of pelvis can be seen on X-Ray and CT Scan and can be clinically diagnosed which means on examination of patient and he gathered open book fracture from PATIS.
- (xix) Pubic Symphysis in front portion and Sacro-Iliac Joint is at the rear.
- (xx) Stated that information about Rod that was put inside was gathered from PATIS and X-ray and CT Scan done before assessment and it was visible in X-Ray and CT Scan.
- (xxi) Stated that he obtained information about Laprotomy from PATIS and that Plaintiff had big scar on his abdominal wall.
- (xxii) Agreed that Catheter is not permanent and stated that if Plaintiff had not gone to India the insertion of Catheter would have been permanent.
- (xxiii) Catheter was removed during operation in India.
- (xxiv) Stated that it is not correct to say that Plaintiff will not be having difficulty in passing the urine as he has problems during re-current urine infection.

- (xxv) Stated that if Catheter was not removed, he would have recurrent problems as urine infections are higher with tube being there and he must state that supracathetic procedure is a temporary measure.
- (xxvi) Agreed that urethral structure can be caused by any form of trauma and further stated that they call Urethra an unforgiving structure and any trauma can cause it.
- (xxvii) Agreed that usually trauma has to be physical but stated that it can also be associated with infection traumatic indwelling and catheter insertion.
- (xxviii) Cystoscopy (camera inserted) is not an operation on its own but during Cystoscopy other assisted surgical procedures can be done as well.
- (xxix) Erectal Dysfunction was what Plaintiff told him as his current complaint and from previous note by the neurologist on Plaintiff's medical folder.
- (xxx) Plaintiff told him about Fecal Incontinence being one of the other current complain.
- (xxxi) When referred to his comment under the hearing "Examination" which says "Inconsistent finding" he stated that this cannot be assessed and when asked as to whether it is correct that he has not done any assessment on Plaintiff being wheelchair dependent, he stated that he has not accounted for that component in his final assessment because it is unassesable component.
- (xxxii) In reference to his comments under hearing "Calf Circumference" on page 2 of his report he agreed that lack of activity and muscle wastage can be lessened because of massage and physiotherapy.
- (xxxiii) Agreed that patients mobility will also lessen muscle wastage.
- (xxxiv) On 2 October 2015 assessment, he did carry out examination on mobilizing and lack of activity and from that arose the statement in 3rd line under the heading "Examination" - "Inconsistent finding".
- (xxxv) When he was asked "inconsistent" from what he stated, from lower limbs, it did not match his mobility pattern.
- (xxxvi) Stated that the findings did not establish any muscle wasting on his right side, and that could not explain why he should be on wheelchair

all the time. Also stated that repeated muscle tone examination did not give consistent results.

- (xxxvii) Agreed that, that was the reason he could not assess Gait arrangement.
- (xxxviii) Did not agree that Plaintiff had rotation movement problem on left side only and stated that Plaintiff has very minor problems on his right side for which AMA Guide does not give any percentage.
- (xxxix) Agreed that, internal rotation of hip gives five percent (5%), external rotation of left hip gives twenty percent (20%) and, extension of left hip gives five percent (5%) and that Plaintiff's left side is more injurious than right side.
- (xl) For Plaintiff he expects bit more mobility out of wheelchair and stated that crutches would be bit extreme at this point and use of walker is something that can be used.
- (xli) Stated that "Nerves are compromised" would mean that they are damaged during fracture or is stretched which makes nerve function lesser and this cannot be healed by exercise or physiotherapy session.
- (xlii) In reference to his report on Vertebrae-Ischium being under at 2cm he agreed that there is no issue of it being fractured or broken anymore and stated that it is united at a displaced location and is joined 2cm away from where it usually should be.
- (xliii) Alkanizer and Antibiotics assist in urine and are same as Urea Powder and another antibiotic Plaintiff was taking and Urea Powder is same as Alkanizer.
- (xliv) In reference to future medical care he confirmed that Plaintiff does not have problem with his urethra.

37. In re-examination PW1 stated that:-

- (i) He considered medical reports done by doctors at CWMH.
- (ii) He considered report by Dr. Saia Puikela and two reports from Lakeshore Hospital.
- (iii) X-ray and CT Scan will not pick nerve injury.
- (iv) Magnetic Resonance Imaging (MRI) will not catch nerve injury at coccyx level.

- (v) Agreed that his assessment of nerve stretching was subjective and all the evidence was subjective on the basis of the complaint about erectile dysfunction and fecal incontinence.
- (vi) If person has damaged nerve at coccyx level it would not affect persons ability to sit or stand as it is very low nerve and does not control movement of muscle in lower limb.
- (vii) When he was asked that if his assessment of 80% confine to wheelchair he stated that “No” and stated that total confinement to wheelchair will entitle him to eighty percent (80%) impairment and his assessment did not conclude that he should be limited to wheelchair and as such that has not been accounted for total WPI that is given.

38. Plaintiff gave evidence next and during his evidence in chief he gave evidence that:-

- (i) His date of birth is 13 November 1980, his level of education is upto class 7, he is not married and has no children.
- (ii) Recalled that accident happened on 23 February 2007, at about 8.30am and at that time he was working for Rajendra Foodtown as Butcherman.
- (iii) Accident happened at Naboro Rubbish Dump when he went there to unload rubbish with driver Sukh Ram in a three (3) tonne closed container type truck as instructed by his Manager, Bimlesh and rubbish comprised of cartons and plastics.
- (iv) At the time accident happened he was closing the tailgate after cleaning the truck and he got injured when one side was left to be closed.
- (v) Accident happened when roller came and crushed him.
- (vi) When roller crushed him he was going to close the tailgate and was facing the back of the truck.
- (vii) He did not see in which direction roller came from and before the accident he saw the roller parked about twenty (20) yards away from him.
- (viii) He did not see roller coming towards him before the accident and roller driver did not give him any warning before he approached.

- (ix) As they entered the premises the truck driver went and reported to a man sitting there.
- (x) Apart from him, the truck driver and the roller driver there was no one else to give direction.
- (xi) He did not expect the roller to reverse and crush him.
- (xii) He did not know what happened after the accident until he gained consciousness at CWMH and his father knows after how long he gained consciousness.
- (xiii) After he gained consciousness, they operated his leg and stomach and he was given injection, x-ray was carried out and he was put on drips.
- (xiv) His condition was not good and was paining a lot.
- (xv) In hospital he attended to toilet needs on bed and was assisted by his father and brother.
- (xvi) This happened for two months he was in hospital and continues until now.
- (xvii) Doctor carried out surgical operation on his leg and stomach and inserted a rod.
- (xviii) After operation he had difficulty passing urine which he did in a bottle and a tube was fitted to pass urine.
- (xix) After admission he was not able to eat food and drank milk for four (4) months.
- (xx) In the hospital he could not move around because he was in pain.
- (xxi) After discharge until now he was not able to move around because he did not feel any power in his body.
- (xxii) He never made attempt to move by himself because he is afraid.
- (xxiii) He was admitted in hospital in India and went twice to India for treatment.
- (xxiv) On first occasion he went in 2009, and was admitted at Lakeshore Hospital, Kerala, India for nineteen (19) days.
- (xxv) On second occasion he went in 2011, and was admitted at Lakeshore Hospital, Kerala, India for nineteen (19) days.
- (xxvi) He went to Lakeshore Hospital because he was finding it hard to pass urine and they carried out operation to fix urine problem.

- (xxvii) When asked as to why he did not go to CWMH, he stated that no doctors were there to carry out the operation.
- (xxviii) He had few improvements after the operation but after sometimes was painful again.
- (xxix) After his last return he is being reviewed by Dr. Naidu at Rakiraki, at Lautoka Hospital and at CWMH.
- (xxx) On first occasion Tower Insurance paid Lakeshore Hospital \$15,000.00 (Fifteen thousand dollars) and second occasion he thinks Tower Insurance paid Lakeshore Hospital about \$32,000.00 (Thirty-two thousand dollars).
- (xxxi) On both occasions he was accompanied by his father.
- (xxxii) He was in pain when he was travelling to Lakeshore Hospital.
- (xxxiii) His condition is not that good and still pains and about his future he stated that it is wasted.
- (xxxiv) His health was good before the accident.
- (xxxv) He received marriage proposal before the accident but he got injured and cannot marry.
- (xxxvi) He worked for Rajendra Prasad Foodtown for more than a year at gross wages of \$129.29 per week and when he was working he was supporting his father and his brother.
- (xxxvii) Now, he is supported by his father who is a vegetable farmer.
- (xxxviii) He is claiming medical expenses since accident in the sum of \$1,115.00 (Exhibit P2).
- (xxxix) He is also claiming \$6,600.00 as transport costs (Exhibit P3) and for loss of earning.
- (xl) Since accident he had three (3) wheelchairs of which two (2) had broken and the cost of the wheelchairs was \$600.00 to \$700.00.

39. During cross-examination Plaintiff:-

- (i) Stated that he had been to the rubbish dump on 23 February 2007, for second time and first time he had been there was one (1) or two (2) months before 23 February 2007.
- (ii) Stated that no one told him about the safety gear at the rubbish dump.

- (iii) When asked if he saw any sign of safety gear he stated that he did not see.
- (iv) When he was shown two (2) notices and asked if the notices were there he stated that he did not see the notice.
- (v) Denied that Roller driver went and spoke to him.
- (vi) Denied that Roller driver asked him about safety gear and stated that he did not have any safety gear.
- (vii) Denied that he hid behind the truck when Roller driver asked him about his safety gear.
- (viii) Denied that Truck driver told Roller driver and he had safety gear in the truck and stated that there was no safety gear in the truck.
- (ix) Denied that, that is why he ran to back of the truck and that Roller driver was waiting for him to put on safety gear.
- (x) Denied that it was made very clear to him that him and the truck driver to have safety gear and stated that no one told him.
- (xi) Agreed that Roller was not in operation when he was dumping the rubbish and stated that Roller was parked 20 yards away.
- (xii) Stated that after dumping the rubbish Truck driver moved the Truck to clean the tailgate and close it.
- (xiii) When asked if he knew that there is a particular area where he can go and clean the truck he stated that Driver parked and he did not know.
- (xiv) Stated that at rubbish dump driver reversed the truck, unloaded rubbish and brought truck in front and Truck driver told him that they had to unload rubbish and come back to work.
- (xv) Stated that Truck driver told him that he will move the truck in front to clean and close tailgate.
- (xvi) Denied that the Roller driver told him and the Truck driver to move the Truck from where it was stopped so that he could roll soil at the tipping place.
- (xvii) Denied that after Roller driver asked Truck driver to move the Truck and stated that the Truck driver moved Truck in front and Truck was parked at same place.

- (xviii) Stated that he did not see Roller coming from any side or angle and did not hear any alarm or sound before he was hit.
- (xix) Stated that there were other trucks going up and down.
- (xx) Stated that he was hit when he was closing the tailgate and the Truck's engine was running.
- (xxi) When it was put to him that after the accident he was assisted by Roller driver and workers at dump he stated that he did not know what happened after the accident.
- (xxii) When it was put to him that he had conversation with Roller driver when he was being transferred to the hospital he stated he did not know anything.
- (xxiii) His father and brother still assist him in toilet matters.
- (xxiv) Stated that he still passes his waste on bed.
- (xxv) Stated that is still not able to move from bed and go anywhere.
- (xxvi) Stated that he has not made attempts to move because it pains and he has no power.
- (xxvii) Stated that he tried doing exercise with his legs but he has no power in his legs.
- (xxviii) Stated that hospital did not make him do exercises.
- (xxix) For his trip to India, one trip was paid for by New India Assurance and the other trip was paid for by Tower Insurance, insurer for Rajendra Foodtown.
- (xxx) He filed claim against Rajendra Foodtown and got paid.
- (xxxi) When he went to India he went in wheelchair and was seated in a special seat at the back and when he wanted to use toilet, air hostess assisted him and took him in the wheelchair to the toilet.
- (xxxii) His marriage proposal was from Ba and he forgot girl's name.
- (xxxiii) Agreed that there was nothing confirmed and was proposal only.
- (xxxiv) Maintained travelling expenses was incurred.
- (xxxv) When it was put to him that receipt numbers are in order; are one after the other in sequence; dates are different and not one after the other he stated that his brother is driving the taxi; who made the receipts; his brother used one invoice and made invoice when he came for checking.

- (xxxvi) When it was put to him invoices were created by his brother to show to court he stated that cost was incurred and his brother prepared invoices on the day they came for checking.
- (xxxvii) Stated that he paid his brother for travelling expenses.
- (xxxviii) When it was put to him that incident happened because of him and he did not have safety protection on him he stated that no one told him to wear safety gear.
40. In Re-examination Plaintiff stated his brother had one receipt book for him but may have given one receipt to someone else.
41. This Court sought following clarification from Plaintiff:-
- (i) How did he use he go to toilet when he was in Court?
 - (ii) If he can use toilet papers?
42. To first clarification he stated that his father and brother goes with him to toilet, lift him up from wheelchair and makes him sit on the toilet pan. They then wait for him in the toilet and then lifts him and puts him back on the wheelchair.
43. To second clarification he answered "Yes".
44. Both Counsel for Plaintiff and Defendant were given opportunity to ask any question in respect to clarification sought by Court when they both chose not to do so.
45. Plaintiff's next witness was Ram Sami Goundar, Plaintiff's father ("**PW2**").
46. During evidence in chief he gave evidence that:-
- (i) He cannot recall date of accident but says was seven (7) years ago and at time of accident Plaintiff was employed by Rajendra Foodtown as butcherman.
 - (ii) He received call from Suva that his son is injured when he hired car and went to hospital but could not see Plaintiff because he was in the recovery.
 - (iii) He first saw Plaintiff when doctors asked him to sign form for operation, which he signed and when he first saw him, he was unconscious and had blood on his stomach, leg and clothes.

- (iv) He did not see treatment given to Plaintiff as they took him to operation theatre.
- (v) At first he was with Plaintiff for one (1) hour and when they took Plaintiff inside he went outside.
- (vi) He stayed with Plaintiff in hospital for about twenty (20) days.
- (vii) In hospital Plaintiff was in wheelchair and for toilet and bathroom needs he was doing toilet in bed.
- (viii) His son's condition in hospital was very bad and was like dead body.
- (ix) After Plaintiff was discharged he was confined to bed for about six (6) months and they carried him for his toilet and bathroom needs.
- (x) After being discharged from CWMH, Plaintiff went to India twice and he accompanied Plaintiff on both occasions.
- (xi) After treatment in India there was some improvement in Plaintiff's condition but not that much.
- (xii) Plaintiff's condition before the accident was good.
- (xiii) His son and him assist Plaintiff with his toilet and bathroom needs.
- (xiv) At time of accident Plaintiff was earning about \$100.00 per week.
- (xv) Plaintiff's injury affected his ability to earn as a farmer because he has to look after him and cannot work on the farm.
- (xvi) He is a small time sugar cane farmer, sold vegetables at Rakiraki Market when he had a stall and was earning about \$100.00 per week from vegetable sales before son's accident.
- (xvii) After son got injured he had to cement part of his home for wheelchair access and set Plaintiff's bed at total cost of about \$2,000.00 to \$3,000.00.
- (xviii) They had to buy three (3) wheelchairs at a cost of \$600.00 to \$700.00.

47. During cross-examination PW2:-

- (i) Stated that in hospital he was assisted by staff to lift Plaintiff and take him to toilet and bathroom which he did for twenty (20) days he was in hospital and his son was not able to wash after using toilet.
- (ii) He still helps Plaintiff with toilet and bathroom needs when he takes Plaintiff to toilet and makes him sit on toilet pan.
- (iii) He helps him to clean by pouring water.

- (iv) Plaintiff does not do toilet in bed now.
 - (v) Plaintiff has to be given bottle for urine.
 - (vi) When in aeroplane going to India, he asked staff for help and they took him to toilet on wheelchair, he lifted him up and put him on the pan and after Plaintiff finished he would clean Plaintiff by wiping while Plaintiff will stand holding onto the wheelchair.
 - (vii) Stated that wife is not there and his other children work.
 - (viii) He stated that he helps Plaintiff both in cane harvesting season and off season.
 - (ix) When it was put to him that after changes to the house Plaintiff is able to go to bathroom and toilet on his own he stated "No".
 - (x) Stated that Plaintiff is not able to wheel himself to toilet and bathroom and they have to put Plaintiff on wheelchair, open the door and then he goes on his own.
 - (xi) Stated that Plaintiff cannot fully wheel the wheelchair on his own and that when he sits on the wheelchair they push and then Plaintiff can wheel.
 - (xii) When it was put to him that there was no injury to Plaintiff's hands he stated that when Plaintiff was admitted he had blood on his hands.
 - (xiii) Stated that he did not have receipts for cost of \$2,000.00 to \$3,000.00 because it was long time and he did not know it will be required.
 - (xiv) Stated that he did not have receipts for wheelchair and did not know where it was.
 - (xv) When asked if he helps his son in doing exercise at home he stated that he does not have time.
 - (xvi) Stated that his health is not good and when asked if he is still able to lift Plaintiff and help him sit on toilet seat he stated that he has to do it in time of need.
 - (xvii) When asked if he helps Plaintiff in any form of movement so that Plaintiff can start working he stated that Plaintiff cannot stand, then how could he work.
48. In re-examination PW2 stated that he has heart problem and blood pressure.
49. Plaintiff's last witness was Imendran Gounder, Plaintiff's brother ("**PW3**").

50. In examination in chief PW3 gave evidence that:-
- (i) He is Plaintiff's brother and he has been transporting Plaintiff to Hospital for review.
 - (ii) He issued receipts to Plaintiff and took Plaintiff to CWMH about twenty (20) times and to Lautoka Hospital.
 - (iii) Metered fare from Rakiraki to CWMH is \$300.00 plus return fare but he charged Plaintiff \$200.00 as return fare per trip right from date of accident till date of trial.
51. During cross-examination PW3:-
- (i) Stated that he is a taxi driver and owns a taxi.
 - (ii) He charged Plaintiff \$200.00 for trip and Plaintiff used to pay him and sometimes gave money for fuel.
 - (iii) Stated that he issued receipts for the trips but was not able to give some receipts.
 - (iv) Stated that he had receipt book for Plaintiff as in Rakiraki they do not have receipt books.
 - (v) He did not have receipt book with him at time of giving evidence.

Defendant's Case

52. Defendant called three witnesses namely:-
- (i) Paul Robert Evens of 9 Qauia Street, Lami, Acting General Manager ("**DW1**");
 - (ii) Seresio Ravisoli of Kalokalo Village, Lami, Machine Operator ("**DW2**");
 - (iii) Emosi Taloga of 17 Paul Sloan St., Bayview Heights, Suva, Orthopedic Surgeon ("**DW3**").
53. DW1 during his evidence in chief gave evidence that:-
- (i) He is Acting General Manager of Defendant Company for seven (7) months and he was not employed by Defendant at time of accident.
 - (ii) He became aware about the accident from company's internal accident report which is the detailed outline of accident and events thereafter and the report is in his possession.

- (iii) Report was prepared because it was management procedure and OHS requirement to ascertain responsibility and fault and to show weakness in procedure that can be rectified or fixed and for future legal proceedings.
- (iv) Report is an internal document and was prepared by Terry Bowen, General Manager Operations at Naboro Landfill and Eric Couchow, Executive Director, H.G. Leach International.
- (v) Company (Defendant) takes OHS requirements seriously; it has three (3) landfills in New Zealand (NZ); OHS requirements are same as in NZ; staff in all areas go through induction and training; All contractors and staff must be made aware of OHS rules and regulations before they can enter; current staff, both administration and unskilled labour actively inform clients and contractors that they must wear safety equipment at all times which is ongoing and he believes that it was same when report was written.
- (vi) Defendant has spare safety gowns at all times at the weighbridge and they provide high visibility gown and anyone entering landfill for commercial purposes must wear their own or they give them.
- (vii) Naboro Landfill is privately owned, and they have contractors and clients with main client being Suva City Council, greater Suva, Nasinu and Nausori area and other commercial clients having commercial interest in bringing rubbish to landfill.
- (viii) All clients sign user agreement which has all rules and regulations.
- (ix) He is not aware as to whether Plaintiff's employer and Naboro Landfill entered into User Agreement but Plaintiff's action indicate that there should have been.
- (x) Clients have responsibility to provide safety gear.
- (xi) In respect to health and safety at Naboro Landfill, stated that all staff are over 18 years and possess ten (10) years service level at Naboro.

54. During cross-examination DW1:-

- (i) Stated that Defendant is contracted Management Company of Naboro Landfill.

- (ii) When asked if Defendant is the occupier he asked for definition of occupier and when definition was given stated that in that case they are the occupier.
- (iii) When asked if Rajendra Prasad Foodtown was visitor or licensee he stated that when he was made aware about this proceedings he conducted interview of staff on site at that time and all staff were aware that that vehicle visited Naboro regularly and they were informed and made aware on every trip.
- (iv) When it was put to him that he agreed Rajendra Prasad Foodtown was regular visitor he stated that they were clients.
- (v) He understood that as occupier of the premises they have a duty to non-workers on the premises.
- (vi) He is aware that as occupier of the premises and in terms of occupier Liability Act they owe a duty of care to visitors on their premises and that they met the duty of care.

55. DW2 in his evidence in chief gave evidence that:-

- (i) He has been employed by Defendant since 2005, for ten (10) years and had been Machine Operator for eight years and when he started work he had to guide truck to where rubbish is unloaded.
- (ii) When asked to describe how he guided trucks he stated that truck goes to weighbridge; payment is made; truck driver is given receipt; truck then enters landfill and meets him; he instructs them about the policy as to unloading of rubbish; instructs them about OHS requirements of landfill before rubbish is unloaded and policy about wearing safety boots and safety vests and after that tell them where to unload rubbish.
- (iii) He knew about claim by Plaintiff.
- (iv) On 23 February 2007, he was guiding truck and on that day his work was to guide truck and make sure road is level by rolling the road every day.
- (v) Truck of Rajendra Foodtown on that day came at about 8.00 o'clock in the morning.
- (vi) He asked driver and boy (Plaintiff) if they had reflector and safety boots and they told him they had.

- (vii) After that they reversed truck to tipping area and the boy came out from passenger side when the truck reversed and tipped the rubbish.
- (viii) That was hand load truck and the boy was throwing rubbish out of the truck.
- (ix) At that time other trucks were coming and he was busy with those trucks.
- (x) After rubbish was unloaded he asked the driver to move the truck so that he can roll the road and the driver moved the truck in front.
- (xi) After the truck moved he rolled the road and reversed the roller.
- (xii) When he reversed the Roller he could only see the rear tyre of the Roller through the side mirror.
- (xiii) He then heard sound and moved the Roller in front when he saw the boy lying on the road.
- (xiv) At that time it was part of his duty to drive the Roller which was used to level the road everyday.
- (xv) If road is of loose gravel then he had to roll the road everyday and in 2007 he was using the Roller.
- (xvi) When he was reversing Roller he faced towards opposite direction to the truck and was facing tipping place and the Roller has reverse alarm sound.
- (xvii) When asked if he could see the truck when he was reversing he stated that on side mirror you can only see the tyre of Roller and you cannot see right at the back.
- (xviii) When he saw the boy he called his supervisor, and when they came they placed the stick where he was injured and took him to the office and informed commercial manager.
- (xix) He then went to hospital, and he was holding Plaintiff's head and talking to him, and he told the boy that he was very sorry and did not mean that thing to happen.
- (xx) They were talking all the way from Naboro to Hospital when the boy asked him to dig into his pocket and get the money in his pocket and give it to the driver which money was payment for Courts.

- (xxi) He did not see Plaintiff, before that day and Plaintiff told him that he is from Rakiraki and it was the first time he came to the landfill.
- (xxii) He saw the truck driver before that day as he went to the landfill most of the time.
- (xxiii) He did not wish to say anything else about the accident.

56. During cross-examination DW2:-

- (i) Stated that at time of accident he did not have driving licence for Roller he was driving but now he has the licence.
- (ii) Sakai Roller has steel wheel which is in front and the engine is at the back.
- (iii) Roller was steel roller and has two rear tyres and the back part is in square shape.
- (iv) He did not at anytime before the accident physically turn around to see what was at the back, before the Plaintiff was crushed and was using side mirror.
- (v) When asked which side of the mirror he looked he stated left side.
- (vi) When asked where was the truck he said "sorry" he looked on right side mirror and that the truck was right at the back.
- (vii) He did not have cones to place where he was working with the Roller.
- (viii) At that time, apart from them no one else was there and he was guiding truck and operating the Roller.
- (ix) There was no sign saying "Danger Roller Reversing".

57. During re-examination DW2:-

- (i) Stated that he was not required to have driving licence when he applied for the job and when he started he did not have driving licence.
- (ii) Stated that when seated in Roller he could look around and look at the back but he did not look around.

58. During examination in chief DW3 gave evidence that:-

- (i) He examined Plaintiff a month ago, prepared report dated 11 December 2015, and signed the said report (Exhibit D1).

- (ii) He completed the report from previous medical reports and examining the patient.
- (iii) He carried out assessment for permanent impairment and did not take into account urethral injury because separate test is needed to say that he is not in control of urine.
- (iv) Patient told him that he is not in control of urine.
- (v) For people not in control of urine have diaper or urinary catheter but patient did not have any diaper or urinary catheter.
- (vi) He did not do assessment on right hip because fracture of femur was on left side and femur is connected to hip or joint and there were no fractures on right.
- (vii) In reference to first sentence in third paragraph of page 2 of Exhibit D1 he stated that Sacroiliac joint test is to stress the joint and if it is painful the person will complain if there is injury or instability in joint.
- (viii) In this instance the test was negative and joint was stable.
- (ix) In reference to second sentence on same paragraph and page he stated that joint was normal.
- (x) In this case patient was reluctant to move the joint, he does not have injury to his spine and from history and examination he does not have spinal injury and there is no reason as to why he is not moving the joint.
- (xi) Agreed that Plaintiff should have some form of movement.
- (xii) In respect to test to lower limb, Plaintiff was reluctant to move both left and right lower limbs.
- (xiii) In reference to fourth paragraph on page 2 he stated as follows:-
 - (a) Radiological examination means X-ray or CT Scan. X-ray was taken on fracture of left femur;
 - (b) Consolidation means fracture is healed;
 - (c) Intra-medullary rod is metal rod within the canal of bone and is used to stabilize fracture at time of operation;
 - (d) Pubic Rami is part of pelvic bone and is united or healed.
 - (e) Malunion means healed but not in normal position.
- (xiv) In reference to paragraph five on page 2 of Exhibit D1 he stated as follows:-

- (a) CT Scan was done at CWMH;
 - (b) Fracture of pelvis has healed;
 - (c) Iliac Fracture shows fracture is united but line of fracture is extending to the joint;
 - (d) No displacement of symphysis pubis means it is in normal position, right in front of pelvic bone;
 - (e) Sacro is at the back of the pelvic; Coccygeal is tail bone; Antero means coming forward; Laterally means towards side; Normally should be curved backwards and straight in the back.
- (xv) Based on this he assessed permanent impairment at thirty-eight percent (38%).
- (xvi) Agreed that Plaintiff should not be confined to wheelchair all the time.
- (xvii) In respect to Plaintiff's complaint about weakness of lower limb, he stated that physiotherapy would assist or help the patient.

59. During cross-examination DW3:-

- (i) Stated that he is an accredited assessor for permanent disability and his credentials are stated in his C.V. and he has attended course for permanent disability impairment assessment (Phase 1 & 2) with Ministry of Labour.
- (ii) Stated that he did not see original medical folder of Plaintiff.
- (iii) In reference to last line, paragraph one on page 2 of Exhibit D1, he stated that numbness is testing for sensation of touch.
- (iv) Agreed that "left leg was in an externally rotated position" as stated in second paragraph on page 2 of Exhibit D1.
- (v) He did not have Dr. Lawrence's report but remembered reading it.
- (vi) Stated that there can be nerve injury or pinch without spinal injury.
- (vii) Stated that CT Scan and X-ray cannot pick nerve injury.
- (viii) Stated that MRI can pick nerve injury.
- (ix) Stated that total permanent impairment assessment is not simple addition but is combined value.
- (x) Stated that malunion of pubic rami can affect mobility and composure.
- (xi) Extension of fracture should not affect mobility and composure.

- (xii) Deviated sacro-coccygeal will not affect mobility but may affect the way Plaintiff is sitting.
- (xiii) Stated that he did not carry out any test of urinal dysfunction because he is not an expert.
- (xiv) When asked if there would be any disability on urethra part he stated that, that needs to be tested.

Whether Defendant owed Duty of Care to the Plaintiff

- 60. It is well settled that an occupier of a premises/property owes a duty of care to ensure that the premises is reasonably safe for any person to enter.
- 61. This common law duty has been clearly stated in sections 4 and 5 of Occupiers Liability Act which provides as follows:-

“s4.- (1) An occupier of premises owes the same duty, the common duty of care, to all his visitors, except in so far as he is free to and does extend, restrict, modify or exclude his 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 is invited or permitted by the occupier to be there.

(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 calling, will appreciate and guard against any special risks ordinarily incident to it, so far as the occupier leaves him 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 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 had acted reasonably in entrusting the work to an independent contractor and had taken such steps, if any, as he reasonably ought in order to satisfy himself 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 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.

(6) For the purposes of this section, persons who enter premises for any purpose in the exercise of a right conferred by law are to be treated as permitted by the occupier to be there for that purpose, whether they in fact have his permission or not.”

“s5.- (1) Where an occupier of premises is bound by contract to permit persons who are strangers to the contract to enter or use the premises, the duty of care which he owes to them as his visitors cannot be restricted or excluded by that contract, but, subject to any provisions of the contract to the contrary, shall include the duty to perform his obligations under the contract, whether undertaken for their protection or not, in so far as those obligations go beyond the obligations otherwise involved in that duty.

(2) A contract shall not by virtue of this section have the effect, unless it expressly so provides, of making an occupier who has taken all reasonable care answerable to strangers to the contract for dangers due

to the faulty execution of any work of construction, maintenance or repair or other like operation by persons other than himself, his servants and persons acting under his direction and control.

(3) In this section "stranger to the contract" means a person not for the time being entitled to the benefit of the contract as a party to it or as the successor by assignment or otherwise of a party to it, and accordingly includes a party to the contract who has ceased to be so entitled.

(4) Where by the terms or conditions governing any tenancy, including a statutory tenancy which does not in law amount to a tenancy, either the landlord or the tenant is bound, though not by contract, to permit persons to enter or use premises of which he is the occupier, this section shall apply as if the tenancy were a contract between the landlord and the tenant.

(5) This section, in so far as it prevents the common duty of care from being restricted or excluded, applies to contracts entered into and tenancies created before the commencement of this Act, as well as to those entered into or created after its commencement; but in so far as it enlarges the duty owed by an occupier beyond the common duty of care, it shall have effect only in relation to obligations which are undertaken after that commencement or which are renewed by agreement, whether express or implied, after that commencement."

62. DW1, the Acting General Manager for the Defendant in his evidence acknowledged and agreed that the Defendant was occupier of Naboro Landfill, and as occupier owed a duty to non-workers and visitors on the premises, and stated that he met the duty. This Court therefore, has no hesitation in holding that Defendant as Occupier of Naboro Landfill owed a duty to the Plaintiff when the Plaintiff was present at Naboro Landfill on 23 February 2007.

Whether Defendant breached the duty of care owed to the Plaintiff

63. After careful analysis of the evidence of Plaintiff, DW1 and DW2, I make following findings:-

- (i) When Plaintiff went to Naboro Landfill, DW2 the Roller driver did not give any instruction to the Plaintiff or the driver of the Truck in which Plaintiff came.
 - (ii) Even if there was a policy for persons entering to wear safety gear that policy was not enforced by Defendant's staff present on the landfill against the Plaintiff.
 - (iii) The Defendant was reckless and had no regard to safety of the person entering the landfill when they left on the premises an employee (DW2) with about two (2) years experience and permitted him to drive the Roller when he did not have licence to drive the Roller.
 - (iv) The accident took place due to the negligence of the Roller driver (DW2).
 - (v) DW2's evidence was that:-
 - (a) he only looked in side mirror and could see the tyre when he reversed the Roller;
 - (b) In re-examination DW2 stated he could turn around and look back when he is seated in the Roller but he did not look back;
 - (c) He reversed the Roller without looking back and hit something and then saw Plaintiff lying on road;
 - (d) After rubbish was dumped he asked Truck driver to move truck in front which Truck driver did.
 - (vi) No evidence was produced to show that there was a safe place for Trucks to be parked for cleaning after dumping the rubbish.
64. No evidence has been produced to show that Plaintiff was given any warning to ensure that he was reasonably safe of the danger of being crushed by the Roller.
65. In view of what is stated in paragraphs 63 and 64 and after analyzing the evidence of Plaintiff, DW1 and DW2, I find that Defendant breached its duty of care owed to the Plaintiff.

Whether Plaintiff was Contributory Negligent

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

“The basic principle of contributory negligence is that, when a court is awarding damages to the plaintiff for injuries caused by the defendant, it may reduce the award if the plaintiff can be shown to have contributed to the injury by some negligence on his part. However, whilst the liability of the defendant arises from a duty towards the plaintiff, the assessment of contributing negligence is not based on a similar duty on the plaintiff towards the defendant. It was explained by Lord Simons in Nance v. British Columbia Electric Railway Co. Ltd [1951 AC 601, 611:

“The statement that, when negligence is alleged as the basis of an actionable wrong, a necessary ingredient in the conception is the existence of a duty owed by the defendant to the plaintiff to take due care, is, of course, indubitably correct. But when contributory negligence is set up as a defence, its existence does not depend on any duty owed by the injured party to the party sued, and all that is necessary to establish such a defence is to prove to the satisfaction of the jury that the injured party did not in his own interest take reasonable care of himself and contributed, by this want of care, to his own injury. For when contributory negligence is set up as a shield against the obligation to satisfy the whole of the plaintiff’s claim, the principle involved is that, where a man is part author of his own injury, he cannot call on the other party to compensate him in full.

...this, however, is not to say that in all cases a plaintiff who is guilty of contributory negligence owes to the defendant no duty to act carefully.”

67. No evidence has been provided to show that Plaintiff was contributory negligence. He was cleaning the truck and closing tailgate when he was crushed by the Roller.
68. I hold the accident took place because of the sole negligence of the Defendant for failing to ensure that the Plaintiff was reasonably safe when he entered the Naboro Landfill under the circumstances of the case.
69. I do not find that Plaintiff was contributory negligent.

Damages

Travelling Expenses

70. Plaintiff gave evidence that after being discharged he had to travel to CWMH twenty (20) times and to Lautoka Hospital from Rakiraki in his brother's taxi which cost him \$6,600.00.
71. It is apparent from Exhibit P3 that the invoice and receipts were created for the purpose of this case and has been exaggerated.
72. However, it is not doubted that Plaintiff did incur travelling expenses which this Court will allow travelling expenses at four thousand dollars (\$4,000.00).

Medical Expenses

73. Plaintiff provided receipt and invoices being Exhibit P2 as evidence of medical expenses incurred by him as such will allow the sum of \$1,115.41 as medical expenses.

Wheelchair

74. Plaintiff's evidence is that he had purchased three (3) wheelchairs so far which was confirmed by his father. I assess cost of wheelchair at \$600.00 each with total at \$1,800.00.

Renovation to House

75. PW2 (Plaintiff's father) gave evidence that he had to renovate his house for wheelchair access for the Plaintiff at cost \$2,000.00 - \$3,000.00 but did have any documentary evidence to prove that.
76. In cases like this it is apparent that the person who incurs such expenses in a personal injury claim does not keep such documents because they do not appreciate its importance to any claim they may bring for the injuries sustained by them. The Court should not reject the claim only because the Plaintiff could not produce the documentary evidence for such expenses but must also consider the oral evidence of the Plaintiff as to whether it is credible or not and if the Court finds such evidence is credible then the Court should not hesitate to award damages for claim such as travelling expenses, expenses for medication and expenses for obtaining report.

77. As such this Court accepts PW2's evidence and allow \$2,000.00 for cost of renovation to allow wheelchair access for Plaintiff.

Loss of Wages

78. It was undisputed that Plaintiff's weekly gross wages was \$129.29.

79. I take note that Plaintiff in his Statement of Claim only claimed for loss of wages at \$93.21 for only twenty (20) weeks when accident took place on 23 February 2007 and Statement of Claim was signed on 31 July 2012.

80. No submissions have been made by Plaintiff's Counsel for loss of wages upto date of Judgment.

81. This Court will nonetheless assess loss of wages from 17 March 2012, being twenty (20) weeks prior to 31 July 2012 upto date of Judgment.

82. The loss of wages upto date of judgment is assessed in the sum of \$32,914.64 which is made up as follows:-

\$129.29 x 235 weeks (17/3/12 to 20/10/16)	-	\$30,383.15
FNPF Contribution upto 31/12/15	-	2,027.26
from 1/1/06 to 20/10/16	-	<u>504.23</u>
		<u>\$32,914.64</u>

Total Special Damages

83. Hence, the total claim allowed for special damage is \$41,830.05 which is made up as follows:

Travelling expenses:	\$ 4,000.00
Medical expenses:	\$ 1,115.41
Wheelchair	\$ 1,800.00
Renovations to House	\$ 2,000.00
Loss of wages and FNPF	<u>\$ 32,914.64</u>
	<u>\$41,830.05</u>

General Damages

84. Plaintiff claims damage for pain and suffering, loss of amenities of life, loss of future earning and loss of future care.

Pain and Suffering

85. The Fiji Court of Appeal in **Chand & Anor. v. Amin**; Civil Appeal No. ABU 0031 of 2012 (2 October 2015) stated as to how damage is to be assessed for pain and suffering in very simple terms as follows:-

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

86. It is not doubted that Plaintiff suffered severe injuries to the left lower limb of his body and must have been in extreme pain and suffering after he gained consciousness.

87. This Court also takes note of the fact that both medical experts (PW1 and DW3) were of the view that the fractures to parts of Plaintiffs body as a result of the accident has healed and that Plaintiff right limb and upper body has no injuries.

88. Based on the medical evidence, Plaintiff’s evidence and cases referred to by Counsel in their Submission this Court assess pain and suffering as follows:-

(i)	Past Pain and Suffering:	\$70,000.00
(ii)	Future Pain and Suffering:	<u>\$10,000.00</u>
		<u>\$80,000.00</u>

Future Income

89. At time of trial Plaintiff was thirty-five (35) years old and a healthy person at time of accident and as such it is just and fair that multiplier of twelve (12) be applied.

90. Loss of future income is therefore assessed at \$80,676.96 and is made up as follows:-

$$\$129.29 \times 52 \times 12 \text{ years} = \$80,676.95$$

Loss of Amenities of Life/Future Care

- 91. No doubt Plaintiff has lost amenities of life as he, a young person at the time of accident.
- 92. This Court assesses \$5,000.00 as loss of amenities of life.
- 93. Medical evidence of PW1 and DW3 is that Plaintiff hands and right leg is not injured, Plaintiff's injuries have been healed and that Plaintiff should not be confined to wheelchair.
- 94. This Court also holds that Plaintiff exaggerated when he stated his present condition and that Plaintiff now requires minimum support for his movement.
- 95. No award is made for future care.

Interest

- 96. I think it is just and fair that interest on special and general damages be assessed at three percent (3%) per annum and four percent (4%) per annum respectively. The reason this Court is awarding four percent (4%) interest on general damages is because of the delay by Plaintiff in prosecuting his claim.

Cost

- 97. I have taken into consideration that the trial lasted for three (3) days and parties have filed submissions.

Conclusion

- 98. This Court holds that:
 - (i) Defendants owed a duty of care to the Plaintiff.
 - (ii) The Defendants breached their duty of care owed to the Plaintiff.
 - (iii) Plaintiff was not negligent or contributed to his injury.
 - (iv) Injuries sustained by Plaintiff as claimed was a result of the accident.
- 99. Defendants are to pay the Plaintiff a sum of \$232,319.00 in special and general damages including interest up to the date of Judgment which said sum is made up as follows:

Special Damages	\$ 41,830.05
Interest at 3% per annum from 23/2/07 (<i>date of Accident</i>) to 20/10/16 (<i>date of Judgment</i>) (3528 days)	<u>\$ 12,130.00</u>
	\$ 53,960.05

General Damages

Pain and Suffering	\$70,000.00
Loss of Amenities of Life	<u>5,000.00</u>
	\$ 75,000.00

Interest at 4% per annum from 31/7/12

(date of Writ of Summons) to 20/10/16

(date of Judgment) (1543 days)

\$12,682.00 \$ 87,682.00

Loss of Future Earnings

\$ 80,676.95

Future pain and Suffering

\$ 10,000.00

Total


\$232,319.00

Orders

96. I make following Orders:

- (i) Defendants do pay Plaintiff the sum of \$232,319.00 including interest;
- (ii) Defendant, do pay Plaintiff cost of this action assessed in the sum of \$6,000.00.




K. Kumar
JUDGE

At Suva

20 October 2016

Daniel Singh for the Plaintiff

Sherani & Co. for the Defendant