

**IN THE HIGH COURT OF FIJI AT SUVA**  
**CIVIL JURISDICTION**

**Civil Action No. HBC 281 of 2014**

BETWEEN

**KRISHNEEL KUBOUTAWA NARAYAN** of Lot 95, Vishnu Deo Road,  
Nakasi, Unemployed.

**PLAINTIFF**

AND

**MOTIBHAI & COMPANY LIMITED** a limited liability company having  
its registered office at 22 Ganga Singh Street, Ba.

**DEFENDANT**

**Counsel** : Mr. P. Sharma for the Plaintiff  
Mr. R. Harper for the Defendant

**Dates of Hearing** : 27<sup>th</sup> & 28<sup>th</sup> August, 2018

**Date of Judgment** : 26<sup>th</sup> September, 2018

## JUDGMENT

- [1] The plaintiff instituted these proceedings claiming damages for the injuries caused him while at work. It is averred in the amended statement of claim that on 03<sup>rd</sup> June, 2013 in the course of his employment, he was walking from warehouse to the garage where he was servicing company vehicles when he slipped on oily surface and suffered injuries.
- [2] The defendant in its amended statement of defence averred that the accident was due to sole negligence of the plaintiff in that the plaintiff failed to follow the defendant's OHS policy with regard to movement between different areas of its premises, failed to keep any or any proper look out whilst traversing the alley way and failed to wear the recommended equipment of the defendant and moving too hastily in the circumstance, particularly when the defendant ought or ought reasonably to have been aware that the place where the accident occurred was liable to be slippery.
- [3] At the pre-trial conference the parties admitted the following facts:
1. That at the material time, the plaintiff was employed by the defendant as a mechanic.
  2. The defendant is a limited liability company having its registered office at 22 Ganga Singh Street, Ba, Fiji and is in the business of retail services of various types of goods including clothes, jewellery and perfumes.
  3. On 03<sup>rd</sup> June, 2013, in the course of employment, the plaintiff was walking from the defendant's warehouse to its garage when he slipped on an oil patch in an alley way.
  4. That after the accident on 03<sup>rd</sup> June, 2013, the plaintiff was taken to the Samabula Health Centre and then transferred to the CWM Hospital. At the CWM Hospital he was referred to the Orthopedic Department and consulted Dr. Taloga. Dr. Taloga eventually referred the plaintiff to the Neurology Department.
  5. That in August 2013, Dr. Alan Biribo, Consultant Neurosurgeon, examined the plaintiff and carried out an MRI scan.
  6. That on 13<sup>th</sup> August, 2013 Dr. Alan Biribo, operated on the plaintiff.

7. After the operation on 13<sup>th</sup> August, 2013, the plaintiff became an outpatient in the Neurology and Urology Departments for further treatment and prescription of medicine. The plaintiff also received physiotherapy treatment.
8. That subsequently Dr. Biribo issued three medical reports on the plaintiff's condition on 16<sup>th</sup> December, 2013, 18<sup>th</sup> June, 2015 and 17<sup>th</sup> March, 2017.
9. That in addition, Urology Department also issued a report dated 12<sup>th</sup> May, 2014.
10. That the defendant reported the accident to the Ministry of Labour, Industrial Relations and Employment by a Workplace Injury and Decease Notification Form dated 21<sup>st</sup> June, 2013.
11. That the defendant again reported the accident to the Ministry of Labour, Industrial Relations and Employment by a notice by Employer of Accident Causing Injury to a Workman dated 29<sup>th</sup> September, 2014.
12. The defendant paid two thirds of his wages after the accident until 29<sup>th</sup> September, 2014.

[4] At the conclusion of the trial the court granted both parties time to file written submissions, if any, on or before 14<sup>th</sup> September, 2018 but only the plaintiff filed his submissions.

[5] The first issue to be determined is whether the injuries caused to the plaintiff were due to the defendant's negligence. The plaintiff testified that he was assigned to service the fleet vehicles and was looking for some cardboard to lie down under the car because they were not provided with car-creepers by the company. When he asked Joseph he asked him to go to the warehouse. While carrying the cardboard cartons he slipped and fell. He said there was water and oil on the floor. He said he could see the front and not the ground. Explaining why he did not take to same route to go back to the workshop he said when he came back there was a vehicle parked blocking his way and this was the only way he could go the workshop.

[6] The other workers who were in the vicinity and who saw the accident corroborated the evidence of the plaintiff. In evidence this witness tendered three photographs (P8) taken by him in evidence showing where the oil leakage was. This witness said that

the oil leak was not fixed while he was there but they cut a drain for the leaking oil to go to a sump. This witness also confirmed that there were vehicles parked blocking the plaintiff's way. In cross-examination of the plaintiff and his witnesses the defendant attempted to show court that it plaintiff who was negligent in that he was walking without a proper view in front. It appears from the evidence of the workers that this oil leakage had been there for some time. There is no evidence that the defendant paid any attention to this oil leakage. If the defendant was concerned about the safety of the workers they should have repaired the oil leakage and if the workers were provided with required equipment such as car-creepers this accident would not have happened. In cross-examination it was suggested to the plaintiff that he was not wearing safety boots provided by the defendant but the plaintiff denied it. Witness Naidu in his evidence said before taking the plaintiff to the hospital they removed the safety boots the plaintiff was wearing.

[7] In paragraph 16 of the amended statement of defence the defendant has stated that it always took all measures to ensure that its workers are not injured at work and gives training and posts notice in respect of the same. The defendant called five witnesses to testify but none of them explained what these safety measures they have taken to prevent accident of this nature at the work place. The learned counsel suggested to the plaintiff that there were notices posted but the plaintiff denied this position. If there were notices posted they should appear in the photographs (P8) or the defendant could have tendered some evidence to show that there were notices or warnings posted where the accident occurred. No such evidence was adduced by the defendant.

[8] The defendant has also averred that the plaintiff's negligence contributed to the injury suffered by him. There is no evidence that suggests that the plaintiff in anyway negligent. It was suggested to the plaintiff in cross-examination that the way he was walking with the cardboard cartons he could not see the oil on the floor which was admitted by the plaintiff. He was walking in an area where the some of the workers were working. It was not a prohibited or unauthorised area for the workers. If there was a warning sign indicating the oil leakage the situation would have been different. But in this case as I said earlier there had been no sign indicating an oil leakage. It cannot therefore be said that the plaintiff was in any way negligent.

[9] For the above reasons I hold that the plaintiff was injured due to the negligence of the defendant.

[10] The plaintiff said that when he fell down he could not get up and then he was first taken to Samabula Health Centre and from there transferred to CWM Hospital. The doctor who examined him first has said he was alright and sent him home but later he found swelling in his back area and went to CWM again where he was referred to Dr. De Asa who referred him to Dr. Taloga (Orthopedic Surgeon) who later referred him to Dr. Biribo, a Neurosurgeon. Both these doctors have given their assessment on Whole Person Impairment of the plaintiff. According to Dr. Biribo the combined values of whole person impairment is 46% where as Dr. Taloga's report says it is 26%. Both these doctors testified at the trial. They do not agree with the assessment of each other. Dr. Biribo's reports were tendered in evidence marked as "P1", "P3" and "P4". The report of Dr. Biribo dated 16<sup>th</sup> December, 2013 discloses the following findings on examination of the plaintiff:

1. An antalgic gait pattern
2. Straight leg raise positive to 45° on the left
3. Wasting of left leg posterior and anterolateral compartments
4. Left foot dorsiflexion weakness 4/5  
Left foot planter flexion weakness 4/5  
Left foot Exterior hallusis weakness 3/5
5. Allodynia over left 5 distribution Decreased sensation over left SSS1 distributions.
6. Decreased sensation over left S1 distribution.

[11] This report shows that there has been some improvements of the plaintiff's condition in November 2013.

[12] In his report dated 17<sup>th</sup> March, 2017 Dr. Biribo says that he examined the plaintiff on multiple occasions and made the following notes which are in his medical records at CWM Hospital:

1. 12/08/2013: This was my first clinic encounter with this gentleman. He mentioned a history of urinary incontinence (would involuntarily wet himself when he laughed or coughed). Genito-urinary exam revealed

that he was wearing diapers, there was loss of anal tone and both anocutaneous and bulbocavernosus reflexes were absent.

2. 28/11/2013: Simillar complaints with examination as above. No improvement in his anal tone noted.
3. 27/10/16: Ongoing bowel and bladder plus sexual dysfunction. Genitourinary exam shows lax anal tone and anocutaneous and bulbocavernosus reflexes. Diapers noted to be wet with urine.
4. 16/03/2017: Patient reports no change in bowel and bladder control. Genitourinary exam reveals soiling of his undergarments and pants with urine. Loss of anal tone with absent anocutaneous and bulbocavernosus reflexes noted.

These serial findings are consistent with a patient that has bowel and bladder dysfunction. The wearing of diapers and soiled garments are indirectly suggestive but the better clinic sign is the absent reflexes which reflect sacral plexus efferent or afferent dysfunction. These reflexes are completely involuntary and therefore cannot be faked. Bowel and bladder control is a complex physiological process but also derives innervation from the sacral plexus and would thus also be affected if the above mentioned reflexes are absent, Furthermore, I had referred to the Urology clinic for his bladder and sexual dysfunction and has been seen on the following dates at the Urology clinic: 05/05/14, 13/10/14, 08/12/14.

[13] Dr. Taloga said in evidence that he arrived at the finding that WPI 28% on the finding at paragraph 5 of his report. He also said that there was no complete blocking of the nerve and that is why he arrived at this conclusion. He testified further that his findings are based on the investigation and not on what the patient told him. When the medical report of Dr. Biribo was shown to him Dr. Taloga said that the impairment rating in that report is based on what the patient said and not on medical findings.

[14] Dr. Biribo in paragraph 6 of his report (P4) states as follows:

There has been mention made in a report by my colleague that an L5/S1 posterolateral disc rupture cannot cause the constellation of genitourinary symptoms that Krishneel complains of. I would agree with that. This was never implied. The L5/S1 posterolateral disc rupture, for which he had surgery, was

the cause of his left foot weakness and this has been salvaged to some extent. His bowel and bladder symptoms are associated with sacral plexus dysfunction, possibly due to injuries sustained to the plexus during the initial fall.

- [15] In his report (D1) Dr. Taloga says that his neurology has improved after the surgery but continues to have persistent radicular pain, urinary incontinence and constipation and the repeat MRI on 12/11/13 only showed a disc bulge at L5/S1 with annulus tear without any nerve root compression.
- [16] From the findings of both doctors it appears that there is no disagreement between them that the plaintiff had consistent pain, urinary incontinence and constipation. Only disagreement is on the finding that the plaintiff has erectile dysfunction. Dr, Taloga has not examined the patient to see whether the plaintiff in fact is experiencing erectile dysfunction. On the other hand when I consider specialize areas of both doctors, Dr. Biribo is in my view more qualified and experienced in the area of neurology. For these I accept the assessment of whole person impairment of Dr. Biribo, which is 46%.
- [17] The plaintiff in his evidence said he cannot do what he used to do before, he is still taking painkillers and is suffering from erectile dysfunction and constipation. He also said that he still wears diapers. After the injuries it has become difficult for the plaintiff to keep sitting or standing for a long time. He testified further that he used to play rugby, soccer, volleyball and also go for swimming but after sustaining injuries he cannot engage in any sport.
- [18] From the evidence of the plaintiff and the doctors it appears to the court that the plaintiff even after five years of the accident still in pain and not in a position to do any work. His mother testified at the trial and said she is doing everything for her son.
- [19] Taking all these factors into consideration I award **\$120,000.00** as damages for pain, suffering and loss of amenities of life.
- [20] The plaintiff also claimed by way of special damages \$47,900.00 for the loss of Dalo crop and \$369,873.25 for the loss of sandalwood trees. The plaintiff testified that he was also a farmer and purchased a land which was under a mortgage and started cultivating Dalo, sandalwood trees and Yagona. In cross-examination the witness admitted that it is a good idea to have someone to look after the cultivation but he did

not hire someone to look after the plants. It is to be noted that the plaintiff could not possibly look after the cultivation in another island while working as a mechanic for the defendant. If he hired someone to look after his cultivation no damage could possibly have been done to the plants. He tendered an assessment certified by an officer of the Forestry Department (P24) in evidence according to which loss of income from Dalo is \$57,900.00 and the total estimated loss of income from sandalwood plants \$435,145.00 totaling \$493,045.00. He has deducted 15% of the said amount pest diseases, natural disasters etc. The plaintiff has not given any evidence as to the basis on which he arrived at the figure of \$15,000.00 per sandalwood tree. These are special damages claimed by the plaintiff. The burden of proving special damages is on the plaintiff. He must adduce sufficient evidence to satisfy court that he is in fact entitled to such damages. In this matter the only evidence available is the document prepared by the plaintiff. There is no evidence that the person who counter signed the document is in fact qualified to certify it. He has just placed his signature on the document. There is no certification that the information contained in the document are correct. For these reasons it is unsafe for the court to rely on this document in assessing damages.

[21] The plaintiff said in his evidence that there were no telephone facilities in the area where the land is situated and he had to go to the island to employ someone to work in the land. The question is how often he could go to the island to attend to his cultivation. He could not have gone their regularly because of his commitments towards the employer. Therefore, the responsibility of the alleged damage to the cultivation cannot be placed on the defendant.

[22] Apart from the above the plaintiff by way of special damages claimed the following:

Travelling to CWM: 23 trips x \$30.00	\$690.00
Travelling to Nausori Heath Centre 41 trips x \$14.00	\$574.00
Medical Report	\$57.00
Diapers 28 x 64 weeks	\$1,792.00
Total	- <span style="border: 1px solid black; padding: 2px;">\$3,113.00</span>

[23] The defendant at the trial did not challenge this claim. The plaintiff also claimed the following amounts as loss of earnings:



Loss of 1/3 wages at the rate of \$3.20 per hour from 03 <sup>rd</sup> June, 2014 to 29 <sup>th</sup> September, 2014	-	\$3072.00
Loss of employees 1/3 FNPF contribution from 03 <sup>rd</sup> June, 2013 to 29 <sup>th</sup> September, 2014	-	\$245.76
Loss of employers 1/3 FNPF contribution from 03 <sup>rd</sup> June, 2013 to 29 <sup>th</sup> September, 2014	-	\$245.76
Loss of 2/3 wages at the rate of \$3.20 per hour from 01 <sup>st</sup> October, 2013 to 01 <sup>st</sup> October, 2014	-	\$4992.00
Loss of employee's 2/3 FNPF contribution from 01 <sup>st</sup> October, 2013 to 01 October, 2014	-	\$399.36
Loss of employer's 2/3 FNPF contribution from 01st October, 2013 to 01 October, 2014	-	\$399.36
		<u>\$9354.24</u>

[24] It is a fact admitted by both parties that the plaintiff was paid 2/3<sup>rd</sup> of his wages till 29<sup>th</sup> September, 2013 as stated in document "D2". Accordingly, the plaintiff is entitled to **\$12,467.24** as special damages.

[25] Since the court decided above to award damages up to the time of filing of this action by way of special damages I will consider the future loss of earnings from the date of filing of the action. The plaintiff was born on 23<sup>rd</sup> December, 1984 and at the time of the filing of the action he was about 30 years of age. He could have worked for 30 years until he attain the age of 60 years. After reducing a percentage for contingencies I allow a multiplier of 20. According to the document "D2" he has worked 45 hours a week and his wages were \$3.20 per hour. Therefore, his weekly salary was (\$3.20 x 45) \$144.00. On this basis he is entitled to damages for the loss of future earnings (\$144.00 x 52 x 20) **\$149,760.00**.

[26] The plaintiff is also entitled to the recover as damages the loss of FNPF contribution by the employer. In the case of **Chand v Amin** [2015] FJCA 143; ABU0031.2012 (2 October 2015) it was held that compulsory FNPF contribution is only up to the age of 55 years. Therefore, the plaintiff is entitled to **\$14,976.00** ( $\$144.00 \times 52 \times 25 \times 8/100$ ) as loss of FNPF contribution.

[27] For the reasons aforementioned the makes the following orders.

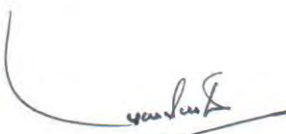
**ORDERS**

(1) The defendant is ordered to pay the following amounts as damages to the plaintiff with interest of 6% from the dated of the service of the summons to the date of this judgment:

Special Damages	-	\$12,467.24
Loss of Future Earnings	-	\$149,760.00
Loss of FNPF	-	\$14,976.00
For pain, suffering and loss of amenities	-	\$120,000.00
		<b>\$297,203.24</b>

(2) The defendant is also order to pay \$7500.00 as costs (Summarily assessed) of this action to the plaintiff.



  
Lyone Seneviratne

**JUDGE**

26<sup>th</sup> September, 2018.