IN THE HIGH COURT OF FIJI
AT LAUTOKA
CIVIL JURISDICTION

Civil Action No. HBC 82 of 2011

BETWEEN : **KASANITA VUNIVUTU** of Lot 19 Hooker's Subdivision, Waila, Nausori, Immigration Officer.

Plaintiff

AND : **THE PERMANENT SECRETARY** Ministry of Works, Nasilivata House, Samabula, Suva.

1st Defendant

AND : **THE ATTORNEY GENERAL OF FIJI** of 7th Floor, Suvavou House, Victoria Parade, Suva.

2nd Defendant

Appearances : Mr. Daniel Singh for the Plaintiff
Ms Mary Lee of the Attorney General's Office for the Defendant

Date of Trial : 7th – 8th May 2015

JUDGEMENT

INTRODUCTION

1. This is a claim for personal injuries by the plaintiff. She sustained the injuries concerned when she fell into an uncovered manhole. The manhole was under the control of, and was managed by, the then Ministry for Works. The plaintiff filed her writ of summons and statement of claim on 31 May 2011.

2. The defendant denies liability. Its statement of defence was filed on 31 May 2012.

3. Although the Pre-trial Conference Minutes executed by both counsel itemises ten (10) issues, it is clear to me from the evidence that not much of the facts in this case is seriously disputed.

ESTABLISHED FACTS

4. In April 2007, Ms. Kasanita Vunivutu, the plaintiff (**PW1**) came to live in Olosara in Sigatoka near Andhra Sangam School. At the time, PW1's husband, Mr. Kiniviliame Keteca (**PW2**) was serving as Resident Magistrate in Sigatoka. PW1 was working at

the Australian High Commission in Suva as a Compliance Officer. She commuted daily from Sigatoka to Suva and back.

5. PW1's and PW2's house was about 25 meters from the main Queens highway. On 02 June 2008, at around 5.30 a.m., PW1 left her house to go to work. She reached the Queens highway, and then she crossed to the other side where she was to wait for a bus to Suva. It was still very dark, as it would be in Fiji at that time of the day in June. PW1 reached the other side, and was proceeding to the side of the road when she fell into an open manhole. She sustained injuries as a result.

6. PW2 was at home when he a member of his household alerted him that something had happened to PW1. PW2 rushed out to the road. Later, with the assistance of a mini van driver who had stopped by, PW2 took PW1 out of the manhole. PW2 then piggybacked PW1 to their house. Later, PW2 drove PW1 to the Sigatoka Hospital.

7. At the time of the accident, PW1 was around 43 years of age.

INJURIES SUSTAINED

8. The Pre-Trial Conference Minutes does not raise any issue about the injuries that PW1 sustained. I accept the evidence led on the injuries sustained as fact. PW2 related that when he came to the manhole, PW1 was grimacing in pain and crying. He saw that PW1 had injured her left ankle.

9. PW1 said that a cast was put over her leg at Sigatoka Hospital on the same day. The cast was later removed a week later on 09 June 2008 at home.

10. Dr. Joeli Mareko (**PW3**), a well-known surgical doctor in Lautoka, wrote two medical reports. Both were part of the Agreed Bundle of Documents and were tendered by consent through PW3. The first medical report dated 26 January 2009 (marked **PEX1)** is reproduced in full below:

26th January 2009

TO WHOM IT MAY CONCERN
RE : KASANITA VUNIVUTU

The above patient was injured while walking on the road and crossed the road and fell into a manhole left uncovered. She sustained injuries to the left ankle and there was diminished ROM on the left ankle.

Investigations

Radiological: x-ray revealed fracture of left medial malleolus and left lateral malleolus.

Treatment

1. Pain relief
2. POP backslab
3. Physiotherapy

She was advised ORIF of the left ankle and this for some reason did not eventuate. She is still being reviewed in the Orthopaedic Clinic. Her last review was on 26.1.09 and she was:

1. Walking with walking aid
2. Swollen left ankle
3. Diminished ROM of left ankle.

She will be reviewed next on 23/3/09.
Yours sincerely

Dr Joeli Mareko
Consultant Orthopaedic Surgeon
LAUTOKA HOSPITAL

11. The second Medical Report dated 06 June 2011 and marked **PEX2** appears in full below:

6th June 2011

TO WHOM IT MAY CONCERN
RE : KASANITA VUNIVUTU

The above patient was injured while walking on the road and crossed the road and fell into a manhole left uncovered. She sustained injuries to the left ankle and there was diminished ROM on the left ankle.
Her neurovascular status was satisfactory.

Investigations

Radiological: x-ray revealed fracture of left medial malleolus and left lateral malleolus.
Her ankle mortis is intact.

Treatment

1. Pain relief
2. POP backslab
3. Physiotherapy

She was advised ORI of the left ankle and this for some reason did not eventuate. She is still being reviewed in the Orthopaedic Clinic. Her last review was on 26.1.09 and she was:

1. Walking with walking aid
2. Swollen left ankle
3. Diminished ROM of left ankle.

She will be reviewed next on 23/3/09.
She is awarded a disability of 10%.

Yours sincerely

Dr Joeli Mareko
Consultant Orthopaedic Surgeon
LAUTOKA HOSPITAL

12. PW3 said in chief that he had seen PW1 on 02 June 2008 and again on 09 June 2008 at the Lautoka Hospital. He said that PW1 had an open reduction internal fixation. He said that no surgical procedure was performed on DW1 because her blood pressure was relatively high when she presented to hospital. PW3 observed that PW1 had difficulty walking on uneven ground. She also had difficulty walking up the steps. PW3 said that PW1 had suffered a non-scheduled injury with a resultant 10% permanent incapacity based on the American Association Guide.

DEFENDANT'S CASE

13. The defendants' sole witness was a Mr. Jonacani Ravouvou. (**DW1**) DW1 worked at the Sewerage and Water Department from 2008-2009 at Sigatoka. In 2010 he was working in Lautoka under the newly restructured Water Authority of Fiji. In 2013, he was transferred to Sigatoka. His area of operation was from Sigatoka to Malevu Village. This included Olosara.

14. DW1 confirmed that the air-valve chamber in question was managed and controlled by the Ministry of Works. The function of the air-valve chamber is to allow the squeezing of air out of the main water pipeline which is important to regulate pressure. The main pipeline runs along the side of the road. DW1 then went on to detail the size of the concrete lid and the depth of the chamber.

15. DW1 said that the distance between the edge of the road and the spot where the chamber was located was about 1.5 meters. DW1 said that they used the air valve only whenever there was a burst in the main. He said they only inspect the pipeline if it is damaged or if there is a report of damage. There is no policy or directive in place with regards to air valves. There had been no recent complaint of any damaged air valve chamber at around the time of the accident.

16. DW1 said that on the same day after the accident, a team from the Ministry went out to investigate. They walked along the pipeline to check for any leakage and also to check the chambers.

17. The team took pictures on the same day between 9.00 a.m. to 10.00 a.m. These pictures were tendered by DW1 and marked DEX 1. The team then covered the manhole with a steel plate and then submitted a report to one Anil Nair.

18. I reproduce in full below a report that DW1 was asked to write in preparation for this case. I note that this one is dated 16 May 2012, which was four years or so after the accident. I also note that this one was not addressed to Anil Nair. DW1 was cross examined on why the Report to Anil Nair was not produced in Court. He said he did not keep a copy of the report but what he wrote in the 16 May 2012 email records his true recollection of what he saw at inspection and what he reported to Anil Nair.

From: Jonacani Ravouvou
Sent: Wednesday, May 16, 2012 11:51 AM
To: Ilisoni.Saladuadua@waf.com.fj; Mohammed Museed
Cc: Ilisoni Saladuadua: Elizabeth Fale'u; Epeli Cawanibuka
Subject: RE: Kasanita Vunivalu Comp.Claim

Good morning All,

Below please find report of the above claim during my term as Acting Sigatoka Water Supervisor.

Incident Report
This was sometimes in 2008 (can't recall the date) when I received the complaint from Mrs. Lanieta Leweniqila (Chief Clerk) that a lady living at Olosara slipped into an Air Valve chamber and injured her leg. We visited her at her home and she was in pain with bandages around her swollen leg which she told us that she was on her way to work in the early morning to catch her bus and suddenly slipped into the uncovered chamber.

Incident Site Report
The Air Valve chamber located on the Left Hand Side of t the Queens Highway towards Korotogo before the Andra College Road junction. The chamber was partly open with damage loose concrete slab lid filling the inner part while the non-damaged partly covering the chamber. **I then submitted the accident report to Mr. Anil Nair the Water and Sewerage Personnel Officer which he came to investigate with pictures taken based on my report.**

Action Taken
We then covered the Air Valve chamber with a steel plate covering the whole chamber.

Conclusion
The chamber lid suspected to be damaged by a vehicle tyres went over it without reporting. **The Air Valve chamber is on the road edge and was surrounded with ankle deep overgrown grass that she could not see the open chambers in that early hours.**

Vinaka

.....
Jonacani Ravouvou
Supervisor NLRBS

19. DW1 said that from their investigation, the team concluded that the manhole was damaged a few hours earlier before the accident. DW1 said that the likely scenario is that the manhole would have been damaged when some heavy truck ran over it.

20. DW1 said that workers in his Ministry would place cones and light around any manhole they were working on.

21. Under cross examination, DW1 said he visited PW1 after receiving a written report.

FINDINGS OF FACT

22. I have warned myself that DW1's email of 16 May 2012 was sent some four years or so after the accident and is not a contemporary record of his observations following the investigation. The report that DW1 said he sent to Anil Nair would be more contemporaneous. It would have been written around the time of the accident whilst their observations were still fresh in the minds of the officers who carried out the investigation and, would relatively, have more veracity as a record of the defendant's investigation team's findings. I have also asked myself why the report was not tendered in Court. I note also that some photographs which were part of the report were tendered in Court.

23. Mr. Singh did cross-examine DW1 on these points. I accept that the 16 May 2012 email could be construed as DW1's attempt to devise or contrive evidence for the defendant's benefit.

24. However, I have taken into account that DW1 was the one who made the earlier report to Anil Nair. DW1's report to Anil Nair is part of the defendant's official records. DW1 said he had asked for it from the officers who are responsible for the maintenance of the records but to no avail. His explanation for the photographs is that they were accessed from the computer where the images are stored.

25. DW1 strikes me as a truthful witness. However, a truthful witness may be truthful as to what he recollects although his recollection may be inaccurate in some regards. The question I ask is whether or not I should accept DW1's email of 16 May

2012 as an accurate "account" of his earlier missing contemporary report to Anil Nair. In the end, the reliability of his email of 16 May 2012, must be tested against all the other findings of fact.

26. I reiterate here what DW1 observed as recorded in his email above.

> *The chamber was partly open with damage loose concrete slab lid filling the inner part while the non-damaged partly covering the chamber.*

27. The main question of fact I have to determine is whether the manhole had been in that state for quite some time prior to the accident or whether it became of that state as a result of some very recent activity shortly before the accident.

28. No clear direct evidence was led on the above point.

29. From the evidence of PW1, it would appear that she was aware of the vicinity around where the manhole was located. Her daily morning routine was to walk from her house to the main Queens highway. She would then cross to wait for the bus around the area where the manhole was located.

30. PW1 was not asked as to whether she was, prior to the day of the accident, ever aware of the existence of the manhole, let alone, if she had ever observed what state the manhole was in, whether or not it was covered, whether it was partly covered, and whether the cover was partly damaged as DW1 describes it above.

31. There was no direct evidence led by any witness on this aspect of the case. As I have said, I gather from PW1's evidence that she would begin her daily commuting to Suva by boarding the bus from that point where the manhole was located. I accept DW1's evidence that the manhole is located at some point along the shoulder of that stretch of the Queens highway about 1.5 meters from the asphalt edging or tar sealing (which DW1 calls the **"roadside"**).

32. Given these facts, it is safe to say that the manhole was quite visible and noticeable and familiar to people who have lived around that area long enough and who would commute from that point. It is also safe to include PW1 into the category of this group of people.

33. I accept DW1's evidence that the Ministry only sends out its technical staff to inspect any pipeline if there is any damage, or, if they receive any report of damage. There was no policy or directive in place with regards to air valves. Also, there had been no recent complaint of any damage on the air valve chamber in question, or on any other air valve around the area.

34. If the manhole had been left open for quite some time prior to the date of the accident, it is highly likely that PW1 and others who live around her neighborhood, would have noticed it and would have reported it to the Ministry.

35. Again, DW1 had speculated that the manhole cover would have been displaced as a result of some heavy treading over the manhole. I take judicial notice of the fact that the stretch of road in question is part of the busy Queens highway which connects the Western Division to the Eastern Division. It is exposed to heavy goods vehicle on a daily basis. Heavy trucks carting heavy logs, and heavy commercial vehicles transporting all sorts of heavy merchandise and consignments between the Western and the Eastern Division - all pass through this stretch. Given the proximity of the manhole to the side of the road, and the frequency of heavy vehicles along that stretch, it would seem that DW1's speculation is not too far-fetched.

36. The fact that the manhole would have been readily noticeable to PW1 and to all those who live in the vicinity, combined with the fact that no such report of an exposed or a damaged manhole was ever received by the Ministry, together, make it highly probable that the manhole in question had only been exposed quite recently before the accident. That would mean that the Ministry had no knowledge whatsoever prior to the accident that the manhole had been left in that state until the fact was reported to it (Ministry) after the accident which then led to an investigation by its technical staff.

37. I observe that DW1 had speculated in his report that a vehicle might have run over the manhole and damaged the lid cover in the process. I accept that the lid was damaged a short while prior to the accident and that there had been no prior report of an exposed manhole to the Ministry.

38. I also observe and accept from DW1's report that:

> *"[t]he Air Valve chamber is on the road edge and was surrounded with ankle deep overgrown grass that she could not see the open chambers in that early hours".*

39. There is no suggestion in the evidence or in any submission that the defendant Ministry was responsible for grass maintenance along the side of this road. If, as I assume is the case, Olosara was already included within the boundary of the Sigatoka municipality at the time of the accident, then I imagine that the municipality would be responsible for the maintenance of the grass around the manhole. I imagine that municipal workers (or workers of contractors hired by the municipality) were likely to have reported a damaged manhole if they saw one.

ISSUES

40. The plaintiff's case is founded on an allegation of breach of statutory duty against the defendant. Paragraphs 1, 2 and 4 of the Statement of Claim contain the following general allegations:

1. The 1st Defendant was at all material times the Department of the State carrying out management and maintenance of roads, highways, water supplies and related infrastructures.
2. The 2nd Defendant is sued pursuant to Section 3(1)(a) and 12(2) of the State Proceedings Acts. The State is liable for the acts and/or omissions of the 1 Defendant.
3. .....
4. The said open water pipe chamber was dangerous to pedestrians and the Plaintiff's injury was caused by the 1st Defendants breach of statutory duty and/or by the negligence of the 1st Defendant, their servants and/or agents.

41. The particulars of breach alleged are pleaded at paragraph 4 of the Statement of Claim as follows:

(a) Failing to put a closing lid on the open water pipe chamber.
(b) Causing or permitting the said open water pipe chamber to be or to become or remains a danger to and a trap to persons lawfully using injury.
(c) Failing to institute or enforce any or any adequate system of inspection and maintenance of the said water pipe chamber whereby the said defect might have been detected and remedied before the plaintiff's said accident.
(d) Failing to fence or guard the open water pipe chamber or to erect warning sign or barriers or to install lights or street lights so as to prevent the Plaintiff from falling into the water pipe chamber.
(e) In the premises, the 1st Defendant exposed the plaintiff to an unnecessary risk of injury.
(f) Failing to exercise any or any reasonable care towards person and in particular the

Plaintiff lawfully using the highway when they knew or ought to have known that the open water pipe chamber was a nuisance and dangerous in that someone would fall into it and get injured.

(g) By reason of the matters aforesaid, the Plaintiff has suffered personal injury, loss and damage.

42. The plaintiff's statement of claim contains no reference whatsoever to any statute, let alone to any specific provision of any statute. In every civil suit against a public authority based on an alleged breach of statutory duty, the question is always whether or not there was a duty of care, and if so, whether that duty was breached and if so, whether the breach caused the damage suffered and even if so, whether a civil remedy is available for the damage suffered. In this case, the question is, whether the defendant Ministry owed a statutory duty of care to PW1 in terms of the alleged acts and omissions in paragraph 4 of the statement of claim and if so, did it breach any of those duties?

THE LAW

43. In **Land Transport Authority v Lal** [2012] FJSC 23; CBV0019.2008 (23 October 2012), the Fiji Supreme Court retraced the development of the common law on breach of breach of statutory duty. Notably, in the early days, it was difficult to extract general principles from the cases in this area of the law. Clearly though, the circumstances of each case was considered against each legislation and the provision allegedly breached[1].

44. Generally, where a statute enacted or prohibited something for the benefit of a person, that person was said to have a remedy only under the same statue[2]. The

[1] The Court said:

[26] In one of the earliest modern cases applying this principle, Lord Campbell CJ in Couch v Steel (1854) 3 E & B 402; 118 ER 1193 granted a remedy to a seaman who had fallen ill on a journey and suffered damage due to the failure of the ship-owner to maintain a list of medicines required by statute. The decisions that followed Couch v Steel, supra, such as Atkinson v Newcastle and Gateshead Waterworks Co. (1877) LR 2 Ex D 441 and Dawson & Co v Bingley Urban District Council [1911] 2 KB 149 did not comfort the common law as they were in apparent conflict with each other, making it difficult to extract general principles. In Dawson, where a private right of recourse was held to exist, the court was conscious of Atkinson which was a decision to the contrary, but the court focused strongly on the fact that the body involved was a purely public body, and the statute concerned was not a 'legislative bargain' between government and private interests. The court started with the general principles relied on in Couch, and noted that this was not a case of nonfeasance, but rather a case where the authority had entered on the performance of its duty and done so carelessly. However, these cases need not detain us any further except to say that the apparent contradictions may be resolved when the provisions of the statute in question are considered in the backdrop of the specific circumstances of each case.

[2] As the Court said at paragraph [25]:

courts were reluctant to find a private right of action. Hence, if a statute imposed a penal sanction, the courts would hold that the said sanction was the only means of enforcing a statutory right. A very good reason had to be advanced in order to convince the courts that a private right of action should be read in[3].

45. Whether or not a civil remedy was available, they would consider several factors[4]. None of these was conclusive. At the end of the day, the courts would still examine the legislation in its entirety before arriving at a conclusion[5].

46. The Fiji Supreme Court referred to some old English cases which demonstrated that the courts would readily hold that a private right to sue was intended where the

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[25] It will be useful to begin with a survey of the common law relating to the tort of breach of statutory duty. Chapter 50 of the second Statute of Westminster in 1285 sets out an early basis for a civil action based on statutory breach. The modern history of the action can, however, be traced to 'Action upon Statute (F)' in Sir John Comyns, A Digest of the Law of England (5th Edition, 1822) page 442, an 18th century source for the availability of an action by an individual who suffers damage caused by the breach of a statute:

"That in every case where a statute enacts or prohibits a thing for the benefit of a person, he shall have a remedy upon the same statute for the thing enacted for his advantage, or for the recompense of a wrong done to him contrary to the said law."

[3] As the court said:

[34] In some cases, the courts have considered that the penal sanction imposed by the statute alone was intended by the legislature to be the main means of enforcement of the statutory right, unless good reasons can be offered for believing otherwise. A leading authority for this proposition is the following dictum of Lord Tenterden CJ in Doe d Bishop of Rochester (Murray) v Bridges [1824-1834] All ER Rep 167, 170 –

"Where an Act creates an obligation, and enforces the performance in a specified manner, we take it to be a general rule that performance cannot be enforced in any other manner."

[4] The court said:

[27] On the issue of whether a civil remedy is available or not, the courts generally consider matters such as: does the statute itself prescribe a penalty, or not (**Cutler v Wandsworth Stadium Ltd** [1949] AC 398, 407); is the statutory provision designed for the benefit of a limited class of persons, or is meant for the benefit of the public at large (**Morrison Sports Ltd v Scottish Power UK plc** [2010] UKSC 37 (28 July 2010) [39]–[40]); is the obligation concerned a specific and confined obligation, or is it more general and ill-defined (**R A Buckley, 'Liability in Tort for Breach of Statutory Duty ' (1984) 100 Law Quarterly Review 204, 221**); and has this obligation, or an obligation analogous to this in previous legislation, been already held by the courts to give rise to a civil action (See, dictum of McMurdo P in **Schulz v Schmauser** [2001] 1 Queensland Report 540, 546). However, none of these factors, by their very nature, can be conclusive, and the legislation should be examined in its entirety before arriving at a conclusion.

[5] As the court said:

[28] The primary obligation on the court is to endeavor to fulfil its function in accordance with the rule of law, rather than simply making decisions in accordance with personal predilection. As Kitto J observed in the High Court of Australia decision of **Sovar v Henry Lane Pty Ltd s** [1967] HCA 31; (1967) 116 CLR 397 at page 405-

"The question whether a contravention of a statutory requirement of the kind in question here is actionable at the suit of a person injured thereby is one of statutory interpretation. The intention that such a private right shall exist is not, as some observations made in the Supreme Court in this case may be thought to suggest, conjured up by judges to give effect to their own ideas of policy and then 'imputed' to the legislature. The legitimate endeavor of the courts is to determine what inference really arises, on a balance of considerations, from the nature, scope and terms of the statute, including the nature of the evil against which it is directed, the nature of the conduct prescribed, the pre-existing state of the law, and, generally, the whole range of circumstances relevant upon a question of statutory interpretation."(italics added)

[29] In the above passage, Kitto J. refers to a 'private right', which should be capable of being discerned from the language of the relevant statute. As he emphasises, each case involves an interpretation of the relevant statute, and where the legislature has not by clear words expressed any intention as to whether such a private right would exist, it is for the courts to infer from the legislation as a whole as to what the intention of the legislature was in its statutory context.

statute imposed an obligation to take steps for the safety of others, and a breach of that had led to injuries[6]. This was applied particularly in industrial safety cases.

47. The Supreme Court also referred to some other old English cases where, in the absence of a contrary legislative intention, the Courts have been ready to recognize a private law right, where the statute was seen to be concerned with the protection of an interest which is recognized by the general principles of the common law[7], or, if the policy of the statute was to protect some private right (e.g. where the statute imposed a duty to take measures for the protection of others).

48. In this regard, the court referred to a case which was concerned with the failure of an employer to provide safety gear for his employees. Reference was also made to a case which concerned a statute made it an offence to use portions of film without the consent of the actors involved. It was held that a breach of that statute gave rise to a civil right to sue because the actors had a civil right to prevent the unauthorised exploitation of their performances[8] - and which right was also protected by the statute in question.

49. When it comes to public authorities which are statutorily bound to maintain public highways, a civil duty to compensate was found notwithstanding the existence of penal remedies. However, the duty has been defined, only, as one limited to

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[6] As the Court said:

[30] The common law courts have been more ready to recognise a private right of action for breach of statutory duty in the context of industrial safety. Thus, in **Groves v Lord Wimborne** [1898] 2 QB 402, in which the court had to decide whether a breach of the duty to fence dangerous machinery imposed by Section 5(4) of the Factory and Workshop Act 1878 gave a cause of action to a workman thereby injured notwithstanding the criminal sanctions also imposed by the statute for breach of the duty. It was in this context that Vaughan Williams LJ observed at pages 415-416

> "It cannot be doubted that, where a statute provides for the performance by certain persons of a particular duty, and some one belonging to a class of persons for whose benefit and protection the statute imposes the duty is injured by failure to perform it, prima facie, and, if be nothing to the contrary, an action by the person so injured will lie against the person who has so failed to perform the duty."

[7] The court said:

[31] A more modern version of this decision is **O'Connor v S P Bray Ltd** [1937] HCA 18; (1936) 56 CLR 464, in which a worker had been injured by reason of the breach by the defendant of a statutory duty to provide safety gear for the lift, imposed by the Scaffolding and Lifts Act, 1912. Holding in favor of a private right of action for breach, Dixon J observed at page 478 of the judgment that -
"In the absence of a contrary legislative intention, a duty imposed by statute to take measures for the safety of others seems to be regarded as involving a correlative private right, although the sanction is penal, because it protects an interest recognized by the general principles of the common law."

[8] As the Court said:

[32] This readiness to uphold civil liability is also evident in contexts outside industrial safety, as for instance in the case **Rickless v United Artists Corporation** [1988] QB 40,where it was held that a statute making it an offence to use portions of films without consent of the actors involved, gave rise to civil liability. In that case, the family of the actor, Peter Sellers, was able to recover substantial damages where previously discarded clips of his were put together to make a film for which they had refused permission. This seems a good example of a situation where a private right should have been enforced, given the policy evident in the statute.

maintaining the highway in a reasonably safe condition[9] - similar to that duty imposed for the safety of workers[10].

50. The Supreme Court then referred to the modern view that a private law cause of action will arise if it can be shown, as a matter of statutory construction, that the statutory duty was imposed for the protection of a limited class of the public and that Parliament intended to confer on members of that class a private action for breach of duty:

> [38] The modern view of the criteria for determining whether a statutory obligation creates a civil remedy is usually seen as well summed up in the judgement of Lord Browne-Wilkinson in **X (Minors) v Bedfordshire County Council** [1995] 3 All ER 353, 364, wherein it was noted that -
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> > *"....a private law cause of action will arise if it can be shown, as a matter of construction of the statute, that the statutory duty was imposed for the protection of a limited class of the public and that Parliament intended to confer on members of that class a private action for breach of duty."*
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> The High Court of Australia (per Brennan CJ, Dawson & Toohey JJ.) gave expression to the concept in **Byrne and Frew v Australian Airlines Ltd** [1995] HCA 24; (1995) 131 ALR 422, at 429 in the following way:-
>
> > *"A cause of action for damages for breach of statutory duty arises where a statute which imposes an obligation for the protection or benefit of a particular class of persons is, upon its proper construction, intended to provide a ground of civil liability when the breach of obligation causes injury or damage of a kind against which the statute was designed to afford protection."*

51. The important point is that in construing the intention of the legislature, the Court must look at the statute and its provisions.

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[9] As the Court said:

> [35] In other cases, some other factors have been considered sufficient to weigh in favour of imposing a civil duty to compensate despite the existence of penal remedies. For instance, in **Dublin United Tramways Co. Ltd. v. Fitzgerald** [1903] A.C. 99, the plaintiff sued for injury suffered when his horse fell on the stones. When the case came before the House of Lords, there seems to have been no dispute that the statute created a private right of action. But the company contended that it had no obligation to remedy transient conditions of rain or snow by putting down sand. The House of Lords accepted that the company's only duty was to "maintain" the fabric of the highway in a reasonably safe condition. If the surface were in proper repair, there would be no further obligation to deal with transient weather conditions.

[10] As the Court said:

> [37] Another recent decision where a private right to damages was found to exist is **Roe v Sheffield City Council**, [2004] QB 653; [2003] EWCA Civ 1 (17 January 2003). In that case, the Court of Appeal of England held that a statutory duty imposed under Section 25 of the Tramways Act 1870, which required that tramlines laid into a public road be 'on a level with the surface of the road', gave rise to civil liability. Pill LJ, giving the majority judgment, concluded that the duty was actionable as it seemed reasonable that Parliament, having authorised a positive interference with the public highway, would want to provide for a cause of action where the duties that went along with that interference were breached. The duty was similar to that imposed for the safety of workers, it was limited and quite specific, and there were no other effective means of ensuring the protection the statute provided. Perhaps the most difficult question was whether the 'class of persons' protected was too wide, but his Lordship relied on the comments of Atkin LJ in Phillips v Britannia Hygienic Laundry Co [1923] 2 KB 832 to the effect that 'road-users' were not too broad a class.

> [39] The decisions discussed above, largely touch on some of the points that arose for consideration in the course of this decision, and clearly establish that while the intention of the legislature is paramount, in construing the intention of the legislature a court is entitled to look at the statutory scheme as a whole in the light of the malady that was intended to be remedied by the legislation. The common law endeavored several centuries ago to redress injury caused to persons including 'road users' who were harmed by the actions of impecunious persons while they were in the employ of more affluent masters for whose benefit they acted, and developed the doctrine of vicarious liability. .....

52. The most recent English Supreme Court decision in **Robinson v Chief Constable Of West Yorkshire Police**, 2018 UKSC 4 revisits some old cases in particular **Anns v Merton London Borough Council** [1978] AC 728, 751-752 and **Caparo Industries plc v Dickman** [1990] 2 AC 605, 617-618.

53. In **Robinson**, Lord Reid concluded at paragraph 33 that if a conduct is considered tortious if committed by a private person, then it should be equally tortious if committed by a public authority, unless common law or statute provides otherwise:

> 33. Accordingly, if conduct would be tortious if committed by a private person or body, it is generally equally tortious if committed by a public authority: see, for example, **Dorset Yacht Co Ltd v Home Office** [1970] AC 1004, as explained in **Gorringe**, para 39. That general principle is subject to the possibility that the common law or statute may provide otherwise, for example by authorising the conduct in question: **Geddis v Proprietors of Bann Reservoir** (1878) 3 App Cas 430. It follows that public authorities are generally under a duty of care to avoid causing actionable harm in situations where a duty of care would arise under ordinary principles of the law of negligence, unless the law provides otherwise.

54. In the case of **Tabuvale v Divisional Engineer Northern** [2004] FJHC 173; HBC0033R.2001B (23 January 2004), a young girl who fell into an uncovered hole in the footpath whilst making her way to school, suffered lacerations to her leg, hip and knee as a result. The footpath was being repaired by the defendants at the time. Her guardian sued the Divisional Engineer Northern for personal injuries. It appears to me that the case did not proceed to trial. However, in dismissing a striking out application filed by the office of the Attorney-General, Mr. Justice Fatiaki recited the headnotes of the New Zealand case of **Oamaru Borough v. McLeod** (1967) N.Z.L.R. 940 :

> 'Where in the course of improving a street or roadway a borough Council creates new conditions which themselves create a danger which ought to have been foreseen and

reasonable steps are not taken to guard against the danger, the council is responsible for damage which results from its negligent performance of the work.'

55. In **Penny v The Wimbledon Urban District Council & Anor** [1899] 2 QBD 74, the defendant municipal council had engaged a contractor to repair a certain road. In carrying out the work, the contractor had heaped some surface soil and grass on the road after dark without warning lights or signs. The plaintiff was passing along the road when he fell over the heap and was injured as a result. Romer LJ said as follows at 78:

> The work done in this case was the making up of a road frequented by the public. From the nature of this work, danger was likely to arise to the public accustomed to use the highway by the alteration of level and by the heaps of soil and the holes almost inevitable in work of the kind. The usual precaution to take in such a case is to put lights or other warnings to prevent persons falling into the holes or over heaps of soil. In my opinion, it is unreasonable not to take those precautions, and the passages from the contract that I have referred to ...shew that this is the correct view.

56. In **Gorringe v Calderdale Metropolitan Borough Council** [2004] 2 ALLER 326, Lord Steyn cautions as follows:

> This is a subject of great complexity and very much an evolving area of the law. No single decision is capable of providing a comprehensive analysis. It is a subject on which an intense focus on the particular facts and on the particular statutory background, seen in the context of the contours of our social welfare state, is necessary. On the one hand, the courts must not contribute to the creation of a society bent on litigation, which is premised on the illusion that for every misfortune there is a remedy. On the other hand, there are cases where the courts must recognize on principled grounds the compelling demands of corrective justice or what has been called the "rule of public policy which has first claim on the loyalty of the law, that wrongs should be remedied....

57. In **Ministry of Public Works & Another v Machora** (29/11) [2011] SZSC 33 (30 November 2011)[11], the Swaziland Ministry for Works and Attorney-General were appealing against a judgement of the Swaziland High Court in favour of the Respondent who was injured when he fell into an uncovered manhole. While it was accepted that the appellants were responsible for the maintenance of the manhole, the appeal court overturned the trial court's decision and found that the appellants, which had a system of regular monthly inspections of manholes, could not

[11] https://swazilii.org/sz/judgment/supreme-court/2011/33.

reasonably have foreseen that the manhole cover in question would have been stolen before the next monthly inspection, and consequently, that the respondent would have fallen into it and injured himself.

LATEST DEVELOPMENT IN ENGLAND

58. As I have said, the most recent English Supreme Court decision in **Robinson v Chief Constable Of West Yorkshire Police** (supra). The facts of the case as summarized by the leading judgement of Lord Reed are as follows:

> 1. On a Tuesday afternoon in July 2008 Mrs Elizabeth Robinson, described by the Recorder as a relatively frail lady then aged 76, was walking along Kirkgate, a shopping street in the centre of Huddersfield, when she was knocked over by a group of men who were struggling with one another. Two of the men were sturdily built police officers, and the third was a suspected drug dealer whom they were attempting to arrest. As they struggled, the men knocked into Mrs Robinson and they all fell to the ground, with Mrs Robinson underneath. She suffered injuries as a result.
> 2. The principal question which has to be decided in this appeal is whether the officers owed a duty of care to Mrs Robinson. The other important question is whether, if they did, they were in breach of that duty. Mr Recorder Pimm held that the officers had been negligent, but that police officers engaged in the apprehension of criminals were immune from suit. The Court of Appeal held that no duty of care was owed, and that, even if the officers had owed Mrs Robinson such a duty, they had not acted in breach of it: [2014] EWCA Civ 15.
> 3. As will appear, the simple facts of this case have given rise to proceedings raising issues of general importance. Most of those issues can be decided by applying long-established principles of the law of negligence. The fact that the issues have reached this court reflects the extent to which those principles have been eroded in recent times by uncertainty and confusion.
> **The facts**
> 4. The events leading to Mrs Robinson's accident began when DS Neil Willan spotted Mr Ashley Williams apparently dealing drugs in a park in the centre of Huddersfield. He did not attempt to arrest Williams immediately, as Williams was young and physically fit, and Willan thought that he was unlikely to be able to arrest him without his running away. He called for backup, and DC Ian Green and DS Damian Roebuck then made their way to join him.
> 5. Williams went to a bookmakers on Kirkgate, and Willan followed him inside. He decided not to attempt an arrest inside the shop, as there were people there whom he recognised, and he was concerned that attempting an arrest would endanger both his own safety and that of the customers and staff. Williams then left the shop and stood outside it. Green and Roebuck then arrived, and another officer, PC Dhurmea, arrived soon afterwards. Like Willan, they were in plain clothes.
> 6. Willan and Roebuck formed a plan to arrest Williams while he was standing outside the bookmakers. The plan involved Willan and Dhurmea approaching Williams from one direction, taking hold of him and effecting the arrest, while Roebuck and Green were positioned in the opposite direction, to prevent his escape and assist once Willan and Dhurmea had taken hold

of him. Willan and Dhurmea positioned themselves up the street from the bookmakers, while Green and Roebuck took up a position some distance down the street. Kirkgate was moderately busy at the time with pedestrians and traffic. Mrs Robinson was one of a number of pedestrians walking along the pavement. She passed Willan and Dhurmea, and then Williams, very shortly after two other pedestrians.

7. Almost immediately after she passed Williams, and when she was within a yard of him, Willan and Dhurmea approached him. Mrs. Robinson was then in their line of sight. The officers took hold of Williams and attempted to arrest him. Williams resisted arrest. As the men tussled, they moved towards Mrs. Robinson and collided with her. The initial contact was between her and Williams, who backed into her. She fell over, and the men fell on top of her. Roebuck and Green arrived three seconds later and assisted in arresting Williams.

59. The issues were defined by Reid LJ. Ultimately, they all narrow down to the question whether the police owes a common law duty of care to avoid harming bystanders in the pursuit of a criminal:

The Issues

20. The issues arising from the judgments below and the parties' submissions can be summarised as follows:

(1) Does the existence of a duty of care always depend on the application of "the Caparo test" to the facts of the particular case?

(2) Is there a general rule that the police are not under any duty of care when discharging their function of investigating and preventing crime? Or are the police generally under a duty of care to avoid causing reasonably foreseeable personal injuries, when such a duty would arise in accordance with ordinary principles of the law of negligence? If the latter is the position, does the law distinguish between acts and omissions: in particular, between causing injury, and protecting individuals from injury caused by the conduct of others?

(3) If the latter is the position, is this an omissions case, or a case of a positive act?

(4) Did the police officers owe a duty of care to Mrs Robinson?

(5) If so, was the Court of Appeal entitled to overturn the Recorder's finding that the officers failed in that duty?

(6) If there was a breach of a duty of care owed to Mrs Robinson, were her injuries caused by that breach?

60. Lord Reid concluded at paragraph 33 (as I have said above) that if a conduct is considered tortious if committed by a private person, then it should be equally tortious if committed by a public authority, unless common law or statute provides otherwise.

61. On whether the law distinguishes between acts and omissions, Reid LJ reiterated that public authorities like private individuals are under no duty of care to prevent

the occurrence of harm save in certain circumstances. Those circumstances are summarised in an article cited by Reid LJ:

> 34. On the other hand, public authorities, like private individuals and bodies, are generally under no duty of care to prevent the occurrence of harm: as Lord Toulson stated in **Michael**, "the common law does not generally impose liability for pure omissions" (para 97). This "omissions principle" has been helpfully summarised by **Tofaris and Steel, *"Negligence Liability for Omissions and the Police"*** (2016) 75 CLJ 128:
>
> > "In the tort of negligence, a person A is not under a duty to take care to prevent harm occurring to person B through a source of danger not created by A unless (i) A has assumed a responsibility to protect B from that danger, (ii) A has done something which prevents another from protecting B from that danger, (iii) A has a special level of control over that source of danger, or (iv) A's status creates an obligation to protect B from that danger."
>
> 35. ...[T]here are certain circumstances in which public authorities, like private individuals and bodies, can come under a duty of care to prevent the occurrence of harm[12]..... In the absence of such circumstances, however, public authorities generally owe no duty of care towards individuals to confer a benefit upon them by protecting them from harm, any more than would a private individual or body.....[13]
>
> 36. That is so, notwithstanding that a public authority may have statutory powers or duties enabling or requiring it to prevent the harm in question. A well-known illustration of that principle is the decision of the House of Lords in **East Suffolk Rivers Catchment Board v Kent** [1941] AC 74. The position is different if, on its true construction, the statutory power or duty is intended to give rise to a duty to individual members of the public which is enforceable by means of a private right of action. If, however, the statute does not create a private right of action, then "it would be, to say the least, unusual if the mere existence of the statutory duty [or, a fortiori, a statutory power] could generate a common law duty of care": **Gorringe**, para 23.
>
> 37. A further point, closely related to the last, is that public authorities, like private individuals and bodies, generally owe no duty of care towards individuals to prevent them from being harmed by the conduct of a third party.....[14]
>
> There are however circumstances where such a duty may be owed, as **Tofaris and Steele** indicated in the passage quoted above. They include circumstances where the public authority has created a danger of harm which would not otherwise have existed, or has assumed a responsibility for an individual's safety on which the individual has relied. The first type of situation is illustrated by **Dorset Yacht**, and in relation to the police by the case of **Attorney General of the British Virgin Islands v Hartwell** [2004] 1 WLR 1273, discussed below. The

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[12] : see, for example, Barrett v Enfield London Borough Council and Phelps v Hillingdon London Borough Council [2001] 2 AC 619, as explained in Gorringe at paras 39-40.

[13] : see, for example, Smith v Littlewoods Organisation Ltd [1987] AC 241, concerning a private body, applied in Mitchell v Glasgow City Council [2009] UKHL 11; [2009] AC 874, concerning a public authority

[14]: see, for example, Smith v Littlewoods Organisation Ltd and Mitchell v Glasgow City Council. In Michael, Lord Toulson explained the point in this way:

> "It is one thing to require a person who embarks on action which may harm others to exercise care. It is another matter to hold a person liable in damages for failing to prevent harm caused by someone else." (para 97)

second type of situation is illustrated, in relation to the police, by the case of **An Informer v A Chief Constable** [2013] QB 579, as explained in **Michael** at para 69.

38. In **Anns**, however, it was decided that a local authority owed a duty of care at common law, when exercising its power to inspect building works, to protect the ultimate occupier of the building from loss resulting from defects in its construction. The House of Lords thus held a public authority liable at common law for a careless failure to confer a benefit, by preventing harm caused by another person's conduct, in the absence of any special circumstances such as an assumption of responsibility towards the claimant. It added to the confusion by importing public law concepts, and the American distinction between policy and operational decisions, into questions concerning duties arising under the law of obligations. Although the decision was overruled in **Murphy v Brentwood District Council** [1991] 1 AC 398 on a limited basis (relating to the categorisation of the type of harm involved), its reasoning in relation to these matters was not finally disapproved until **Stovin v Wise**.

39. The position was clarified in **Gorringe v Calderdale Metropolitan Borough Council**, which made it clear that the principle which had been applied in **Stovin v Wise** in relation to a statutory duty was also applicable to statutory powers. Lord Hoffmann (with whom Lord Scott of Foscote, Lord Rodger of Earlsferry and Lord Brown of Eaton-under-Heywood agreed) said that he found it difficult to imagine a case in which a common law duty could be founded simply on the failure, however irrational, to provide some benefit which a public authority had power (or a public law duty) to provide (para 32). He was careful to distinguish that situation from cases where a public authority did acts or entered into relationships or undertook responsibilities giving rise to a duty of care on an orthodox common law foundation (para 38).

40. However, until the reasoning in **Anns** was repudiated, it was not possible to justify a rejection of liability, where a prima facie duty of care arose at the first stage of the analysis from the foreseeability of harm, on the basis that public bodies are not generally liable for failing to exercise their statutory powers or duties so as to confer the benefit of protection from harm. Instead, it was necessary to have recourse to public policy in order to justify the rejection of liability at the second stage. That was accordingly the approach adopted by the House of Lords and the Court of Appeal in a series of judgments, including **Hill**. The need to have recourse to public policy for that purpose has been superseded by the return to orthodoxy in **Gorringe**. Since that case, a public authority's non-liability for the consequences of an omission can generally be justified on the basis that the omissions principle is a general principle of the law of negligence, and the law of negligence generally applies to public authorities in the same way that it applies to private individuals and bodies.

41. Equally, concerns about public policy cannot in themselves override a liability which would arise at common law for a positive act carried out in the course of performing a statutory function: the true question is whether, properly construed, the statute excludes the liability which would otherwise arise: see **Gorringe** at para 38 per Lord Hoffmann.

42. That is not to deny that what might be described as policy considerations sometimes have a role to play in the law of negligence. As explained earlier, where established principles do not provide a clear answer to the question whether a duty of care should be recognised in a novel situation, the court will have to consider whether its recognition would be just and reasonable.

COMMENTS

62. In Fiji, the two tiered test in **Anns v Merton London Borough Council** [1978] AC 728 is law. This is confirmed by the Fiji Supreme Court in **Lautoka City Council v Ambaram Narsey Properties Ltd** [2014] FJSC 20; CBV0010.2014 (26 November 2014). One of the issues raised before the Court in the application for special leave to appeal in the above case was:

> *(4) Whether the Fiji Court of Appeal erred in accepting that the decision of **Anns v London Borough of Merton** (supra) was good law when it had been overruled to a substantial extent in its own jurisdiction by the House of Lords and whether Fiji is bound to follow English common law.*

63. The Supreme Court answered the above point as follows at paragraphs 17 and 24:

> 17. The Court of Appeal in its judgment at paragraphs [147] to [164] dealt specifically with the decisions in **Suruj Lal v. Joseph Michael Chand**, **Anne's (sic) and others v. London Borough of Merton** and **Murphy v. Brentwood D.C.** and their effect. The Court of Appeal having dealt with those decisions concluded that **Suruj Lal's** case presently stands as precedent.
>
> 24. As stated above the High Court and the Court of Appeal have correctly applied the law relating to negligence in imposing a duty of care on the Appellant and the Second Respondent.

64. The two-tiered test advanced by Lord Wilberforce in **Anns** are as follows:

> First one has to ask whether, as between the alleged wrongdoer and the person who has suffered damage there is a sufficient relationship of proximity or neighbourhood such that, in the reasonable contemplation of the former, carelessness on his part may be likely to cause damage to the latter – in which case a prima facie duty of care arises. Secondly, if the first question is answered affirmatively, it is necessary to consider whether there are any considerations which ought to negative, or to reduce or limit the scope of the duty or the class of person to whom it is owed or the damages to which a breach of it may give rise ...

65. In considering the first tier under **Anns**. i.e. whether the statutory authority owes a duty of care, I would apply the approaches of Lord Steyn and Lord Hoffman in **Gorringe** (supra) and ask the following:

Lord Steyn said:

> [I]n a case founded on breach of statutory duty the central question is whether from the provisions and structure of the statute an intention can be gathered to create a private law remedy? In contradistinction in a case framed in negligence, against the background of a statutory duty or power, a basic question is whether the statute excludes a private law remedy? An assimilation of the two enquiries will sometimes produce wrong results

Lord Hoffmann in the same case said:

> "the question is not whether [the common law duty] is created by the statute but whether the terms of the statute ... are sufficient to exclude it".

66. It is clear that, whatever approach one takes in approaching the first tier of **Anns**, one must always begin with the terms of the statute which, in this case, was not pleaded.

67. Even if assuming that a statute had been pleaded and that I had found the answer to the first tier of **Anns** in the affirmative, I would still consider the following in the second tier (i.e. whether there are any considerations which ought to negative, or to reduce or limit the scope of the duty or the class of person to whom it is owed) based on the following:

(a) there is nothing to suggest that the defendant had carried out some maintenance or capital infrastructural improvement works in the area. Even if it had, there is no suggestion that it had thereby created new dangerous conditions such as leaving the manhole open without any appropriate warning signs and barricades to alert the public of the danger that the exposed manhole posed.

(b) the duty to provide appropriate warning signs only arises if the defendant had created the danger by itself opening the manhole and leaving it that way, or, if the defendant was aware that the manhole had been left open.

(c) distinction must be drawn between, on the one hand, cases where the defendant authority has itself created the danger:

> e.g. having constructed a manhole - provided no cover for it with no warning signs, or following some capital upgrading works, failed to put a cover on the manhole.

And, on the other hand, cases where the danger has resulted from the acts of a third party or agent unconnected to the defendant authority:

> e.g. a scrap metal dealer stealing a manhole cover or a truck running over the manhole.

(d) in the former cases, the question is simply whether the defendant authority has taken sufficient precautionary measures to minimize the risk of peril it had created such as in **Oamaru Borough**.

(e) in the latter cases, the court must consider a host of factors such as those raised in **Machora** (supra) including the particular risk in question and whether a duty to impose a particular regime of regular inspection is owed.

(f) I would consider this case before me now to be a case based on an omission to inspect regularly. Accordingly, the law of negligence as it relates to omissions must apply. In this regard, I would rely on Reid LJ's observations in **Robinson v Chief Constable Of West Yorkshire Police** (supra paragraph 61).

68. Having said all that, and If I may paraphrase Lord Steyn in **Gorringe** (supra) what is clear from all the case law is that:

> "in a case founded on breach of statutory duty the central question is whether from the provisions and structure of the statute, an intention can be gathered to create a private law remedy"?

69. It is hard to even consider the above when no statute is pleaded in the statement of claim. I did pose to counsel the question as to whether the doctrine of *res ipsa loquitur* is available. With the benefit of some submissions on the point, I am not convinced that *res ipsa loquitur* is so available to cure the defect in not pleading any statute. Counsel for the plaintiff could have sought leave to amend the claim to plead a statute during the trial. He chose not to. Regrettably, I must dismiss the claim. As costs follow the event, I order nominal costs to the defendant which I summarily assess at $500 (five hundred dollars only).

HIGH COURT OF FIJI
LAUTOKA

.....

Anare Tuilevuka
JUDGE
03 October 2018