

IN THE HIGH COURT OF FIJI
WESTERN DIVISION AT LAUTOKA
CIVIL JURISDICTION

HBC NO. 128 OF 2014

BETWEEN : **SHEETAL PRITIKA CHAND** of Voi-Voi, Legalega,
Nadi, Fiji, Domestic Duties in her own personal capacity
and as the Administratrix of the Estate of RAJ DEO SINGH
of Voi-Voi, Legalega, Nadi, Driver, deceased.

PLAINTIFF

A N D: **VISION TRADING LIMITED** trading as DHOBY'S a
limited liability company having its registered office at
Courts (Fiji) Limited, 123 Ratu Mara Road, Samabula,
Suva, Fiji

DEFENDANT

Appearance : Ms. U. Baleilevuka on 07 March 2018 & Ms. Chand with
Mr. Siddique Faizal Koya on 2nd & 3rd May 2018 for the
Plaintiff.

: Mr. R. R. Gordon, with Mr. W.S.Pillay for the defendant.

Dates of Trial : 7th March 2018 & 2nd & 3rd May 2018

Written Submissions : 25 June 2018 by the defendant and on 23rd July 2018 by the
plaintiff

Date of Judgment : 11th October 2018

Judgment by : A.M. Mohamed Mackie- J.

J u d g m e n t

A. INTRODUCTION:

1. The plaintiff above named in her personal capacity as the widow and as the Administratrix of the Estate of her late husband, **Raj Deo Singh**, filed this action on the 11th August 2014 against the defendant company claiming damages and other ancillary reliefs over the tragic death of her husband, who was employed as a Boiler Assistant at

DHOBY'S Laundry owned by the defendant company and died, due to drowning as he was unable to escape from a Soak pit, in which he was working.

2. It is in the evidence that a concrete water tank with the capacity of 3,000 liters of water, sitting on a 6 foot height steel stand, had fallen into the adjacently located soak pit, where the deceased was, admittedly, engaged in digging/ desilting and removing the soil therefrom as a part of his duty.

B. FACTS AS PER PLEADINGS:

3. For the purpose of better manifestation and clarity, I shall reproduce below the statement of claim (SOC), which is very concise and consisted of only 7 paragraphs.
 1. *"The Plaintiff is the wife of Raj Deo Singh and brings this action in her own right and as the Administratrix of the Estate of Raj Deo Singh (hereinafter called the "deceased") who died on 30th day of July 2012.*
 2. *The deceased worked for the Defendant as a Boiler Assistant. His appointment was made on the 12th day of June 2012 by the Defendant.*
 3. *On the 30th day of July 2012 the deceased died due to the drowning as he was not able to escape from the soak pit. He was 40 years old at the time of his death.*
 4. *The accident occurred by reason of the breach by the Defendant of the common duty of care which it owed to the deceased pursuant to Section 9 of the Health and Safety at Work Act 1996 and also pursuant to Section 55 of the Health and Safety at Work (General Workplace Conditions) Regulations 2003 of the Laws of Fiji as an employer to take such care as in all circumstances of the case is reasonable to see that the deceased would be reasonably safe in using the premises for the purpose for which he was employed by the Defendant to be upon the premises.*

Particulars of Negligence by the Defendant.

- (a) *Failure to provide the deceased with all the proper equipment necessary to carry out his duties.*
- (b) *Failure to provide safety instructions to the deceased with respect to the use of equipment for his work as a Boiler Assistant.*
- (c) *Failure to provide adequate supervision to the deceased as he worked near the soak pit.*
- (d) *Failure to provide adequate signage for the soak pit area.*

5. *The deceased is now survived by his wife Ms. Sheetal Pritika Chand, the Plaintiff herein and his two children Aryan Devanesh Singh and Reha Ishita Singh.*
6. *The deceased was the sole income earner of his family.*
7. *The Plaintiff also claims interest at 10 (ten) per centum from the date of accident to the date of judgment under the Law Reform (Miscellaneous Provisions (Death and Interest) Act Cap. 29 Laws of Fiji.*

WHEREFORE the Plaintiff claims from the Defendant as follows;

- (a) *Special Damages*
 - (b) *General Damage*
 - (c) *Damages under the Compensation to Relatives Act Cap.29 Laws of Fiji*
 - (d) *Interest at 10% per annum from the 30th day of July 2012 to the date of judgment under Law Reform (Miscellaneous Provision) (Death and Interest) Act Cap 27 Laws of Fiji on all sums awarded.*
 - (e) *Costs.*
4. The defendant by its Statement Of Defence (SOD) dated 21st November 2014, while denying the entire averments in the SOC, called upon the plaintiff for Strict proof of same and in paragraph 4 of its SOD, apart from denial, stated further that the particulars in paragraph 4 of the SOC are vague and general and therefore the defendant cannot plead to the same, save as to such particulars are an embarrassment to the pleadings before this court and should be struck out or disregarded. Accordingly, the defendant prayed for the claim to be struck out with cost on Solicitor Client basis.

C. AGREED FACTS & DISPUTED ISSUES:

5. According to the Pre- Trial Conference minutes (PTC) dated 09th September 2016, following facts and issues have been agreed upon between the parties.

AGREED FACTS

1. **THAT** *the Plaintiff is the wife of Mr. Raj Deo Singh (deceased) and the Administratrix of the Estate of Raj Deo Singh.*
2. **THAT** *the deceased worked for the Defendant as a Boiler Assistant and his appointment was made on the 12th day of June 2012 by the Defendant.*
3. **THAT** *on the 30th day of July 2012 , the deceased died due to drowning as he was unable to escape from a soak pit and he was 40 years old at the time of his death.*

DISPUTED ISSUES

4. WHETHER the accident that caused the death of Mr. Raj Deo Singh occurred by reason of the breach by the Defendant of the common duty of care which was owed to the deceased and the Defendant owed this duty as an employer to ensure the reasonable safeness of usage of the premises for which the deceased was employed by the Defendant to be upon the premises?
5. WHETHER the Defendant was negligent in terms of their failure to provide the deceased with all the proper equipment necessary to carry out his duties?
6. WHETHER the Defendant was negligent in terms of their failure to provide safety instructions to the deceased with respect of the use of equipments for his work as a Boiler Operator?
7. WHETHER the Defendant was negligent in terms of their failure to provide adequate supervision to the deceased as he worked near the soak pit?
8. WHETHER the Defendant was negligent in terms of failing to provide adequate signage for the soak pit area?
9. WHETHER the Defendant is liable due to their negligence for the death of the deceased and is entitled to pay cost to the plaintiff accordingly?
10. WHETHER the Plaintiff is the sole bread winner and his family is facing financial difficulties due to the negligence of the Plaintiff? (Plaintiff should be read as the Defendant)
11. WHETHER costs or any interest is payable, and if so on what basis?

D. TRIAL

6. During the 3 day's trial held before me, following witnesses gave evidence for the plaintiff and the defendant respectively;
PW-1 to PW-4 for the plaintiff & DW-1 to DW-3 for the defendant

1. Ms. Sheetal Pritika Chand(The Plaintiff)- PW-1
2. Mr. Nilesh Chand (Co- worker of the deceased)- PW-2
3. Mr. Sunia Duikoro (fire officer National fire Authority)-PW-3
4. Mr. Luke Tabutabu Salusaluedrau (Assistant Labour Officer -PW-4

5. Mr. Panapasa Matailevu (Referee SCT – Lautoka)- DW-1
6. Mr. Sikeli Raituku (An Employee of Dorbis Laundry , Nadi) DW-2
7. Mr. Ravi Raj Singh (An Employee of Dorbis Laundry , Nadi) DW-3

7. Only one document , namely, the notice of accident, which caused the death of the deceased, sent by the deceased's employer to the Ministry concerned was marked as PE-1 on behalf of the plaintiff and on behalf of the defendant two documents , namely, a copy of the Agreement , purportedly, entered into between the employer and the Plaintiff for the payment of compensation in terms of the Workmen Compensation Act and the payment advice received by the Ministry of Labor from the New India Assurance for a sum of \$ 23,400.00 were marked as DE-1 and DE-2 respectively. Although, it is stated in submissions that a letter was marked as PE-2, such a marking or document is not found in the record.

E. ORAL EVIDENCE:

8. PW-1, being the wife of late Raj Deo Singh, testified that she has obtained the probate for the Estate of her husband, he was 40 years old at the time of his death, he was the only one working in the family, she has 3 schooling children at the ages of 12, 10 and 8 respectively, her late husband was earning \$112.00 per week and her family is now surviving by her working and with the help of her parents. She was not cross examined by the learned counsel for the defendant.

PW-2, the co- worker of the deceased on the fateful day, who was called upon by Raj Deo Sing (deceased), after the tea brake, to help him out in taking out the soil excavated by him from the soak pit, being the only eye witness to the incident, gave evidence as to how he happened to help the deceased and what really caused the fall of the water tank into the soak pit, which, according to him, covered the pit burying the deceased in it, apart from spilling the water therein into the pit causing the deceased to drown as well.

He said, among other things, that he was employed at Dhobi's for 4 years as a Boiler Operator and on the day of the incident, i.e. 30th July 2012, after engaging in Boiler Maintenance in the morning hours , went to help Raj on his request ,after the tea brake , there was no one other than them in the soak pit area, he was standing near the very tank, which was placed on a four legged metal stand at 6 feet height, and it suddenly fell down into the pit along with steel stand.

He stated further, that when the tank fell, the steel stand hurt his hand and the deceased was inside the pit trapped under the tank and the steel stand (angle line) blocked

everywhere, so the deceased could not come out and the water therein filled the soak pit. He immediately called the staff and they cleared the water till his head appeared, but the full head could not come out since the deceased was trapped under the tank and the angle line was blocking. The witness also stated that no supervisor was there at the time of the incident.

According to this witness, when the Police and the Crane came, he was not there to see how Raj was taken out, as he had to go to hospital due to the injury caused to him.

It was when the witness was cross examined by the learned defence counsel and on specific questions being posed by the court; the incident was clearly spoken about by the witness for the ascertainment of actual facts and circumstances that led to this tragedy. The salient parts of his evidence will be referred to and reproduced during the analysis of the evidence.

PW-3, the officer from fire service department during his evidence stated that his office received the call for help at 12.59, he arrived at the scene within around 10 minutes, on arrival he saw the victim was trapped underneath the tank in the soak pit and the tank had crushed the deceased. Though, they tried to take out the tank utilizing all the necessary equipment they had, they could not do it to take the victim out and thus a Crane was arranged and it was at 4: 12 in the afternoon, the tank was removed by the crane. He said that when the body of the deceased was taken out, it appeared as if his bones had been crushed. He also stated that the tank was quite big and made of concrete.

When an attempt was made by the learned counsel for the plaintiff to obtain further evidence from this witness as to the nature of the steel stand on which the tank stood and whether there were any safety signs in place, this was objected by the learned defence counsel and it was upheld by the court since this witness had come primarily to rescue the deceased and not to inspect the scene of the incident.

PW-4, the Labor Officer, stated that the Ministry of Labor was notified about this incident by the defendant company and the notice PE-1 containing the particulars, including a statement was received by Ministry. The said statement reads *"He was working on the soap pit under the water tank which was on the steel beam. Accidentally, the tank collapsed and fell. He was trapped under it"*

This witness confirmed that the deceased's weekly earning was \$103.54. He stated that a reminder was sent to the defendant company to pay \$ 23,400.00 as compensation within 14 days and the defendant had not raised any dispute over it and thereafter, the New

India Insurance Company had sent a cheque for the said amount. The learned counsel for the defendant objected to detailed evidence on these facts by this witness, saying it had no much relevance as this was not a claim under the Workmen Compensation Act. The learned plaintiff's counsel limited this officer's evidence only to highlight the fact that the said sum was not accepted by the plaintiff. This was not disputed by the defence.

Evidence by Defence

DW-1 is a former Police Officer, presently functioning as the referee of SCT at Lautoka, who had carried out an investigation by visiting the scene of incident, as a private investigator, on the request of the Insurance Company concerned, only after two months of the incident and had prepared a report. According to his evidence, he says that he was able to ascertain the fact that there had been two tanks placed on separate stands with the capacity of 3000 liters each and one of it had fallen into the soak pit and same was not there when he inspected the scene. He admitted that he did not interview any one from the defendant company. He also said that it was revealed that the tank had been erected by the previous owners of the Laundry and not by the defendant company.

His conclusion was that it could have been a freak accident and they could not pinpoint what was the cause for the tank to collapse. Also he said it could have been the wear and tear of the structure. He had not taken a statement from the only eye witness Nilesh, but had relied on the statement made by him to the Police.

DW-2 is an employee of the defendant company working for 5 years, having joined in 2009 when the business was with the previous owners. He spoke about the condition of the tanks in the premises stating that they were there for a long time, it was not constructed by the defendant company and the condition of the tanks was good. He is not an eye witness, but arrived at the scene after hearing a big noise caused by the fall of the tank. He expressed his opinion, without even being asked, to the effect "from my point of view, because they were digging there, may be the stand slide that's why the tank fall down".

DW-3 is a long standing employee of the laundry, having worked under several previous owners from 1983. He confirmed that the defendant company took over in January 2012 with the existing structures. He also stated about the nature of the stand on which the tank in question was sitting. He was not an eye witness when the incident took place. This witness was on an attempt to show that there was no soak pit existed prior to the incident, which is contrary to what the other witnesses said and the admitted

fact in this case. Hadn't there been a soak pit as he said, no necessity would have arisen to dig it causing the tank to fall into it.

F. SUBMISSIONS

9. The learned counsel for both the parties have filed comprehensive written submissions on the dates mentioned above and I am thankful to them for same. The learned defence counsel has addressed various issues that he had raised prior to and during the trial.

G. ANALYSIS AND DETERMINATION:

10. In the light of the entire evidence led before me at the trial and on close scrutiny of the contents of the written submissions, I shall attempt to find the most suitable and justifiable answers to the agreed issues above. Any other matters/ issues not covered by the aforesaid agreed issues will also be addressed in this judgment for the sake of completeness.

Whether Defendant Owed Duty of Care to the Deceased?

11. Before proceeding to answer the first agreed issue (No-4) above, in order to decide whether the defendant owed duty of care to the deceased, it is desirable to recognize whether the action of the plaintiff is founded under the common law or under a statutory law.
12. The first agreed issue bearing No-4 is seems to be arising out of the pleadings in paragraph 4 of the SOC. This issue raises the question "*whether the accident that caused the death of Mr. Raj Deo Singh occurred by reason of the breach by the Defendant of the common duty of care which was owed to the deceases and the defendant owed this duty as an employer to ensure the reasonable safeness of usage of the premises for which the deceased was employed by the defendant to be upon the premises?*"
13. The averments in paragraph 4 of the SOC , on which the above issue is based , appears to have had a mild ambiguity as to whether the plaintiff is bringing this action for damages under the common law or under a particular statute, which imposes statutory duty of care on an employer. It was based on this ambiguity, among other things, the defendant's Solicitors filed a striking out application before me when the trial was around the corner and same was dismissed by my ruling dated 2nd/ 7th March 2018.

14. In justifying my dismissal of the said striking out application, I was and am still of the view that once the issues are framed the pleadings rescinds to the background and it is on the issues framed the matter is adjudicated. The reason for this will become clear when the paragraph 4 of the SOC and the 1st agreed issue (NO. 4) are closely scrutinized. Once the above issue was framed, the ambiguity or vagueness, if any, in the pleadings stood vanished. The fact that the plaintiff is bringing this action, alleging the breach of duty of care, under the common law, which is also imposed on an employer by the section 09 of the Health and Safety at Work Act 1996, has become clear with the framing of the above issue.
15. The wordings to the effect “common duty of care” in paragraph 4 of the SOC and in the above issue are well and truly sufficient to denote that the action is brought under the common law for breach of duty of care, which duty is also imposed on the employer by the relevant statute. I beg to disagree with the learned counsel for the defendant, when he argues that this action is not brought under the common law for breach of duty of care. Obviously, the Plaintiff brings this action both under the common law and the statutory law.
16. Even though the defendant has admitted that the deceased was an employee of it as a Boiler Assistant and he died due to drowning as he was unable to escape from the soak pit , in which he was working, the defendant has not accepted that they owed a duty of care to the deceased. I just want to state in clear terms that employers owe duty of care to its employees to provide safe system of work and to protect its employees from foreseeable risk and dangers. This common law remedy is further guaranteed by the statutory law when the victim is a worker.
17. Then common law duty has also become a statutory duty pursuant to Section 9 of the Health and Safety at Work Act (1996). The deceased was an employee of the defendant at the time material; as such the defendant owed him a duty of care to provide safe system of work, free of danger and risk to the deceased.

“At common law an employer is under a duty to take reasonable care for the safety of his employees so as not to expose them to unnecessary risk. This duty of care must be considered and in measuring it, one must balance the risk against the measures necessary to eliminate the risk”: see Denning LJ in Watt v Hertfordshire County Council [1954] 2AER 368.

18. Our Health and Safety at Work Act 1996 and its Regulations, in addition to common law obligation, impose on every employer a general duty to ensure, so as far as reasonably practicable, the health safety and welfare at work of all his employees.
19. It must however be noted that on the plain reading of section 15 of part ii of this Act, it appears that the Act does not give rise to civil liability and same is still governed by common law. However, I have taken a different view in my judgment in HBC-40 of 2017 *Dhimant Patel v Courts Fiji Ltd* , following the ratio decidendi in *Krishna V Standard Concrete Industries Ltd* [2008] FJHC 42;HBC 17 .2006 (19 March 2008) in which, Jiten Singh- J , *inter- alia* , in paragraph 31stated as follows.

“[31] Mr. Narayan submits that Section 15 prevents a civil remedy if an employer breaches the Act. One of the objects of the Act as the long title suggests was to reform the law relating to the health and safety of workers. The Act also forbids contracting out of the provisions of the Act. As Section 3(1) indicates it applies to all workplaces except for a named few. The Act would lose a lot of its efficacy and objectives if a worker injured as a result of employer’s breach of the provisions of the Act could not sue him. What Section 15 means is that simply because there is a breach of a section does not ipso facto give a worker a right of action for damages. For example under Section 9(2)(c) if an employer fails to provide in appropriate languages information regarding the use which a plant is designed for or fails to provide information about any research or tests carried out on any substance, it does not give cause for civil proceedings. I am of the view what Section 15 means is that there has to be an injury as a result of failure to comply with the Act before one can bring civil proceedings. Section 15 does not prohibit civil proceedings but retains the essence of tort law that there must be injury to found a claim.”

20. Therefore, it can be safely concluded that the plaintiff hereof can bring and has correctly brought this action to vindicate her right under common law, which stands intact and further guaranteed in the **Health and Safety at Work Act 1996**, imposing it as a statutory duty on the defendant, being the employer of her deceased husband. I have no hesitation in arriving at the conclusion that the defendant owed the duty of care not only under the common law, but also under the Health and Safety at Work Act 1996, which imposes statutory duty of care on the defendant.

Whether the Defendant Breached the Duty of Care owed to the Deceased?

21. The plaintiff under paragraph 4 of the SOC particularizes the alleged negligence of the defendant stating that the defendant failed to provide the deceased with proper equipment, safety instructions, adequate supervision and adequate signage during the

work. It is based on the above averments the next 4 issues have been raised (Agreed issues No. 5 to 8)

22. The Plaintiff's claim is essentially founded on the breach of duty of care. She claims that her husband died on 30th July 2012 due to drowning in the soak pit, in which he was working as an employee of the defendant. She was not an eye witness to the incident and totally relied on the evidence of the PW-2 Nilesh Chand to prove her case.
23. It was the said PW-2, Nilesh Chand, who came out with substantial facts through his evidence as to how he happened to be a co-worker with the deceased on this fateful day, what caused the water tank to fall and how it led to the death of the deceased. Since this witness is no longer in service with the defendant company, he appeared to be an independent and disinterested witness, who struck me as a truthful witness. His evidence was not challenged at all on any material fact and throughout the cross examination his evidence remained unshaken.
24. The deceased, Raj Deo Singh, had joined the defendant company only on 12th June 2012 as a Boiler Assistant. According to PW-2 Nilesh Chand, deceased Raj had initially commenced the work singlehandedly in the Soak Pit in the morning hours of fateful day till the tea interval and on his request Nilesh had joined him to help him in taking out the soil excavated by Raj from the Pit. The assistance of Nilesh was required, obviously, due to the fact that the pit was around 5 feet deep according to the witness. If the pit was only 3 feet deep, as suggested by the defence, the requirement for Nilesh's help would not have arisen and the deceased would not have called him for help. Nilesh does not say that he was asked by any superior officer in the defendant company to help the deceased. It becomes clear that the deceased had been tasked with this work to do it all alone. There was no evidence or at least a suggestion by the defence to the contrary.
25. The focal parts of the evidence of PW-2 sheds enough light to show as to how this tragedy occurred leading to the death of Raj Deo Singh. His evidence directly points the finger at the defendant for its failure/s and guides any sensible person to arrive at a safe conclusion as to where and how the defendant failed in its duty owed to the deceased as an employer.
26. According to his evidence (in page 3) there had been none present near the soak pit area except for deceased Raj and this witness. He says that the distance between the tank and the soak pit was 1 cm and no supervisor was present near the soak pit (page-4). The distance he referred as 1 centimeter, was the actual distance between one of the leg (foot) of the steel stand on which the water tank rested and the edge of the pit. This was made

very clear during the cross examination and when he answered the questions asked by the court as follows. (Vide page 21)

CRT. What was the distance between the wall of the pit; you said the earth was coming down and the leg of the stand?

A. The soak pit and the Pit?

CRT. The soak pit and the leg of the stand

A. *One centimeter*

27. The evidence reveals that the 6 feet height steel stand on which this tank sat was four legged with individual concrete foundation on the bottom of them, buried in the ground and one of it was situated at the edge of a wall of the pit. Learned Counsel for the defendant did not ask any question to clarify about the distance between the wall of the pit and the foot of the steel stand, which was adjacent to the pit. This witness repeatedly said the distance was one centimeter. This clearly shows that the foot of the leg that slipped into the pit had almost been placed or planted at the very extreme edge of the wall of the soak pit or on the other hand the pit had been dug adjacent to the particular foot of the leg that skidded into the pit due to the unsupervised and/or uninstructed digging of the pit by the deceased.

28. In order to clarify the nature of the pit , I posed further questions to the witness in page 18, which goes as follows;

CRT: Was the soak pit, just a pit on the ground or was it a built one?

A. *Just a pit; it's not built.*

CRT. It's not concrete with walls?

A. *No.*

29. The above evidence shows how dangerous this water tank was, sitting on a steel stand, of which one leg was almost in the pit, posing danger to anyone working or standing under it. This could have been clearly and necessarily foreseeable, had any responsible supervisor / foreman/ engineer from the defendant company given clear instruction and/or supervision before the deceased commenced the work or during the work.

30. There was no evidence coming forth from the defendant to prove that a supervisor or anyone competent of supervising and instructing the deceased was present near the soak

pit or any instruction was given or supervision was in fact made. PW-2 Nilesh went there only to help the deceased on his request to take out the soil and not on the instruction of any one in the defendant company. He was only a co-worker, who volunteered to help the deceased. He could not have been expected to play the role of the employer or its supervisor to instruct or to supervise the deceased as questioned by the learned defence Counsel during the cross examination. However, just before the fall, on being alerted by the movement of soil from the wall of the pit, which was caused due to the digging by the deceased, he had warned him. But it was too late and the tank took its turn wasting no time in burying the victim alive.

31. Witness told that he had not received any safety instructions from the defendant on the day of the incident or on other days in his general duties. The DW-2 for the defence, who is an employee of the defendant, stated that they had not received any training or instructions and such trainings and giving instructions started only after this incident. This defence witness in examination in chief in page 51 by his answer to the 2nd question has stated *"because they were digging there, may be the stand slid that's why the tank fall down"* This evidence corroborates PW-2 Nilesh's evidence.
32. The following parts of the PW-2 Nilesh's evidence too will show as to how this tragedy happened:

CRT: do you know the exact reason for the fall of the first tank?

A: No.

CRT: Had it something to do with Raj's work there?

A. Raj was working in the morning there; he took the spade and the fork ; but I didn't know Raj dig the thing or no because he just called me to take out the soil from there and soak pit and the tank was like this ; and suddenly the base just went like this and the tank fell down . That' only I know.

33. With the above answer, the learned counsel for the defendant was seen to be in an attempt to take from this witness's mouth an answer to the effect that there was no fault on the part of the defendant for the fall of the tank. The witness said *"I am not sure"*. Vide page- 15 question No-4). The same effort continued throughout the cross examination vide page 16 question No-1, page 21 question nos-2 and 5. This was clearly a move to get the opinion of the witness. He was not before the court as an expert to give his opinion. He was before the court only to narrate what he saw at the time of incident.
34. In page 20 the witness answered two specific questions as follows:

Q. *whilst you were taking the mud out of the soak pit, did you notice anything unusual or irregular?*

A. Yes.

Q, *what did you notice?*

A. *"The soil from the tank was about to fall.; the soil is coming out from that side; it's like sliding but **that** tank never fall ; only **this** tank fall; and I told Raj to come out because something is going to happen; because the soil is coming out ; and Raj told me no , nothing will happen. Suddenly after that, we heard the structure tapping sound; it's about to fall; and then same time I jumped"*

35. In my view, had there been a supervisor or any responsible person from the defendant company to supervise or observe the work and instruct the deceased of this impending danger in digging a pit located adjacent to the tank, while one foot of the steel stand was almost at the edge of the pit and when the pit had no wall built around it to avoid any sliding of earth, this tragedy could very well have been foreseen and avoided.
36. There is no evidence from the defendant to establish that there was a supervisor or a competent person to supervise and to instruct the deceased at the beginning or during the work. Had there been one in place he/she should have reasonably foreseen this impending danger. One need not be an expert to foresee this type of dangers.
37. I will readily agree with the learned counsel for the defendant, when he says that the provision of hand gloves, shoes or any other equipment would not have prevented this accident. However, if a prudent supervisor had played his role, he would, undoubtedly, have foreseen the danger and duly instructed the deceased to stop the digging or at least would have made appropriate arrangement to provide a strong support to the tank and the stand to stop its leaning and falling, as a temporary measure until the work is over or as a permanent solution to stop a possible fall in the future.
38. Equally, displaying of any sign would also not have avoided the tragedy, when the deceased had been ordered and allowed by the defendant to work under such a vulnerable condition. Had the defendant, through its supervisor / foremen/ engineer identified the danger in advance, before doing any work in the pit , a display of sign would have assisted in warning and keeping away the by passers . The place of incident was the back side of the defendant's Laundry and not a public place to warrant such a sign or display, unless it was for the purpose of generally warning its workers to keep away from that area, having identified the danger in advance.

39. Even if any sign of warning had been displayed, when the deceased was duty bound to complete the given work by his employer, with no supervision and proper instructions to him, it would not have produced any effect in avoiding the fall of the tank
40. The main issue here is ordering and allowing the deceased to work unsupervised and uninstructed. The deceased, being a person new to the work place, would not have done this work on his own decision. He, undoubtedly, has worked on the order of his supervisor / Forman or any superior officer. Even the little warning given by the PW-2 Nilesh at the last moment, need not have, necessarily stopped him from continuing the work, as he was doing the work on the order of his superior officer.
41. The evidence of PW-3 fire officer and that of the PW-4 labor officer does not assist in deciding the pivotal issue before me, as to whether the defendant breached the duty of care or not. It is the evidence of the PW-2 Nilesh that really substantiated the plaintiff's case.
42. The witnesses called by the defendant were not in a position to satisfy the court that the defendant had taken necessary measures for the safety of the deceased by providing necessary supervision and/ or instructions prior or during the work attended by the deceased.
43. It is clear beyond doubt, on the convincing evidence of the PW-2 that the defendant was in breach of its duty to take all reasonable care for the safety of the deceased. The defendant failed to provide necessary supervision and/or instructions to the deceased when he was engaged in digging the soak pit, where the adjacent water tank was bound to fall due to skidding or erosion of the wall of a pit as a result of digging. The water tank was resting on a 6 foot height steel stand. One foot of the steel stand was situated on the edge of the bare soak pit and due to the unsupervised and uninstructed digging the steel stand collapsed causing the water tank to fall. The tank hit the wall of the adjacent building first and then landed into the pit where the deceased was working.
44. The relevant officers in the defendant company, by due inspection and supervision prior to the work, could have arranged a strong support to the steel stand and to the tank to avoid the fall in order to ensure the safety of the victim. The defendant did not provide proper supervision and / or instructions for the deceased on the day in question. The defendant did not prove that it fulfilled these obligations, for which it is bound by law.

45. The issue 5 does not specify the safety equipment which the defendant failed to provide. However, providing equipment such as hand gloves, shoes or helmet as stated in the evidence would not have avoided the incident and the death that followed. Hence issue No-5 attracts a negative answer.

I have found that the defendant failed to provide necessary safety instructions to the deceased, to be followed in performance of his duties as a Boiler Assistant, and particularly when he was engaged in digging the pit in such a vulnerable environment. Therefore, the issue No-6 attracts an affirmative answer.

The answer to issue No.7 is, undoubtedly, affirmative as the defendant has blatantly violated and breached its duty of care by failing to provide much needed supervision when the deceased was at work. However, for the reason stated above, the issue No. 8 has to be answered negatively.

46. The death of Raj Deo Singh was caused due to defendants failures as aforesaid and owing to its negligence. I accept the Plaintiff's unchallenged evidence that the deceased was the only breadwinner in the Plaintiff's family and they are facing financial difficulties as a result of defendant's negligence.
47. In my judgment, the defendant was in breach of section 9 of the Health and Safety at Work Act,1996, in failing to take adequate precautions for the deceased's safety and by exposing him to a dangerous situation where he had to work under a vulnerable environment.
48. *In the case of Sheik Mohammed Amin v Vishwa Chand & Courts (Fiji) Ltd, (HBC 39 of 2008)* Hon. Calanchini J (as he then was) held that it is the duty of an employer to provide a safe system of work. That judgment was upheld on appeal (ABU 0031 of 2012):

Lord Hope in *Robb v Salamis (M &I)*, [2007] 2 All ER 97 at pg 109 said:

"The employer must anticipate that it may not be possible to predict the precise ways in which situations of risk may arise, especially where the risk is created by carelessness. The employer is liable even if he did not foresee the precise accident that happened (see Miller v South of Scotland Electricity Board 1958 SC (HL) 20 at 34 per Lord Keith of Avonholm). As Lord Reid said Hughes v Lord Advocate [1963] UKHL 1; (1963) 1 All ER 705 at 708, (1963) AC 837 at 847, the fact that an accident was caused by a known source of danger but in a way that could not have been foreseen affords no defence."

Additional Issues and Arguments in Defendant's written submissions

49. The learned counsel for the defendant, from paragraph 3 to 25 of his closing written submissions, has taken up a position that the Plaintiff failed to adduce evidence that she is the Administratrix of the Estate of the deceased and no Probate or Letters of administration was tendered in evidence. It is also stated that she cannot bring this action for damages under the **Compensation to Relatives Act**.

I agree with the submissions of the learned counsel that the Act does not set out heads of award of damages nor does it create a class or classes of damages and all what the Act preserve is the right to an action when a person dies and sets out who is entitled for damages awarded, if any, and in what proportions.

However, the submission of the counsel with regard to the locus standi of the plaintiff to bring this action cannot be accepted, in view of the 1st agreed fact in the pre-trial conference minutes to the effect "**THAT the Plaintiff is the wife of Mr. Raj Deo Singh (deceased) and the Administratrix of the Estate of Raj Deo Singh**" This seems to have escaped the attention of the learned Counsel. The plaintiff can make use of the relevant provisions of this Act to come before the court and have the damages, if given, divided among the beneficiaries of the Estate in the manner it should be done in terms of the Act

50. From paragraph 27 to 43 of the written submissions, learned counsel argues that the plaintiff's claim(s) are prohibited by sections 16 and 25 of the Workmen's Compensation Act. Counsel relies on a purported Agreement marked DE-1 claimed to have been signed between the plaintiff and the representative of the defendant company before the Labor Officer concerned.

This purported Agreement was not put to the plaintiff by the defence counsel and she was not cross examined at all. Section 16(1) (b) of the Act specifically says

"Where the workman is unable to read and understand the writing in the language in which the agreement is expressed the agreement shall not be binding against him unless it is endorsed by a certificate of a district officer or a person appointed by the district officer or permanent secretary, in writing, in that behalf, to the effect that he read over and explained to the workman the terms thereof and that the workman appeared fully to understand and approve of the agreement"

The purported agreement marked DE-1 does not say it was signed by the plaintiff. The name that appears as agreeing party is that of late Raj Deo Singh. The signature appears there was not identified as that of the plaintiff. It says "Signature by the workman" The locus standi of the plaintiff to enter into such an agreement is not stated therein. No one

knows whether this was signed after or prior to the obtaining of the Probate in respect of the Estate of the deceased. More importantly, there is no any certification in writing that the contents of this DE-1 was read out , explained and it was understood by the plaintiff as required by the above section. However, the fact remains that the Plaintiff has not accepted the amount offered by the Employer through the Insurance Company. In view of the above I don't agree with the learned counsel's contention that the plaintiff's claim(s) are prohibited by section 16 and 25 of the Act. This argument should necessarily fail.

51. The arguments advanced by the learned counsel from paragraph 45 to 59 in the written submission that the plaintiff cannot bring this or any action for loss and/or damage suffered by reason of the and/or any breaches of the Health and Safety at Work Act. This objection has been sufficiently dealt with in main part of my judgment and does not require repetition. The plaintiff is before the court under the common law to vindicate that the defendant owed the duty of care unto her deceased husband, which duty is now statutorily imposed on the defendant as the employer under this Health and Safety at Work Act 1996. This argument of the learned counsel holds no water.
52. The learned defence counsel from paragraph 61 to 68 of the W/S argues that breach and/or breaches of section 9 of the Health and Safety at Work Act do not apply and/or are not applicable and /or not relevant. The court has found that the defendant has failed in its duties of providing timely supervision and necessary instructions when the deceased was at work.

All these breaches are generally covered by Section 9(1) of the Act. I find the sub section (C) thereof well and truly specifies the duties (**instructing and supervising**) imposed on the employer. In addition to the above, the sub sections (d) and (e) as well imposes this duty of care.

The Section 9 of the Act does not only deal with breaches that are related to plants and substances. There are plenty of other instances where the duty of care is expected from the employer. One need not have necessarily worked with the plants and substances to fall under this section. However, the deceased was, admittedly, a Boiler Assistant. The water tank, the stand or scaffolding it stood and the Soak pit in question can be considered as parts or components of the steam Boiler. The particulars given in the SOC citing the relevant Act was adequate.

53. I accept the learned counsel's argument from paragraphs 70 to 79 of the written submissions that the deceased was not working at a height in order to fall under regulation 55 of the Health and Safety at Work (general workplace conditions) regulations 2003.
54. The plaintiff filed this alleging that it was the defendant, as the employer of the deceased, who owed the duty of care. Non- making of the defendant's employees or agents, who the plaintiff believed owed the deceased a duty of care and breached that

duty, need not have been necessarily made a party to the action. Failure to make such persons as a party will not defeat the action. Even if such persons are made a party it is the defendant, who becomes liable to pay under vicarious liability. The defendant has not been prejudiced or misled in adducing its defence. Hence the arguments found from paragraphs 81 to 87 do not warrant serious consideration.

55. From paragraphs 88 to 106 of the written submissions, the learned counsel submits that the plaintiff failed to allege and/or identify and/or plead a proper cause of action in negligence. This has already been dealt with in my judgment and in my ruling pronounced on 7th March 2018 when I dealt with the striking out application. In my view, the particulars that were pleaded in the SOC were sufficient. The incident occurred within the premises of the defendant's laundry. The directors and others, namely, the engineer/ supervisor/ foreman and other employees were privy to the incident occurred. The Plaintiff was not an eye witness and fully relied on the PW-2 who was the only eye witness and the co-worker of the deceased.

The defendant need not have fully relied on the Plaintiff for every details and particulars. The SOC was in a concise form. The pleadings are said to be similar to the Skeletons and it is only during the trial the necessary flesh and blood are added by way of evidence. The Plaintiff has accomplished that task, particularly, through leading the evidence of the PW-2 who was fully subjected to cross examination by the defence.

Moreover, long before the filing of this action, the defendant was precisely aware as to what occurred on the day of the incident that led to the death of Raj Deo Singh. This is evidenced by the document marked PE-1 (the notice sent by the defendant to the Ministry of labor) where the defendant has clearly stated "*HE WAS WORKING IN THE SOAP PIT UNDER THE WATER TANK WHICH WAS ON THE STEEL BEAM. ACCIDENTLY THE TANK COLLAPSED and fell. HE WAS TRAPPED UNDER IT.*" The duty of care owed by the defendant is sufficiently pleaded in paragraph 4 of the SOC and same was reduced to agreed issues. Out of these alleged breaches, two have been proved as breaches committed by the defendant, namely, failure to supervise and give instructions. Thus, this argument of the learned counsel fails.

56. From paragraphs 107 to 143 of the written submissions, learned counsel contends that the particulars of negligence pleaded by the plaintiff have not been made out. Out of the alleged 4 failures on the part of the defendant, this court has found two of them have been breached by the defendant as stated above. They are failure to supervise and instruct the deceased when he was at work. Those findings are backed by evidence in preponderance. There was no contrary evidence from the defence. None of the directors of the defendant company or its engineer/supervisor or anyone, who entrusted the work to the deceased opted to come before the court to give evidence in defence.
57. The argument placed from paragraph 144 to 151 cannot be accepted. This has been already dealt with. However, in the expense of repetition, I would say the deceased was

only a novice at the time of the incident carrying out the duty given to him by his employer. He displayed his dedication to the work disregarding the instant warning given at the last moment by the co-worker PW-2 about the impending danger. Even the PW-2, who gave the warning, could not escape. He was out of the pit and fortunate enough to save his life. This shows that the incident was so instant and the warning by PW -2 could not have avoided it. This should have been foreseen by the supervisor / engineer or the person who entrusted the work to the deceased. He or she should have instructed the deceased and supervised him during the work in order to have this tragedy avoided.

58. It appears that the learned counsel for the plaintiff has been deprived of the opportunity of responding to the above arguments advanced by the learned defence counsel, seemingly, due to non-service of defendant's written submissions on them. Had it been served, undoubtedly, the learned counsel for the plaintiff would have responded to these arguments in their belated submissions filed after the defendant's submissions. However, I have done the best I can do in fairness to both the parties.

E. CONCLUSION

59. After carefully analyzing the entire evidence adduced, I hold that the Plaintiff has established on a balance of probabilities that her husband's sudden death on 30th July 2012 was caused due to the negligence of the defendant, its authorized servants and/ or agents. The defendant owed a duty of care to the deceased, who was a novice to the work place. He was required to dig and desilt the soak pit, which was situated adjacent to the steel stand on which a large water tank rested. One foot of the steel stand was located at the brink of the soak pit, in which the deceased was working. The imminent danger in digging the bare soak pit, when one the base foot of the steel stand was located at the brink of it, was clearly foreseeable. The defendant failed in providing timely supervision and instruction to the deceased. The defendant failed to conform to the standard of care imposed on it under the law and has thereby breached that duty of care owed to the deceased.

F. ASSESSMENT OF DAMAGES:

60. The Plaintiff in her SOC filed herein, claims for Special damages and General damages under the Compensation to Relatives Act Cap 29 Laws of Fiji or alternatively, under the Law Reform [Miscellaneous Provisions] [Death and Interest] Act Cap 27 Laws of Fiji and interest on all sums awarded. It is in the evidence of the labor officer that the plaintiff was not satisfied with \$ 23,400.00, being the amount she was to receive under the Workmen's Compensation Act and she did not accept it. For the reasons stated in my

judgment, the purported agreement marked DE-1 need not have stood as a bar for her to bring this action.

60.2. **Special Damages**

The following special damages were specified for the first time in the written submissions of the Plaintiff.

- a. Funeral costs : \$ 3,000.00
- b. Transport expenses \$ 1,000.00
- c. Cost of obtaining Probate \$ 500.00
- d. Interest on special damages \$ 821.25

None of the above special damages were pleaded nor was documentary or oral evidence adduced during the trial in proof of such expenses. It has been submitted by the learned counsel for the defendant that the funeral expenses were taken care of by the defendant as an ethical employer. Special damages always have to be specifically pleaded with details or such details should be made available prior to the trial.

The moment of bereavement in a family is not the time for someone in the family to engage in collecting bills, receipts and book keeping. These are suddenly cropped up expenses, certain part of which may be taken care of by family members, well-wishers and sometime by an employer like in this case. But one cannot totally depend on others for all the expenses incurred in this regard and connected thereto. However, since the plaintiff in this case has not pleaded such expenses at all, I disallow the claim for special damages.

60.3. **General Damages**

General damages are always to be assessed. Plaintiff is a Mother of three Schooling children at the ages of 12, 10 and 8 as per her unchallenged evidence. Having lost her only income earner, she must be finding it difficult to make the ends meet. According to her evidence, she has been compelled to go to work and depend on her parents too in order to put bread on the table for her family.

The deceased Raj Deo Sing, died by fall of a heavy water tank on his head, probably being crushed by it, and by drowning in the water discharged from it. From the soak pit he was taken out after about 4 hours, but not alive. No one knows for how long he suffered or the extent of suffering he would have undergone.

In Hicks v Chief Constable South Yorkshire Police [5][1992] 2 All ER 65[3], the House of Lords said as follows:

“In this case the deceased died the same day, hence no claim for pain and suffering arises as no damage is given for pain and suffering when unconsciousness and death followed the injury within a very short time (Hicks v Chief Constable South Yorkshire Police [1992] 2 All ER 65)”.

When the circumstances of the case in hand are considered, there is no evidence of pain and suffering and I decline any award for pain and suffering.

A sum of \$ 2,500 .00 is awarded for the loss of expectation of life and a further sum of \$3,500.00 is awarded for the loss of amenities of life/consortium, totaling to \$6,000.00.

60.4. Lost Years

It has been revealed through the oral evidence of the labor officer and the document marked PE-1 that the deceased was in receipt of \$103.54 cts per week. The deceased was 40 years at the time of his untimely demise. These particulars are not challenged. This figure could have easily been ascertained from the salary records of the deceased with the defendant.

The plaintiff asks for \$130.00 as lost wages plus 10% being the employer’s contribution for FNPF. Considering the circumstances, the assessment of FJ\$ 125.00 as weekly earning is reasonable. For this 10% FNPF contribution needs to be added.

There was no evidence as to how his earnings were spent. Plaintiff said that the deceased was the only breadwinner in the family. However, it cannot be assumed that the entire earnings of the deceased would have been utilized for family expenses. No evidence to show that the deceased was in the habit of smoking or drinking. Considering the available facts, I decide the deceased would have spent around 20% of his weekly salary on his personal expenses and transport. It takes \$ 25.00 away and his remaining salary would have been \$100.00 per week.

So the net loss of weekly income to the estate of the deceased would be FJ \$ 100.00 (\$125.00-\$25.00). The annual loss of income would be \$ 100.00 x 52= \$5,200.00.

There was no evidence on any health issues or disability. He was engaged in hard labor. The heading of the SOC introduces the deceased as a driver, which is an added

qualification he had to earn income. Considering the contingencies of life the multiplier of 15 would be appropriate. So the lost future earnings would be \$ 5,200 .00 x 15= \$ 78,000.00. On account of FNFP contribution by the employer (defendant) 10% of the said total amount would be \$ 7,800.00. The total amount under this head will be \$ 85,800.00.

60.5. **Costs:**

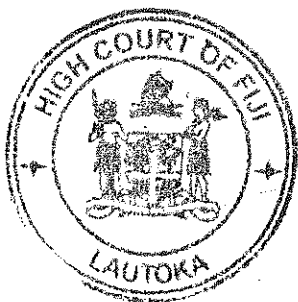
The plaintiff moves for \$ 7,500.00 being the costs. This action was commenced in August 2014. An award of \$ 4,000.00 as summarily assessed cost would be reasonable.

Summary:

a. Loss of life expectancy	\$ 2,500.00
b. Loss of amenities /consortium	\$ 3,500.00
c. Lost years	\$ 85,800.00
d. Interest on a, b, c above @ 6%from 30.7.2012 to 11.10.2018	\$ <u>34,119.00</u>
e. Sub-total a, b, c, d above	\$ 125,919.00
f. Cost summarily assessed	\$ <u>4,000.00</u>
g. Grand Total	\$ 129,919.00

G. **FINAL OUTCOME:**

- a. The Plaintiff succeeds in her claim and Judgment entered in her favor.
- b. A total sum of FJ \$ 125,919 is awarded as damages including the interest.
- c. A sum of \$ 4,000.00 ordered as summarily assessed costs.
- d. Total amount payable by the defendant shall be \$ 129, 919.00.



.....
A.M. Mohamed Mackie
Judge

At Lautoka
11th October, 2018