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

Civil Action No. HBC 114 of 2015

BETWEEN : **NITESH CHANDRA** of Legalega, Nadi, Bank Officer.

PLAINTIFF

AND : **RATTAN DEO** of 10 Salala Place, Namadi Height, Tamavua, Suva, trading as **SHOP N SAVE SUPERMARKET**

DEFENDANT

Counsel	:	Mr. E. Maopa (Babu Singh & Associates) for the Plaintiff Ms. Devi (Faiz Khan Lawyers) for the Defendant
Date of Trial	:	05 and 06 November 2018
Date of Judgement	:	01 May 2020

JUDGEMENT

INTRODUCTION

1. At the outset, I will point out that no issue has been raised between counsel as to whether the defendant in this case is properly described.

2. This is my judgment following the trial of the plaintiff's claim for personal injuries against the defendant. The plaintiff called two witnesses:

(i)	Dr. Ravinesh Goundar	**PW1** (the doctor who attended to PW2 on the day of the accident)
(ii)	Nitesh Chandra	**PW2** (the plaintiff himself)

3. The defendant called the following three witness:

(i)	Inia Korowale	**DW1** – Security Officer at Shop & Save Supermarket carpark in Namaka, Nadi.
(ii)	Dr. Talonga	**DW2** – Orthopaedic Surgeon, Suva who assessed and wrote a report on **PW2** on 30 May 2016.
(iii)	Shelvyn Daniel Singh	**DW3** – Property Supervisor, Shop & Save, Namaka, Nadi.

UNCONTROVERTED FACTS

4. The alleged personal injuries were sustained personally by **PW2** on 02 March 2015. On the said day, **PW2** went with his sister in law and mother to Shop & Save Supermarket in Namaka in Nadi to shop for groceries. The supermarket is located on the ground floor of the building in question. There is provision for parking for customers in the basement. This was where **PW2** parked his car on the day in question.

5. At the supermarket, **PW2** purchased various small retail groceries. He filled two trollies with these. In addition, he also bought some food items in bulk ("**bulk-items**").

6. Whilst the bulk-items were being packed by the supermarket attendants, **PW2** decided to take the lead to his car at the basement with the two trollies. He went down the trolley-ramp which led to the basement.

7. At the basement, **PW2** would unload the groceries into the trunk of his car. He then waited for the supermarket attendants to bring the bulk items.

8. After waiting for some time, **PW2** got out of his car and proceeded towards the elevator nearby.

9. The elevator was not operational. It was still being assembled by Vinod Patel Works for the defendant. The evidence of **DW3** which is uncontroverted is that Vinod Patel Works had started putting together the elevator in 2012. For one reason or another, work on the elevator was not steady. The elevator was finally completed in October 2015 when it became fully operational.

10. I am aware, having visited the building occasionally to shop during same time period, that the building in question was also under "slow" construction. I believe the supermarket was fully operational form quite a number of years whilst the rest of the finishing of the rest of the building was slowly taking shape.

11. To get back to the basic storyline, **PW2** reached the elevator and proceeded to step into it, left foot first. However, the elevator did not have a floor fitted at

the time, which, I accept, **PW2** was not aware of at the time. As a result, **PW2** did not have a footing as he stepped in. He immediately fell forward to the left and fell into a square-pit below the elevator. The pit, I gather, is of concrete wall and flooring.

12. The elevator had never ever been used before. As I have stated above, it had not been fully assembled at the time of the accident. The evidence of **DW1** and **DW3** which is uncontroverted and which I accept as fact is that the electrical fittings had not been completed at the time.

13. It would be some seven or eight months later when the elevator was finally commissioned for use.

14. It is also a fact that the plaintiff, **PW2**, is well known customer at the supermarket in question. Both **DW1** and **DW3** testified to this.

15. As a result of the fall, **PW2** sustained some personal injuries. However, **PW1**, who testified for **PW2**, said that the injuries sustained by **PW2** were not serious. **PW1** also agreed with the assessment of Dr. Talonga, **DW2**, who gave evidence for the defendant that **PW2** suffered no permanent incapacity.

16. I accept as uncontroverted fact, based on the evidence of both doctors (**PW1** and **DW2**), that **PW2** suffered only superficial injuries soft tissue muscular injuries and lacerations (damage to the skin) with no fracture to the bone or any resultant long-term impairment or restriction in his movement, as **DW2** said in his report dated 30 May 2016 which **PW1** fully agreed with in Court in chief.

THE PLAINTIFF'S CLAIM

17. The plaintiff claims compensation from the defendant for the personal injuries he sustained as a result of the elevator incident. He alleges that the defendant owed a duty of care to its customers to provide a *"safe place for shopping, proper and adequate warning to warn others of any danger or risk within the lift area"*[i].

18. The plaintiff appears to plead both common law negligence as well as breach of statutory duty against the defendant.

19. At paragraph 13 of the statement of claim, he pleads as follows:

> *That the defendant failed to comply with the statutory obligations pursuant to the Health and Safety At Work Act 1996 (Sections 9 to 13).*

20. He claims special damages in the sum of $700 as well as general damages plus interest under the Law Reform (Miscellaneous Provisions) (Death & Interest) Act (Cap 27).

21. To succeed in his claim, the plaintiff must establish the following:

    (i) that the defendant owes him a common law and/or statutory duty of care.

    (ii) that the defendant had breached that common law and/or statutory duty of care.

    (iii) that the plaintiff suffered injuries as a result of the breach of common law and/or statutory duty of care.

DUTY OF CARE

22. There used to be a well-established set of common law set of rules relating to an occupier's duty of care to an invitee and a licensee.

23. However, increasingly, the courts have simply applied the laws of negligence by imposing on occupiers a duty to take reasonable care that their premises are reasonably safe for those who enter them, applying the Lord Atkin neighbour test in **Donoghue v. Stevenson** [1932] A.C. 562 at 580[ii].

24. In Fiji, section 4(1) of the Occupiers Liability Act states that the common law duty of care of an occupier applies to all his or her "visitors".

> *Extent of occupier's ordinary duty*
>
> 4(1) ***An occupier*** *of premises* ***owes the same duty, the common duty of care****, to all* ***his or her visitors****, except in so far as he or she is free to and does extend, restrict, modify or exclude his or her duty to any visitor or visitors by agreement or otherwise.*

25. I must point out at this juncture that the plaintiff has not pleaded the Occupiers Liability Act. However, because the Act simply re-enacts the common law position, I see no reason why the Act cannot be considered in the circumstances of this case.

26. Section 3(2) of the Occupiers Liability Act appears to clarify that an "occupier" under the Act is the same as an "occupier" under common law and that a "visitor" under the Act is the same as an "invitee" or "licensee" at common law[iii]:

3(2) *The provisions of sections 4 and 5 shall regulate the nature of the duty imposed by law in consequence of a person's occupation or control of premises and of any invitation or permission he or she gives or is to be treated as giving, to another to enter or use the premises, but they shall not alter the rules of the common law as to the persons on whom a duty is so imposed or to whom it is owed; and accordingly* ***for the purpose of those provisions the persons who are to be treated as an occupier and as his or her visitors are the same as the persons who would at common law be treated as an occupier and as his or her invitees or licensees***.

27. The scope of the occupier's duty to his or her visitor is defined in section 4(2) and (3) as follows:

4(2) *The common duty of care is a duty to take such care as in all the circumstances of the case is reasonable to see that the visitor will be reasonably safe in using the premises for the purposes for which he or she is invited or permitted by the occupier to be there.*

(3) *The circumstances relevant for the present purpose include the degree of care and of want of care, which would ordinarily be looked for in such a visitor, so that, for example, in proper cases—*

(a) *an occupier must be prepared for children to be less careful than adults; and*

(b) *an occupier may expect that a person in the exercise of his or her calling, will appreciate and guard against any special risks ordinarily incident to it, so far as the occupier leaves him or her free to do so.*

28. Section 4 is an exact replica of section 2 of the English Occupiers Liability Act 1957[iv].

29. As Lord Denning said in **Wheat v E Lacon & Co Ltd** [1966] AC 552, the English 1957 Act:

> *In the Occupiers' Liability Act, 1957, the word "occupier " is used in the same sense as it was used in the common law cases on occupiers' liability for dangerous premises.*

30. Lord Denning who delivered the leading speech in **Wheat**, defined "occupier" as a person who has sufficient control over the premises to the

extent that he ought to realise that lack of care on his part can cause damage to his lawful visitors. He went on to define the term "visitor" as follows:

> *Those persons were divided into two categories, invitees and licensees: and a higher duty was owed to invitees than to licensees. But by the year 1956 the distinction between invitees and licensees had been reduced to vanishing point. The duty of the occupier had become simply a duty to take reasonable care to see that the premises were reasonably safe for people coming lawfully on to them: and it made no difference whether they were invitees or licensees, see* ***Slater v. Clay Bros****. [1956] 2 Q.B. 264 at p. 269. The Act of 1957 confirmed the process. It did away, once and for all, with invitees and licensees and classed them all as "visitors "; and it put upon the occupier the same duty to all of them, namely, the common duty of care. This duty is simply a particular instance of the general duty of care which each man owes to his "neighbour "*

31. There appears to be no issue raised in the submissions or in the evidence that the defendant has sufficient control of the building or the premises in question. I find that the defendant is the occupier of that part of the building in question at common law, and accordingly, in terms of the Occupiers Liability Act.

32. I also accept that the plaintiff, as a shopper at the defendant's supermarket, is there at the invitation of the owner for the owner's benefit and is therefore an invitee at common law or a "visitor" in terms of the Occupier's Liability Act.

33. Section 10(1) of the Health & Safety At Work Act 1996 imposes a duty on every employer to ensure that non-workers at his or her workplace are not exposed to any health or safety risk arising from the conduct of his undertaking.

> ***10.(1)*** *Every employer shall ensure that persons not in his or her employment or contracts of service are not exposed to risks to their health and safety arising from the conduct of his or her undertaking while they are at his or her workplace*

34. Section 15 of the 1996 Act, which appears in the same Part 2 of the Act as sections 8 to 14, provides:

> *15 Nothing on this Part shall be construed as—*
> *(a) conferring a right of action in any civil proceedings in respect of any contravention, whether by act or omission, of any provision of this Part;*
> *(b) conferring a defence to an action in any civil proceedings or as otherwise affecting a right of action in any civil proceedings; or*
> *(c) affecting the extent (if any) to which a right of action arises or civil proceedings may be taken with respect to breaches of duties imposed by or under the associated health and safety legislation.*

35. In my view, no private law right of action arises under sections 9 to 13 of the Health & Safety At Work Act, by operation of section 15 of the Act, although, the same facts which would support a finding of a breach of any of these sections, may provide evidentiary support for a separate civil law claim.

36. Accordingly, I will only consider the common law claim pleaded.

BREACH OF DUTY

37. The main issue in this case is whether the defendant breached its duty of care to **PW2**. The plaintiff's case is premised on the theory that the defendant had failed to put appropriate warning signs such as tape or reflector cones in the car park basement to ward off the public.

38. **DW1** and **DW3** both said that two white A4 sized papers were posted on both sides of the lift with the following words:

CAUTION: WORK IN PROGRESS

39. To be effective, a warning must be clear in language, readable, specific and should be displayed in a conspicuous place in a location that any visitor can easily find.

40. Because the area in question is in the basement of the building and not quite well illuminated, an A4 sized notice would ordinarily appear to me to be not adequate. I also accept that the notice in question does not specifically say anything about the elevator. All it gives is a general warning.

41. However, having said that, I must say that in a situation where the risk in question is very obvious, it is arguable that whether or not the warning that was put in place was adequate, is neither here nor there.

42. Section 4(4)(a) of the Occupiers Liability Act provides:

> *4(4) In determining whether the occupier of premises has discharged the common duty of care to the visitor, regard is to be had to all the circumstances, so that, for example—*
> *(a) where damage is caused to a visitor by a danger of which he or she had been warned by the occupier, the warning is not to be treated, without more, as absolving the occupier from liability, unless in all the circumstances it was enough to enable the visitor to be reasonably safe*

43. Section 4(5) provides that:

> *4(5) The common duty of care does not impose on an occupier any obligation to a visitor in respect of **risks willingly accepted** as his or her by the visitor, and in this respect, the question whether a risk was so accepted shall be decided on the same principles as in other cases in which one person owes a duty of care to another.*

44. In **Staples v West Dorset District Council** [1995] 93 LGR 536, [1995] PIQR 439, [1995] EWCA Civ 30[v], Lord Justice Kennedy, delivering the leading

judgement, and after examining the English equivalent of the above two provisions, said that in situations where the risk is obvious, no warning is required at all.

> *It is, in my judgment, of significance that the duty is a duty owed by the occupier to the individual visitor, so that it can only be said that there was a duty to warn if without a warning the visitor in question would have been unaware of the nature and extent of the risk. As the statute makes clear, there may be circumstances in which even an explicit warning will not absolve the occupier from liability (see s.4(a) above); but if the danger is obvious, the visitor is able to appreciate it, he is not under any kind of pressure and he is free to do what is necessary for his own safety, then no warning is required. So, for example, it is unnecessary to warn an adult of sound mind that it is dangerous to go near the edge of an obvious cliff (see* ***Cotton v Derbyshire Dales District Council*** *C.A. 10.6.94 unreported).*

45. Is the case before me one where the risk was very obvious?

46. In my view, it is very clear from the evidence that the elevator has never ever been operational at any time whatsoever because it was still being constructed.

47. The electrical fittings had not been installed at all. This would mean that there were no elevator lights outside or insider the car.

48. Also, I take into account that **PW2** was a regular customer at the defendant's supermarket who had parked his car in the basement on numerous occasions, according to **DW1**.

49. **PW2** had never before used the elevator, nor had anyone else in the world for that matter. In fact, on the day in question, when **PW2** had two trollies full of groceries to take to his car, he used the trolley ramp to get from the supermarket to the basement.

50. One would expect that, if at all there was a most convenient time for the plaintiff to use the elevator, it would have to be when he was returning to the car park after shopping with two trollies full of groceries.

51. In my view, all these factors taken into account suggest strongly that:

(i) on a subjective level, **PW2**, as a frequent visitor who had never before used the elevator in question, was aware or should have been aware that the elevator was not operational.

(ii) on an objective level, even a visitor who was visiting the premises for the first time would have been alerted to the fact that the elevator was not operational because it did not have any light outside or inside the elevator. An elevator, after all, is powered by electricity.

(iii) hence, even if a warning had not been placed by the defendant, **PW2** had either willingly accepted the risk by stepping onto an elevator which was clearly not operational by all accounts, or **PW2** in fact had negligently contributed to his own injuries.

52. Since the defendant had only pleaded contributory negligent, I find that **DW1** did contribute to his own injuries.

INJURIES SUFFERED

53. **PW1** Doctor Ravish Goundar, is a medical practitioner of fourteen years experience. In 2015, he was based at Sen's Medical Centre in Nadi. He said he examined the plaintiff on 02 March 2015 during his normal routine shift. The plaintiff was brought in for injuries after a fall. The plaintiff came in with the Police Medical Form. He read and tendered the Fiji Police Medical

Examination Form which he had filled and signed after examination. The plaintiff suffered a trauma to the left shoulder and soft injuries. He said there was no break through the skin, no damage to bone, and no restriction to movement. He said the plaintiff suffered some pain though during movement on the left shoulder which indicates that he only suffered soft tissue injury in the muscles. He also noted some laceration to the knee. This is just skin injury not involving any muscle or bone injury. He also noted some graze on the face. This simply means superficial trauma to the skin on the face. This affects only the top layer of the skin and is not deep enough to go into the muscle.

54. **PW1** was also referred to a Report written by Dr. Talonga (**DW2**) on 30 May 2016 about a year after his report. He said he would agree with Dr. Talonga's observation about there being no abnormal gait, no wasting of muscle on shoulder, no restriction of movement, and there being no permanent injuries and that the plaintiff had fully recovered.

55. He said **DW2**'s findings are consistent with his initial findings about the plaintiff's injuries being soft tissue superficial grazes only which, although may restrict movement for two months only, are not permanent and are likely to heal completely with no residual restriction in movement as Dr. Talonga found a year later.

56. In cross-examination, **PW1** said he did not refer the plaintiff to an Orthopaedic surgeon or to radiology because the plaintiff's injuries were not serious to warrant such a referral.

57. He was referred to a report which said that the plaintiff resumed work about four weeks later which indicated that although he suffered soft tissue injuries only, the plaintiff did suffer some pain.

ASSESSMENT

58. I find that the defendant had breached its duty of care to the plaintiff in this case but also that the plaintiff had negligently contributed substantially to his own injuries. I have reviewed all the cases raised in the plaintiffs and the defendants submissions. In most of these cases, the plaintiffs have suffered more substantial injuries involving broken bones and some permanent incapacity. Nothing of the sort is suffered or sustained by the plaintiff in this case. I am of the view that if anything, all that the plaintiff will be entitled to is a rather nominal damages to compensate him for the pain and suffering he obviously suffered from the superficial injuries he received. For this, I make a global nominal award of $4,000-00 (four thousand dollars).

59. Out of this, I make a 50% deduction for **PW2**'s contributory negligence which is a reduction by $2,000 and which then reduces his award for general damages to $2,000. I grant him the special damages claimed of $700.

60. To this, I add $1,000 costs.

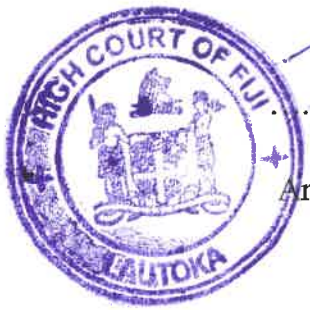
ORDERS

(i) $2,000 award in general damages

(ii) $700 special damages

(iii) $1,000 costs

Total $3,700



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Anare Tuilevuka
JUDGE
Lautoka

1st May 2020

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[i] This is how the plaintiff words his claim in his submissions at paragraph [2].

[ii] See for example the following comments of Lord Denning in **Wheat v L Lacon & Co. Ltd** (supra):

> *The case raises this point of law: did the Brewery Company owe any duty to Mr. Wheat to see that the handrail was safe to use or to see that the stairs were properly lighted? That depends on whether the Brewery Company was " an occupier " of the private portion of the "Golfer's Arms," and Mr. Wheat its " visitor" within the Occupiers Liability Act, 1957: for if so, the Brewery Company owed him the "common duty " of care ".*
>
> *In order to determine this question we must have resort to the law before the Act: for it is expressly enacted that the Act " shall not alter the rules "of the common law as to the persons on whom a duty is so imposed or to " whom it is owed ; and accordingly ... the persons who are to be treated as " an occupier and as his visitors are the same ... as the persons who would at " common law be treated as an occupier and as his invitees or licensees ".*
>
> *At the outset, I would say that no guidance is to be obtained from the use of the word " occupier " in other branches of the law: for its meaning varies according to the subject-matter.*
>
> *In the Occupiers' Liability Act, 1957, the word " occupier " is used in the same sense as it was used in the common law cases on occupiers' liability for dangerous premises. It was simply a convenient word to denote a person who had a sufficient degree of control over premises to put him under a duty of care towards those who came lawfully on to the premises. ..... When Lord Esher first essayed a definition of this general duty, he used the occupiers' liability as an instance of it, see **Heaven v. Pender** (1883) 11 Q.B.D. 503 at pages 508-9: and when Lord Atkin eventually formulated the general duty in acceptable terms, he, too, used occupiers' liability as an illustration, see **Donoghue v. Stevenson** [1932] AC 562 at page 580, and particularly his reference at pages 586-7 to **Grote v. Chester Railway Company** (1848) 2 Ex. 251. Translating this general principle into its particular application to dangerous premises, it becomes simply this: wherever a person has a sufficient degree of control over premises that he ought to realise that any failure on his part to use care may result in injury to a person coming lawfully there, then he is an " occupier " and the person coming lawfully there is his " visitor ": and the " occupier " is under a duty to his " visitor " to use reasonable care. In order to be an "occupier " it is not necessary for a person to have entire control over the premises. He need not have*

exclusive occupation. Suffice it that he has some degree of control. He may share the control with others. Two or more may be "occupiers ". And whenever this happens, each is under a duty to use care towards persons coming lawfully on to the premises, dependent on his degree of control. If each fails in his duty, each is liable to a visitor who is injured in consequence of his failure, but each may have a claim to contribution from the other.

[iii] Section 1(2) of the English Act has a similar effect but in a slightly different wording:

(2) The rules so enacted shall regulate the nature of the duty imposed by law in consequence of a person's occupation or control of premises and of any invitation or permission he gives (or is to be treated as giving) to another to enter or use the premises, but they shall not alter the rules of the common law as to the persons on whom a duty is so imposed or to whom it is owed; and accordingly for the purpose of the rules so enacted the persons who are to be treated as an occupier and as his visitors are the same (subject to subsection (4) of this section) as the persons who would at common law be treated as an occupier and as his invitees or licensees.

[iv] Section 2 of the English Occupiers Liability Act 1957 provides:

2 Extent of occupier's ordinary duty

(1) An occupier of premises owes the same duty, the "common duty of care", to all his visitors, except in so far as he is free to and does extend, restrict, modify or exclude his duty to any visitor or visitors by agreement or otherwise.
(2) The common duty of care is a duty to take such care as in all the circumstances of the case is reasonable to see that the visitor will be reasonably safe in using the premises for the purposes for which he is invited or permitted by the occupier to be there.
(3) The circumstances relevant for the present purpose include the degree of care, and of want of care, which would ordinarily be looked for in such a visitor, so that (for example) in proper cases—
(a) an occupier must be prepared for children to be less careful than adults; and (b) an occupier may expect that a person, in the exercise of his calling, will appreciate and guard against any special risks ordinarily incident to it, so far as the occupier leaves him free to do so.
(4) In determining whether the occupier of premises has discharged the common duty of care to a visitor, regard is to be had to all the circumstances, so that (for example)—

(a) where damage is caused to a visitor by a danger of which he had been warned by the occupier, the warning is not to be treated without more as absolving the occupier from liability, unless in all the circumstances it was enough to enable the visitor to be reasonably safe; and
(b) where damage is caused to a visitor by a danger due to the faulty execution of any work of construction, maintenance or repair by an independent contractor employed by the occupier, the occupier is not to be treated without more as answerable for the danger if in all the circumstances he had acted reasonably in entrusting the work to an independent contractor and had taken such steps (if any) as he reasonably ought in order to satisfy himself that the contractor was competent and that the work had been properly done.

(5) The common duty of care does not impose on an occupier any obligation to a visitor in respect of risks willingly accepted as his by the visitor (the question whether a risk was so accepted to be decided on the same principles as in other cases in which one person owes a duty of care to another).

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

[v] http://www.bailii.org/ew/cases/EWCA/Civ/1995/30.html