IN THE HIGH COURT OF FIJI
AT LABASA
CIVIL JURISDICTION

Civil Action No. 06 of 2016

BETWEEN	**:**	**HARISH CHAND**
		PLAINTIFF
AND	**:**	**LOCAL WOODS & HARDWARE LIMITED**
		DEFENDANT

BEFORE	**:**	**Hon. Justice Kamal Kumar**
COUNSEL	**:**	**Mr A. Sen for the Plaintiff**
		Mr A. Ram for the Defendant
DATE OF HEARING	**:**	**23 and 24 October 2017**
DATE OF JUDGMENT	**:**	**30 January 2018**

JUDGMENT

Introduction

1. On 17 February 2016, Plaintiff caused Writ to be issued with Statement of Claim claiming for special damages, general damages, loss of FNPF contribution, interest and costs arising out of injuries sustained by the Plaintiff in an accident during the course of his employment on 11 July 2014.

2. On 11 March 2016, and 8 April 2016, Defendant filed Acknowledgement of Service and Statement of Defence respectively.

3. On 2 May 2016, Plaintiff filed Reply to Statement of Defence.

4. On 12 July 2016, Plaintiff filed Affidavit Verifying List of Documents.

5. On 22 November 2016, the Acting Master directed Defendant to file Affidavit Verifying List of Documents, complete discovery and for parties to convene Pre-Trial Conference (**"PTC"**) and file Minutes of PTC by 15 December 2016, and adjourned this matter to 16 December 2016.

6. On 16 December 2016, this matter was adjourned to 20 January 2017, to enable Defendant's doctor to examine Plaintiff and for Defendant to file Affidavit Verifying List of Documents.

7. On 20 January 2017, Acting Master directed parties to hold PTC and file Minutes of PTC and adjourned this matter to 6 February 2017.

8. This matter was next called on 8 February 2017, when Acting Master granted parties further time to hold PTC and file Minutes of PTC and adjourned this matter to 28 February 2017, and thereafter to 15 March 2017, for Plaintiff to file Minutes of PTC and Order 34 Summons.

9. On 28 February 2017, Plaintiff filed Minutes of PTC.

10. On 2 March 2017, Plaintiff filed Order 34 Summons and Copy Pleadings and on 15 March 2017, being returnable date of Order 34 Summons this matter was fixed for trial on 10 and 11 July 2017.

11. On 12 June 2017, Defendant filed Application to vacate trial dated on the grounds that Defendant wants Plaintiff to be examined by doctor approved by Defendant (**"Adjournment Application"**).

12. On 15 June 2017, being returnable date of Adjournment Application the Acting Master vacated the trial dates and adjourned this matter to 29 June 2017, for parties to attend to the needful and fix fresh trial dates.

13. On 29 June 2017, the matter was adjourned to 11 July 2017, on the ground that Counsel for Plaintiff informed Court that parties were "conducting vigorous settlement talks" and require further time.

14. On 11 July 2017, leave was granted for Defendant to file Affidavit Verifying List of Documents by close of business on that day and this matter was set down for trial on 23 and 24 October 2017.

15. On 11 July 2017, Defendant filed Affidavit Verifying List of Documents.

16. The trial proceeded on 23 October 2017, and concluded on 24 October 2017.

17. At conclusion of trial Counsel for both parties made oral Submissions and this matter was adjourned for Judgment to be delivered on Notice.

Issues to be Determined

18. The issues that need to be determined are as follows:

    (i) Whether Defendant owed duty of care to the Plaintiff?

    (ii) Whether Defendants breached duty of care owed to the Plaintiff?

    (iii) Whether Defendant's breach caused Plaintiff injuries which resulted in Plaintiff suffering pain, special and general damages?

    (iv) Whether Plaintiff was contributory negligent?

    (v) What is the quantum of damages?

Documentary Evidence

19. The following documents have been put in evidence by the parties:

Exhibit No.	**Document**
P1	Photocopy of Birth Certificate of Harish Chand, Plaintiff;
P2	Plaintiff's pay-slip dated 12 September 2015;
P3	Photocopy of Medical Report dated 26/08/15 from Labasa Hospital;
D1	Photocopy of Medical Report dated 16/06/17 from Nasese Medical Centre;

D2 Photocopy of Westpac Banking Corporation Deposit Slip of two thirds of Plaintiff's wages;

D3 Photocopies of Plaintiff's Medical Certificates (sick sheets) for the period 16 July 2015 to 12 August 2015.

Plaintiff's Case

20. Plaintiff gave evidence himself and called one (1) more witness.

21. Plaintiff during examination in chief gave evidence that:-

(i) He was born on 5 July 1974, and is forty-three (43) years old (Exhibit P1);

(ii) On 11 July 2014, he was employed by the Defendant as a Labourer and his duties included removing timber and to do all works as directed by the Defendant's Foreman for which he was trained by Foreman;

(iii) In 2014, he was paid about $110.00 per week;

(iv) He started working for Defendant in 2013;

(v) He worked at Defendant's timber yard and that Defendant is engaged in selling all kinds of timber;

(vi) On 14 July 2014, he reported to work and at about 8.00am on that day he was directed by Defendant's Foreman (hereinafter referred as "**Foreman**") to take out 12" x 1" timber of about seven feet long from a stack of timber;

(vii) The 12" x 1" timber were stacked next to 6" x 2" timber stack of about three to four feet in height on which was stacked loose weatherboards of about two feet in height;

(viii) Whilst he was looking down and taking out 12" x 1" timber with the Foreman who was on the other side, the weatherboards that were stacked on the 6" x 2" timber fell on his left leg;

(ix) He could not recall how many 12" x 1" timber they took but stated they took out some;

(x) He could not recall how many weatherboards fell on his leg but stated almost half of it fell;

(xi) Him and the foreman did not do anything like touching the weatherboards for the weatherboards to fall;

(xii) Weatherboards were stacked for a week and they did not get to do anything with the weatherboards;

(xiii) He had no idea why and how weatherboards fell on him but when asked for the reason he stated that maybe "it was not placed the right way";

(xiv) It was Foreman's job to ensure that timber is stacked correctly/properly and to inspect yard to see that it is safe to work in the yard;

(xv) He had no reason to believe that weatherboards would fall on him and that the Foreman did not know it would fall;

(xvi) Foreman did not give him any warning that weatherboards could fall on him;

(xvii) When weatherboards fell on him he went toward one side, started shouting that his leg broke and he could not move away from the timber because his leg got stuck;

(xviii) Weatherboards were in different length (13', 14' or 15') and was about three (3) feet wide;

(xix) His leg was trapped for about one (1) hour until other workers came and removed the weatherboards;

(xx) When trapped he was conscious, his leg was broken, was in very severe pain and was yelling;

(xxi) After timber was removed, he was taken to hospital in Company van and it took them about ten (10) minutes to reach hospital;

(xxii) He was taken to emergency unit on stretcher bed from the van and was seen by doctor immediately;

(xxiii) At that time his leg was wobbly and hanging loose;

(xxiv) Doctors gave him injection and was put on drip;

(xxv) At 6.00pm on the same day his leg was operated under general anaesthesia and plastered;

(xxvi) Prior to operation his pain was severe which reduced slightly after operation;

(xxvii) First day, in hospital was very difficult as he could not go to washroom and had to do everything on the bed and slept for maybe one (1) hour;

(xxviii) On the second day, when he was given injection and tablet his pain was relieved until the effect of the injection and tablet and after that pain would come back;

(xxix) He was able to sleep on second night until pain was relieved;

(xxx) Third night was same and as pain got relieved he was able to sleep;

(xxxi) After he was discharged on the sixth (6^{th}) day he had plaster and used crutches to go to the van with assistance of two (2) people;

(xxxii) Apart from doctors and nurses he was looked after by his wife who would come to hospital at around 6.30am and go back around 7.00pm;

(xxxiii) After being discharged he went to his mother-in-law's house in Namara, Labasa where he was residing at that time;

(xxxiv) For first two (2) weeks at home the pain was quite severe and he had to call neighbour to take him to washroom;

(xxxv) His wife wiped him because he could not have shower and he did not go outside;

(xxxvi) He could not remember date he went to Labasa Hospital ("LH") next but stated that he was admitted for a day when he visited next but later agreed that he was admitted from 29 July 2014 to 4 August 2014 (seven (7) days);

(xxxvii) At that time they carried out x-ray which showed that his leg was crooked, when they removed the cast and re-aligned his bone in the theatre;

(xxxviii) The pain at that time was like at the beginning and when he was in hospital he was given injection and tablets and when the pain reduced he was discharged, and went home;

(xxxix) Between 4 August 2014 and 14 October 2014, he went to hospital for about five (5) to six (6) times;

(xl) On 14 October 2014, he was admitted to re-align his bones by removing the cast, putting a lid type of thing and re-casting;

(xli) On 25 October 2014, he was re-admitted to straighten his leg and was attended to by Doctor Maloni and he was informed that Dr. Loefler from Australia will come to re-align his bones by fixing plate with screws;

(xlii) Doctor Loefler carried out last operation when he fixed plate with nuts and bolts;

(xliii) His pains at the time of last operation was same as when his leg broke as the cast was cut and plate fixed;

(xliv) When plate was fixed, he did not have cast but his leg was bandaged;

(xlv) He was on crutches for about eight (8) months after last operation and the crutches was provided by the Defendant;

(xlvi) He was told by Dr Loefler to stay on crutches for six (6) months and once Dr Loefler reviewed him after six (6) months, he was told he could put slight pressure on his leg;

(xlvii) After Dr Loefler reviewed him after six (6) months he was able to walk without crutches after two (2) to three (3) months;

(xlviii) From date of accident, he was able to walk without any assistance after about one (1) year and two (2) to three (3) months;

(xlix) Noticeable difference between his leg is that one is bit shorter then the other; his left leg is a bit twisted and he does not have same strength on his left leg;

(l) He cannot walk without some gait as before the accident because his left leg is bit bent;

(li) He could play soccer and volleyball before the accident which he cannot do now and also he cannot go down the slope near his house;

(lii) When he goes down the slope his injured leg starts to pain;

(liii) His injured leg starts to pain when he exerts pressure on it, in cold season and when it gets wet;

(liv) During his spare time he used to do gardening using fork which he cannot do now;

(lv) Before injury he did rice and sugar cane farming on the farm which he gave to his brother because he is not able to work the farm;

(lvi) He did not play soccer at district level but played in his village and at bazaars;

(lvii) After injury he has been employed by Defendant in the office;

(lviii) Prior to accident he used to plant rice and vegetables for his own personal consumption but now he has to buy vegetables and rice;

(lix) He is claiming for:-

(a) $1480.00 being loss of one third of his wages plus $257.40 being loss of FNPF;

(b) Damages for pain and suffering and loss of future earning capacity;

(c) Interest and costs.

22. During cross-examination Plaintiff:-

(i) Agreed that at time of accident his wages was $94.98 per week and he was paid $62.89 being two thirds (2/3) of his wages until he returned to work;

(ii) Agreed that the amount shown in his pay slip dated 12 September 2015, is wages he received after one (1) year of returning to work;

(iii) Stated that his duties in 2014, involved taking out timber sold with Foreman when Foreman directs so and dress timber;

(iv) When timber comes into the yard it comes in packets and it is the Foreman's responsibility to unload timber with forklift and stack the timber and the timbers are stacked with wires on;

(v) Stated that the wires are to be cut when timbers sold are taken out;

(vi) Stated that two (2) persons are needed to take out timber because it is long and heavy;

(vii) After they take out sold timber the remaining timbers are stacked there;

(viii) The weatherboards stacked were open because some were sold and the remaining ones were stacked on 6' x 2' timber by Foreman named Rajneel using forklift;

(ix) When asked if he was there when weatherboards were stacked he stated that, when Foreman's forklift is in operation they are not supposed to be close to it because they might be injured and that he watched from a distance;

(x) The weatherboards were not sold after it was stacked on 6" x 2" timber;

(xi) Stated that just prior to accident they took out some timber but cannot tell exact number;

(xii) Stated that weatherboards did not fall before the accident;

(xiii) When it was put to him that how could weatherboards fall when you do not interfere with it or touch it he stated that it can fall if it is not set properly;

(xiv) Denied that he touched the weatherboards and that is why it fell and stated that neither him nor the Foreman touched it and the stacks were one (1) foot apart;

(xv) Stated that length of weatherboards were in different sizes;

(xvi) Stated that he has been working in timber yard since July 2013, which is one year before the accident;

(xvii) Agreed that sometimes timber fall from stack but stated that it hardly happens and it happens when timber is being stacked by forklift and that no one was injured;

(xviii) When asked if it would have been prudent if he did not stand in the middle he stated that timber being taken out was long; no one stands in the middle and you have to stand at the end with legs spread;

(xix) When it was put to him that you stand behind (at the end) timber the risk of timber falling on him is slim he stated:-

(a) Stacks will depend on length of timber;

(b) Weatherboard stack was longer than 12" x 1" stack;

(c) Stacks were not placed in line;

(d) Weatherboard stack went beyond the 12" by 1" timber stack;

(xx) When weatherboards fell on him he was taking out 12" by 1" timber, which was at one to one half feet high;

(xxi) Stated that they were taking out timbers twelve (12) or fifteen (15) feet in length which would be cut into seven (7) feet in length;

(xxii) Agreed that to take out timber stacked one to one and half feet high, you have to crouch low;

(xxiii) When it was put to him that under that circumstance his head might get hurt not his feet he stated that leg is on one side and timber will fall on leg as timber do not fly;

(xxiv) Stated that timbers taken out by them were thrown in open space next to 12" x 1" timber and was to be cut in seven feet length by using chainsaw;

(xxv) They were throwing instead of stacking because timber had to be cut and stacking will take time;

(xxvi) Denied that there was vibration which caused weatherboards to fall;

(xxvii) Agreed that when you throw timber, there will be sound and that they were throwing timber on top of each other;

(xxviii) When it was put to him that throwing of timber he could feel in his eardrum he stated that it was not that loud but he could hear;

(xxix) Stated that he is not sure if throwing timber on ground would cause sufficient vibration to dislodge stack of timber;

(xxx) Stated that timber was not thrown high or hard;

(xxxi) Agreed that when he went to hospital he was given morphine, paracetamol and brufen as stated in Dr. Maloni's report;

(xxxii) Stated pain did not subside after tablet and injection was given and he continued to have some pain until after they took him to theatre and did operation;

(xxxiii) Stated he complained to medical staff about his pain when he was told that pain will be there until operation;

(xxxiv) After the operation pain was relieved a little bit;

(xxxv) Denied that after second admission doctors advised him to go to Lautoka Hospital and he refused and after the medical report was read to him he stated that he was only asked one (1) week before Dr Loefler was supposed to come and his response was that since he has waited for so long he will wait for Dr Loefler instead of going to Lautoka Hospital;

(xxxvi) When it was put to him that he chose to get plates fixed by Dr Loefler rather than going to Lautoka Hospital he stated only one (1) week was left for Dr Loefler to come to Fiji; no accommodation was provided for in Lautoka; he had not place to live in Lautoka; his wife would have to travel with him and she had no place to stay in Lautoka and he was willing to wait for Dr Loefler;

(xxxvii) Agreed that after Dr Loefler's treatment he significantly improved and stated that Dr Loefler told him not to talk for six (6) months and that he will come back in six (6) months and review him;

(xxxviii) Stated that Dr Loefler came back in six (6) months and told him his leg is okay and that he can put little pressure on it and walk slowly;

(xxxix) Stated that after review by Dr Loefler he went to hospital for clinic three (3) times and after the clinics doctors advised him that he could go back to work and do light duty;

(xl) During clinics doctors would carry out x-ray, view x-ray report and his folder and send him back and doctors told him that his leg was getting better;

(xli) Agreed that wages he is getting now is better than what he was getting before the accident and stated that his expenses have gone up as he has to hire someone for grass cutting and buy vegetables and rice.

23. In re-examination Plaintiff stated:-

(i) He did not know what was minimum labour wage rate in 2014;

(ii) Wages for all staff were increased;

(iii) On date of accident he was working with Foreman, Rajneel who took him to do the job site and he did what Foreman asked him to do;

(iv) He did not act contrary to Foreman's instructions;

(v) He was taught by Foreman as to how to take timber out and Foreman told him to throw the timber on the side and he did whatever Foreman was doing;

(vi) The 12" x 1" timber stack was one (1) foot high and they were just lifting timber and putting it on the side;

(vii) He did not know if weatherboard would fall or was likely to fall;

(viii) Foreman did not warn him that weatherboard was likely to fall and if he had any doubt that the weatherboard would fall he would not have worked there;

(ix) Agreed that the doctors prepared medical report dated 26 August 2015.

24. Plaintiff's next witness was Maloni Bulanuca of Labasa Hospital compound, Labasa, General Surgeon (**"PW2"**).

25. PW2 during examination in chief gave evidence that:-

(i) In reference to medical report dated 26 August 2015, he stated that:-

(a) Plaintiff arrived at the emergency department of hospital with closed fracture of tibia and fibula (2 bones) between ankle and knee of left leg;

(b) He was informed that it happened at workplace when bundle of wood fell on his leg;

(c) Plaintiff was given morphine, panadol and brufen to prevent clots;

(d) Same day at 3.55pm, Plaintiff was taken to operating theatre to straighten out the fracture;

(e) Manipulation was conducted under anaesthesia to straighten bones;

(ii) Fracture was between ankle and knee and slightly lower and Tibia is thicker and Fibula is less thicker;

(iii) Plaintiff was discharged on 16 July 2014, and was trained to be on crutches;

(iv) Person with type of injury suffered by Plaintiff would suffer pain at the rate of five (5) on a scale of one (1) to five (5) with five being worst;

(v) Patients will still have pain after being given pain killers;

(vi) Plaintiff finding hard to sleep after plaster was put is consistent with pain;

(vii) In relation to Plaintiff's admission on 29 July 2014, he stated that:-

(a) Usually they wait for two (2) weeks to allow natural swelling of injured area to subside before they can apply full Plaster of Paris ("POP") because it is a worry that if cast is put early swelling can block nerves and blood supply to that part of the body;

(b) X-ray showed fracture not aligned properly and had to be re-aligned which was done on 30 July 2014, under general anaesthesia;

(c) He had to cut a small window in the cast and had to re-align bones;

(viii) In relation to Plaintiff's admission on 14 October 2014, he stated that:-

(a) Purpose was to do wedging and also he did not notice any satisfactory healing at fracture site;

(b) It was because it was wind bearing bone susceptible to not healing and sometimes you could have soft tissues or blood clots between the fracture;

(ix) During this process, patients will continue to have pain;

(x) Plaintiff was admitted on 25 October 2014, for him to have operation by Dr Loefler which operation was carried out when metal plate was fitted with eight (8) screws;

(xi) Plates fixed can remain for permanent or can be removed and it gives stability to bone;

(xii) In reference to X-ray he stated that implant looks steady, has not migrated, fracture has aligned and bone is healed;

(xiii) Plaintiff's gait is not normal which is not uncommon and quite a bit comparative studies having looked long term outcome of injuries noticed four (4) common things:-

(a) shortening of leg because you have to pull slightly as you compress screws and plates;

(b) Mal-union puts pressure on joint above or below injured bones;

(c) Will have joint pains;

(xiv) Plaintiff's leg is slightly bowed at fracture site because of mal-union and thickness of the plates;

(xv) In Plaintiff's case, there is leg shortening;

(xvi) The effect this type of injury will have on social life being of a person will be:-

(a) Ninety-five percent (95%) of them will be able to return to work;

(b) Out of that ninety-five percent (95%) one third will have to modify their work;

(c) Five percent (5%) will not be able to go back to work;

(xvii) Person with that type of injury will have irritation in physical well-being.

26. During cross-examination PW2:-

(i) When it was put to him that closed fracture is far easier to deal with then open fracture he stated that it is in some cases but is not absolute as it is dependent on which form and how vital fracture is effected;

(ii) Stated that in this case fracture was clear and was weight bearing bone;

(iii) When asked why they did not give more painkillers when painkillers given did not work he stated that there is threshold as to how much can be given depending on side effects and they need to put Plaintiff to sleep and re-align;

(iv) Stated that he noticed angulation which is not normal and that is reflected in eight percent (8%) total impairment assessment;

(v) Stated that several factors that could have caused healing to take time are that:-

(a) It was weight bearing large bone;

(b) Extensive Force is used;

(c) Blood clots;

(vi) Agreed that plates fixed really helped Plaintiff to get back;

(vii) Stated that plates were not fixed during first operation because no plates were available and that Plaintiff was offered to go to Lautoka Hospital on same month Dr Loefler came.

(viii) Stated that from surgery point of view he agrees with Dr De-Asa's finding that "No further management at this stage is needed with most activities of daily living ably performed by the patient";

(ix) Stated that x-ray shows Plaintiff's fracture has healed.

27. In re-examination PW2:-

(i) Stated that healing of patient does not mean end of pain and misery;

(ii) Stated that last time he reviewed Plaintiff he did not show any sign of mental illness and Plaintiff did say to him that he continues to have nibbling pain.

Defendant's Case

28. Defendant called Alvin De Asa of 62 Ratu Sukuna Road, Suva, Orthopedic Surgeon **(DW1)**, as its first witness.

29. DW1 during examination in chief gave evidence that:-

(i) Plaintiff came to his clinic for second opinion on injury sustained by him in July 2014, and upon examination he found:-

(a) Plaintiff walked with a limp and recent x-ray showed that he sustained closed fracture of the distal of tibia and fibula on his left leg;

(b) Plaintiff had a slight shortening of his left leg of about one (1) centimetre compared with his right leg;

(c) X-rays showed completely healed fracture with dynamic compressor plates and eight (8) screws inserted;

(d) X-ray also showed ten percent (10%) varus angulation and eight percent (8%) interior angulation;

(e) Fracture has been consolidated;

(ii) He gave percentage for permanent incapacity of twenty percent (20%) for left tibia and eight percent (8%) for WPI based on physical examination of Plaintiff and X-ray findings in reference to AMA guide to Impairment in respect to diagnosis of closed fracture of mild angulation;

(iii) In respect to statement in his report (Exhibit D1) he stated reason for what he stated was:-

(a) First part “No further management” means there is no need for any further medical intervention;

(b) Assessment is done after twelve to eighteen (18) months;

(c) “Activities of daily living” means Plaintiff should be able to perform most activities of daily living;

(iv) One important aspect is that Plaintiff’s fracture occurred outside of a joint meaning risk for developing arthritis is much less than fracture within the joint;

(v) Plaintiff should be able to take part in vigorous sports like volleyball but it will be at a risk;

(vi) Plaintiff should be able to perform chores around the home and gardening;

(vii) Most persons complain of pain which is subjective and they base their assessments on medical finding;

(viii) He had the opportunity to see Report of Labasa Hospital and the WPI of eight percent (8%) is based on same guidelines.

30. During cross-examination DW1:-

(i) Agreed that Plaintiff was referred to him by the Insurance company for assessment;

(ii) Stated that generally it takes about eight (8) to twelve (12) weeks to heal and it would surprise him if he was told that it took patient sixty-five (65) weeks to heal;

(iii) Stated that manipulation and re-alignment of fracture is a painful process and is done under anaesthesia and when patient wakes up he will have pain;

(iv) Stated that wedging means simply to re-align fracture and he just came to know that Plaintiff was admitted for forty-six (46) days;

(v) Stated that if persons fracture site is disturbed in two (2) weeks or three (3) months late, that person will suffer pain at range of 3 to 4 within a range of 1 to 5 with 5 being most painful;

(vi) Agreed that Tibia/Fibula are weight bearing bones with not much soft tissues;

(vii) When it was put to him that, it could be the reason Plaintiff had to go through three (3) manipulations and Dr Loefler told Plaintiff not to use his leg for six (6) months he stated that was doctor's opinion;

(viii) Stated that shortening of Plaintiff's left leg was taken into consideration by him in his assessment which is stated at paragraph 2 and 3 of his report and "astrophy" means wasting of muscle;

(ix) Stated that one (1) centimetre shortening is not relevant based on the book which does not affect function of human being and two (2) centimetres and above shortening becomes significant;

(x) Stated that with one (1) cm shortening Plaintiff will function normally and he will walk with a limp and if shortening is less than two (2) cm it is normal;

(xi) Agreed that plates can be removed under surgical intervention and he was not sure how much it costs to have it removed;

(xii) When it was put to him that it would be in tune of twenty thousand dollars ($20,000.00) he agreed and stated if it is done overseas;

(xiii) Healing process after removal of plates would take about two (2) weeks;

(xiv) Agreed that Plaintiff cannot play any extensive or contact sports as it will be risky;

(xv) Stated that Plaintiff not being able to walk on slopes is consistent with his injury and shortening of his leg and angulation;

(xvi) Agreed that ninety-five percent (95%) of fractures heal;

(xvii) Stated that if fracture is healed pain on fractured site will go away completely;

(xviii) Agreed that most people complain of pain at fracture site when it is healed, and stated that most people will have pain at fracture site if it is healed which happens when fracture is at joint as this can develop into post traumatic arthritis;

(xix) When it was put to him that when it is normal fracture and Plaintiff is complaining of pain he stated that he cannot say why;

(xx) Stated that if leg is shortened, angulated and has plates it can cause pain if standing for long or walking for long;

(xxi) Stated any intensive labour work would put stress.

31. In re-examination DW1:-

(i) Stated that Plaintiff getting healed in sixty-five (65) weeks could be a number of causes which are:-

(a) If Plaintiff developed complications with most common being infection;

(b) Improper treatment;

(ii) In reference to repeated alignments stated that probably it was not aligned properly on first time around;

(iii) Agreed that given that fracture happened in July, plates should have been fixed much earlier and stated that based on Labasa Hospital Report he could say that they tried to manage it conservatively but that type of fracture he would have operated Plaintiff initially if had seen him initially;

(iv) Stated that on his examination, plate is not causing any stress to Plaintiff which is same as Labasa Hospital Report and Plaintiff did not advise so;

(v) Plate can stay for life as long as Plaintiff does not develop any complications in the form of infection, loosening of screws or if the plate breaks and none of these were present, during examination by him.

32. Defendant's second witness was Abhinesh Atish Karan of Korowiriwiri Labasa, Managing Director of Defendant Company **(DW2)**.

33. DW2 during examination in chief gave evidence that:-

(i) Plaintiff is his brother-in-law and has been working for the Defendant for two (2) years;

(ii) Defendant runs timber/hardware merchant business and sells timber and general hardware material;

(iii) Plaintiff was employed as general labourer at Defendant's timber yard;

(iv) Plaintiff was injured in Defendant's premises on 11 July 2014, and at that time he was in his main office and did not see the accident;

(v) He knew about the accident at 11.00am on that day when the Foreman called him and told him that timber fell on Plaintiff;

(vi) He then went to hospital and from there he went to the site;

(vii) Normally timbers are stacked and it is the first time such incident happened;

(viii) Since he was not present, he does not know reason for the accident;

(ix) Defendant paid two third (2/3) of Plaintiff's wages by direct deposit into Plaintiff's bank account;

(x) Plaintiff came back to work on 12 August 2015, and until then he produced sick sheets;

(xi) When Plaintiff came back he was moved to sales office and currently he is employed as Salesman;

(xii) Plaintiff's current wages after deduction is around one hundred thirty-five dollars ($135.00) and Plaintiff is able to do his work well.

34. During cross-examination DW2:-

(i) Agreed that Plaintiff's duty was to report to Foreman, who is overall in-charge of Defendant's yard and Plaintiff is supposed to do work as told by Foreman;

(ii) Stated that he had no problem with Plaintiff and Plaintiff did work tasked to him;

(iii) Agreed that timber must be stacked properly and because timber is heavy it can be dangerous if not stacked properly;

(iv) Agreed that if a clock falls and injures him it would be because it is not screwed or fitted properly and in the same breadth if you do not stack timber properly or fasten it, it will fall;

(v) Agreed that the ground where timber is stored is sold and making noise or moving timber adjacent to a stack will not make timber fall unless it is not stacked properly;

(vi) Agreed that it is more likely that accident took place because timber was not stacked properly;

(vii) Stated that Foreman was told to tie loose timber with number eight (8) wire;

(viii) Agreed that when Plaintiff returned to work he was given office work because he could not perform hard labour work and labour work needs energy;

(ix) Stated that one reason Defendant increased employee's wages is increase in minimum wages rate by Government in 2015 and 2016 and recently Defendant gave increment for all general labourers;

(x) Stated that he is in regular contact with Plaintiff and agreed that Plaintiff is walking with a limp;

(xi) Stated that Plaintiff complains about pain when it is cold, when he is in air-conditioned office, travelling for long and sitting for long.

Whether Defendant owed duty of care to Plaintiff

35. It is well settled 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.

36. The common law duty has also become a statutory duty pursuant to Section 9 of the Health and Safety at Work Act 1996 which provide as follows:-

"9.(1) Every employer shall ensure the health and safety at work of all his or her workers.

(2) Without prejudice to the generality of subsection (1) of this Section, an employer contravenes that subsection if he or she fails-

(a) to provide and maintain plant and systems of work that are safe and without risks to health;

(b) to make arrangements for ensuring safety and absence of risks to health in connection with the use, handling, storage or transport of plant and substances;

(c) to provide, inappropriate languages, such information, Instruction, training and supervision as may be necessary to ensure the health and safety at work of his or her workers and to take such steps as are necessary to make available in connection with the use at work of any plant or substance adequate information in appropriate languages -

(i) about the use for which the plant is designed and about any conditions necessary to ensure that, when put to that use, the plant will be safe and without risks to health; or

(ii) about any research, or the results of any relevant tests which have been carried out, on or in connection with the substance and about any conditions necessary to ensure that the substance will be safe and without risks to health when properly used.

(d) as regards any workplace under the employer's control -

(i) to maintain it in a condition that is safe and without risks to health; or

(ii) to provide and maintain means of access to and egress from it that are safe and without any such risks;

(e) to provide and maintain a working environment for his or her workers that is safe and without risks to health and adequate as regards facilities for their welfare at work; or

(f) to develop, in consultation with workers of the employer, and with such other persons as the employer considers appropriate, a policy, relating to health and safety at work, that will -

(i) enable effective cooperation between the employer and the workers in promoting and developing measures to ensure the workers' health and safety at work; and

(ii) provide adequate mechanisms for reviewing the effectiveness of the measures or the redesigning of the said policy whenever appropriate."

37. The Plaintiff was an employee of Defendant when Plaintiff was involved in an accident in the course of his employment and as such Defendant owed him a duty of care to provide safe system of work which is free of danger and risk to the Plaintiff.

Whether Defendant breached duty of care owed to Plaintiff

38. After analysing the evidence of Plaintiff and DW2 and the Submissions filed, I have no hesitation in holding that Defendant breached its duty owed to Plaintiff by failing to provide Plaintiff safe place and safe system of work and reason for my finding are as follows:-

(i) Plaintiff carried out his duties as instructed by Foreman;

(ii) Defendant by its Foreman failed and/or neglected to ensure that the weatherboards placed on 6" x 2" timber was stacked properly and/or tied together and affixed to 6" x 2" timber to avoid it from falling at any point in time.

39. Counsel for the Defendant relied on the case of **Chand v. Labasa Town Council** (2005) HBC 0084 of 2002 Labasa (22 November 2005) ABU0118 of 2005S (24 November 2006) CBV005 of 2007 (22 February 2007).

40. In **Chand's** case the Courts held that Plaintiff could not provide any form of alternative to system being used by Labasa Town Council for heating coal tar in drums.

41. However, in this instance it was Defendant's own case that by leaving the weatherboards untied on the stack of 6" x 2" timber stand it was left open for the weatherboard stack to fall due to vibration and the vibration could have occurred at various times which would have caused the weatherboard stack to move over a period of time and eventually fall on the Plaintiff's legs on the date of accident.

If there was a possibility that untied weatherboard stack would move due to vibration in Defendant's yard then Defendant should have taken the precaution and made sure that the weatherboard stack is tied with number eight wire as was DW2's evidence or otherwise to avoid it from falling at some point in time.

Whether Defendant's breach caused injury to Plaintiff

42. There is no dispute that injury sustained by Plaintiff was caused by the accident.

Whether Plaintiff Contributed to His Injury

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

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

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

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

44. Defendant's evidence was that Plaintiff was the first person who was injured. This does not make Plaintiff contributory negligent.

45. This Court therefore finds that the accident occurred due to negligence of the Defendant Company by failing to provide safe system and by failing to take reasonable care that accidents such as that happened on 14 July 2014, do not happen and was not contributed in any way by Plaintiff in anyway whatsoever.

46. Plaintiff's evidence is that he worked as directed by the foreman which was confirmed by Defence witness (DW2) and therefore it is beyond doubt that Plaintiff was not negligent whatsoever.

Special Damages

Travelling, Medical and Hospital Expenses

47. Defendant agreed to the amount of one thousand dollars claim under this heading.

Loss of Wages and Fiji National Provident Fund

48. By consent of both parties the Statement of Claim was amended to reflect wages at $94.98 instead of $68.35 at paragraph 10 which took one third wages to $32.09 instead of $22.70.

49. It has been accepted by the parties that:-

(i) Plaintiff's wages at time of accident was $94.98;

(ii) Plaintiff was paid $62.89, two third of his wages until he returned to work (65 weeks);

(iii) Plaintiff's loss of one third wages for 65 weeks amounts to $2,085.85;

(iv) Loss of Plaintiff's FNPF on one third wages amounts to $166.85

50. There is no dispute between the parties in respect to amount claimed for loss of one third wages and FNPF on this wage.

51. Hence the total claim allowed for special damage is made up as follows:-

Travelling, Medical & Hospital expenses	$ 1,000.00
Loss of Wages	2,085.85
Loss of FNPF	166.85
TOTAL	**$3,252.70**

General Damages

52. Plaintiff claim damage for pain and suffering, loss of amenities of life and loss of future earnings.

Pain and Suffering

53. The Fiji Court of Appeal in **Chand & Anor. v Amin;** Civil Appeal No. ABU0031 of 2012 (2 October 2015) case cited at paragraph 23(ii) stated as to how damage is to be assessed for pain and suffering in very simple terms as follows:-

*"The assessment of damages under this head depends upon the consequences to the individual plaintiff (**Bresatz v Przibilla** (1962) 108 CLR 541 at 548 cited in Law of Torts by **Balkin & Davis** 5th ed. at 11.28). In **Hail v Rankin** [2001]*

QB 272 the English Court of Appeal had acknowledged monetary inflation to be considered while making the awards. However the amounts decided on in previous cases can be considered no more than as a guide, and any particular determination must depend on such factors as the intensity of the pain felt by the plaintiff and its likely duration (Balkin & Davis (supra) at 11.28)."

54. Plaintiff relied on following authorities:-

(i) **Lal v. Lal & Anor.** (2016) HBC 25 of 2016 (Labasa) (10 February 2016);

(ii) **Mudaliar v. Rama & Anor.** (2014) HBC 3 of 2012 (Labasa) (4 April 2014);

(iii) **Chand v. Nair** (2011) HBC 326 of 2006 (Suva) (27 June 2011);

(iv) **Labaivalu v. Pacific Transport Co. Ltd** (2017) ABU 0059 of 2014 (26 May 2017);

(v) **Nasese Bus Company Ltd. & Anor. v. Chand** (2013) ABU40 of 2011 (8 February 2013).

Defendant relied on **Tamanibuici v. Prasad & Anor.** (2015) HBC 34 of 2012 (Labasa) (29 September 2015).

55. In **Lal's** case Plaintiff suffered open fracture on left leg and went through operation whereby external fixtures made of stainless steel were used to hold bones together which were crushed at time of accident and was hanging. In terms of medical officers evidence the pain suffered by Plaintiff in respect to the nature of injury would have been 4 or 5 on a scale of 1 to 5 with five (5) being highest. Medical evidence was that injury will affect Plaintiff rest of his life and Plaintiff would suffer arthritis in future. Court awarded Plaintiff $65,000.00 for past pain and suffering and $5,000.00 for future pain and suffering.

56. In **Asish Mudaliar's** case Plaintiff suffered injuries as a result of being crushed between two buses.

The Plaintiff suffered from mid-shaft femur fracture (thigh bone) on 16 August 2011, when a rod was inserted. The rod was removed on 29 November 2012.

Court found that Plaintiff suffered pain and suffering, lost amenities of life and injury suffered by Plaintiff was severe. Plaintiff at date of trial (4/4/2014) was 36 years old.

The Court awarded $60,000.00 for pain and suffering and loss of amenities of life.

57. In **Nasese Bus Company Ltd's case** which was an Appeal from **Chand & Nair & Anor.** (Supra) Respondent Plaintiff suffered:-

(i) closed displaced comminuted intraarticular fracture of left ankle;

(ii) closed extensive degloving injury right thigh;

(iii) grade II anterious cruciate ligament injury right knee; and

(iv) multiple abrasions to both upper and lower limbs.

Respondent/Plaintiff was awarded $65,000.00 by Honourable Trial Judge for pain and suffering which award was increased to $90,000.00 on appeal.

58. In **Labaivalu's** case Plaintiff a seventeen (17) year old girl at time of accident had a piece of 6" x 2" and one (1) meter long pierced her body when a bus was driven into a community hall with part of timber being inside her body and other part in the building. Plaintiff could not get out of the bus or move and people had to saw timber to get her out after about one hour.

The medical evidence was that Plaintiff suffered a lot of tissues because of big wounds it pulled on the surrounding tissue and confirmed that Plaintiff was not same person as before.

Prior to accident Plaintiff was inter-school captain, played volleyball, took part in short put and four hundred (400) meter running competition.

The High Court awarded sixty thousand dollars ($60,000.00) for pain and suffering and loss of amenities of life.

Court of Appeal after analysing the evidence before High Court increased award for pain and suffering to ninety thousand dollars ($90,000.00).

59. Counsel for the Defendant in his submission submitted that this Court in **Tamanibuici's** case awarded a sum of Thirty thousand dollars ($30,000.0) for past pain and suffering and two thousand dollars ($2,000.00) for future pain and suffering.

60. It appears that Learned Counsel for Defendant either did not read the Judgment in **Tamanibuici** case or attempted to mislead this Court in some respect.

61. In **Tamanibuici's** case this Court awarded Plaintiff seventy thousand dollars ($70,000.00) for past pain and suffering and ten thousand dollars ($10,000.00) for future pain and suffering.

62. In **Tamanibuici's** case the Plaintiff suffered following injurings:-

(i) Fracture of right femur;

(ii) Fracture of left forearm and ulna of left arm;

(iii) Fracture of right cavicle.

Plaintiff at time of accident was fourteen (14) years old. He had gone through surgery whereby rod was inserted in his right thigh and his leg was put on cast. Plaintiff was admitted on 5 June 2009.

The medical officer's evidence was that Plaintiff's skin and muscle was cut to release tension and ease flow of blood. After this swelling of Plaintiff's right leg increased that he had to go through open reduction surgery because the fracture of right femur was bad and had to be straightened. After this surgery Plaintiff's leg was put on plaster.

Plaintiff was discharged on 5 August 2009, but was re-admitted on 21 September 2009, because fracture had not united. On 29 September 2009, Plaintiff went through another open reduction and internal fixation surgery and was discharged on 1st October 2009.

In total Plaintiff was admitted for seventy one (71) days.

63. In this instant:-

(i) Plaintiff is a forty-three (43) year old man with no form of medical history prior to the accident;

(ii) According to medical evidence he suffered from closed fracture of left distal tibia and fibula which left his left leg wobbly and hanging prior to his operation;

(iii) Plaintiff was taken to Labasa Hospital after one (1) hour from time of accident with his left leg hanging due to his bones being broken;

(iv) Plaintiff had to go through treatment over a period of almost five (5) months and on two (2) occassions had to go through operation to re-align his bones;

(v) Plaintiff was hospitalized for forty-six (46) days;

(vi) According to medical evidence Plaintiff's pain soon after the accident would have been 4 or 5 on a scale of 1 to 5 with 5 being on highest side;

(vii) Even though the injuries were not same Plaintiff almost had to go through process which was to re-align his bones as was in **Tamanibuici's** case;

(viii) Medical evidence has been that when cast is cut or removed to re-align the bones, the pain suffered by the person is same as he/she suffered at the beginning.

64. Defendant led evidence that Plaintiff refused to go to Lautoka Hospital for treatment when asked to do so in November 2011. Obviously this was after some four (4) months after the accident and Plaintiff being admitted three (3) times and only two (2) weeks before Dr Loefler was to come to Fiji with plates to treat Plaintiff.

65. No doubt Plaintiff for reason stated in his evidence rightly refused to go to Lautoka Hospital and any reasonable person in his position would have done so under the circumstances.

66. Before this Court assesses damages for pain and suffering I must state in very clear terms that when an employee gets involved in an accident during course

of employment it becomes incumbent on the employer to ensure that the employee receives the best treatment possible to relieve injured employee of pain and suffering and ensure that the injuries get treated as soon as possible. This means that if the best possible treatment or equipment is not available in the district hospital then the employer or its insurer should take immediate steps to have the employee evacuated to another hospital for such treatment at employer's own cost including accommodation cost for employee and his/her caregiver.

67. No evidence has been produced to show that Defendant or its insurer has taken any interest in seeing that Plaintiff receives the best treatment possible to relieve him of his pain and injury as soon as practible.

68. After analysis the evidence and case authorities this Court makes assessment for past pain and suffering in the sum of sixty five thousand dollars ($65,000.00).

69. Whether Plaintiff is entitled to an award of future pain and suffering will depend on nature of the injury and totality of the evidence produced in Court. It must be borne in mind that pain and suffering is subjective which Court has to determine after analysing the evidence in total and assessing demeanoure of Plaintiff and not only medical evidence.

Whilst medical evidence may carry some weight it should not be determinative. With all due respect the mere fact that medical evidence says injury is completely healed should not be used as conclusive evidence that Plaintiff wil not suffer from pain and suffering in future. It appears that Court of Appeals view in **Attorney-General of Fiji v Tomanibicu** ABU 0079 of 2015 (30 November 2017) is that if medical evidence is that Plaintiff's injury has been healed no award for future pain and suffering should be made which I believe is not the case.

70. In this instant:-

(i) Plaintiff claims that he has pain when he walks for long, goes down slopes and in cold weather;

(ii) Plaintiff's suffering in cold is confirmed by DW2;

(iii) PW2's (Medical Officer) evidence at paragraph 25 (xiii), (xvii) and 27(i) of this Judgment, suggests that Plaintiff will have joint pain.

(iv) DW1 (Orthopedic Surgeon) (stated in cross-examination as appears at paragraph 30 (xx) of this Judgement that if person's leg is shortened, angulated and if has plates it can cause pain if standing for long or walking for long.

71. Plaintiff gave evidence which this Court does not doubt that his leg pains if in cold weather or he stays in airconditioned room for long, he has pain when he walks up and down the slope and when he walks for long. Even though Plaintiff's injury has been healed this Court accepts that Plaintiff will have pain and suffering to some extent in the future.

72. This Court awards five thousand dollars ($5,000.00) for future pain and suffering.

Loss of Amenities of Life

73. Plaintiff's evidence was that he is not able to do gardening, cut grass, play volleyball and soccer.

74. Medical evidence suggests that Plaintiff has no difficulty in doing gardening and household chores except that Plaintiff will be at a risk if he takes part in vigorous sports such as soccer and volleyball.

75. This Court after analysing the evidence awards two thousand dollars ($2,000.00) for loss of amenities of life.

Loss of Future Earning Capacity

76. Medical evidence is Plaintiff fracture has been healed and no evidence has been produced to show that Plaintiff will not be able to work until his retirement age.

77. Court takes into consideration that Plaintiff from 12 August 2015 has been employed as a Salesman which does not require him to use his legs and energy as much as when employed as a labourer.

78. It is no doubt that if Plaintiff continued to work as labourer then there would have been a possibility that he would not be able to work as a labourer for long.

79. This Court therefore find that Plaintiff has not lost earning capacity as a salesperson.

Interest

80. I think it is just and fair that interest on the special and general damages be assessed at six percent (6%) per annum.

Cost

81. I have taken into consideration that the trial lasted for almost two (2) days; both parties called witnesses and made oral submission.

Conclusion

82. This Court holds that:

(i) Defendant owed a duty of care to the Plaintiff.

(ii) The Defendant breached duty of care owed to the Plaintiff.

(iii) Plaintiff's injury was caused as a result of the accident and breach of duty of care by Defendant;

(iv) Plaintiff was not negligent or contributed to his injury.

83. Defendant is to pay the Plaintiff a sum of $83,739.25 in special and general damages including interest up to the date of Judgement which said sum is made up as follows:

Special Damages [paragraph 50]	$ 3,252.85
Interest at 6% per annum from 11/7/14 *(date of Accident)* to 30/1/18 *(date of Judgment) (1299 days)*	$ 694.60
	$ 3,947.40

General Damages		
Pain and Suffering	$65,000.00	
Loss of Amenities of Life	2,000.00	
Interest at 6% per annum from 17/2/16 *(date of Writ of Summons)* to 19/1/18 *(date of Judgment)* (*713 days)*	67,000.00 $ 7,852.60	
		$ 74,852.60
Future Pain and Suffering		$ 5,000.00
Total		**$ 83,800.00**

Orders

84. I make following Orders:

(i) Defendant do pay Plaintiff the sum of Eighty Three Thousand Eight Hundred Dollars ($83,800.00) including interest;

(ii) Defendant, do pay Plaintiff cost of this action assessed in the sum of $3,500.00 within fourteen days from date of this Judgment.

K. Kumar
JUDGE

At Suva
30 January 2018

Maqbool & Co. for Plaintiff
Gibson & Co. for Defendant