

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

**Civil Action No.: HBC 341 of 2008**

**BETWEEN** : **RAJESH NAIDU** of Kuku, Bau Road, Nausori, unemployed.

**PLAINTIFF**

**A N D** : **FORMSCAFF (FIJI) LIMITED** a limited liability company duly incorporated in Fiji and having its registered office at Lot 2 Leonidas Street, Walu Bay, Suva.

**FIRST DEFENDANT**

**A N D** : **AMBE CONSTRUCTION LIMITED** a limited liability company duly incorporated in Fiji and having its registered office at the office of Vishnu Prasad & Company, 4<sup>th</sup> Floor, Pacific House, Butt Street, Suva.

**SECOND DEFENDANT**

**Counsel** : **Ms. S. Devan for the Plaintiff**  
**Mr. R. Singh for the 1<sup>st</sup> Defendant**  
**Mr. R. Naidu for the 2<sup>nd</sup> Defendant**

**Date of Judgment** : **25 November, 2016**

**JUDGMENT**

**INTRODUCTION**

1. The Plaintiff filed a claim in the High Court on the 30 September 2008 seeking damages against both the Defendants in respect of injuries that he suffered on 2 April 2008 during the course of his employment with the 2<sup>nd</sup> Defendant. In the alternative, he claims compensation pursuant to the Workmen's Compensation Act against the 2<sup>nd</sup> Defendant. The injury was due to falling of a metal part of scaffolding while dismantling it by the employees of 1<sup>st</sup> Defendant. The Plaintiff was working in front

where scaffoldings were being dismantled by the employees of the 1<sup>st</sup> Defendant. The 1<sup>st</sup> Defendant was invited to the construction site by the 2<sup>nd</sup> Defendant for removal of scaffoldings. The matter was taken up for trial before Justice Kotigalage and was concluded before him and parties agreed to adopt the proceedings and also relied on the written submissions filed before the said judge.

2. The erecting and dismantling of scaffold at the Housing Authority building complex were conducted by the employees of the 1<sup>st</sup> Defendant, as such nature of work to which the provisions of the Factories Act of Fiji (Cap 99).
3. Section 2 (1) of the Factories Act (Cap 99) defines factory as:

***"factory"** means any premises in which, or within the close or cartilage or precincts of which, persons are employed in manual labour in any process for or incidental to any of the following purposes, namely:-*

- (a) *the making of any article or of part of any article; or*
- (b) ***the altering, repairing, ornamenting, finishing, cleaning or washing, or the breaking up or demolition of an article; or***
- (c) *the adapting for sale of any article;*

*premises in which, or within the close or cartilage or precincts of which, the work is carried on by way of trade or for the purposes of gain and to or over which the employer of the persons employed therein has the right of access or control; and*

***"factory"** also includes the following premises in which persons are employed in manual labour:-*

- (i) *any yard or any dock, including the precincts thereof, in which ships or vessels are constructed, reconstructed, repaired, refitted, finished or broken up;*
- (ii) *any premises in which the business of sorting any article is carried on as a preliminary to the work carried on in any factory or incidentally to the purposes of any factory;*
- (iii) *any premises in which the business of washing or filling bottles or containers or packing articles is carried or incidentally to the purpose of any factory;*

- (iv) *any premises in which the business of booking, plaiting, lapping, making-up or packing of yarn or cloth is carried on;*
- (v) *any laundry or kitchen carried on as an ancillary to another business or incidentally to the purposes of any public institutions;*
- (vi) *any premises in which the construction, reconstruction or repair of locomotives, vehicles or other plant for use for transport purposes is carried on as ancillary to a transport undertaking or other industrial or commercial undertaking, not being any premises used for the purpose of housing locomotives or vehicles where only cleaning, washing, running repairs or minor adjustments are carried out;*
- (vii) *any premises in which printing by letterpress, lithography, photogravure or other similar process, or book-binding is carried on by way of trade or for purposes of gain or incidentally to another business so carried on;*
- (viii) *any premises in which the making, adaption or repair of dresses, scenery or properties is carried on incidentally to the production, exhibition or presentation by way of trade or for purposes of gain of cinematography films or theatrical performances, not being a stage or dressing-room of a theatre, in which only occasional adaption or repairs are made;*
- (ix) *any premises in which the business of making or mending nets is carried on incidental to the fishing industry;*
- (x) *any premises in which mechanical power is used in connexion with the making or repair of articles of metal or wood incidentally to any business carried on by way of trade or for purposes of gain;*
- (xi) *any premises in which the production of cinematography film is carried on by way of trade or for purposes of gain;*
- (xii) *any premises in which articles are made or prepared incidentally to the carrying on of building operations or works of engineering construction not being premises in which such operations or works are being carried on;*
- (xiii) *any waterworks or other premises in which mechanical power is used for the purposes of or in connexion with a public water supply;*
- (xiv) *any sewerage works in which mechanical power is used and any pumping station used in connexion with any sewerage works;*

(xv) *any irrigation works in which mechanical power is used and any pumping station used in connexion with any irrigation works;*

(xvi) *any premises in which persons are regularly employed in or in connexion with the generation, transformation, conversion, switching, controlling, regulating, distribution or use of electrical energy by way of trade or for the purposes of gain, or incidentally to any other business so carried on.*

4. The Plaintiff claims that the first Defendant was in breach of its statutory duty by:
  - (i) Dismantling the scaffold otherwise than under the immediate supervision of a competent person and otherwise by competent workmen possessing adequate experience of such work, contrary to regulation 13, Part IV, Section 99 of the Construction Regulations of the Factories Act, Cap 99.
  - (ii) Failing to ensure that the scaffold was securely supported and properly suspended whilst being dismantled to prevent loose iron and planks going affray, contrary to regulation 14 (1), Part IV, Section 99 of the Construction Regulations of the Factories Act, Cap 99.
5. The Plaintiff in the alternative claims for compensation under Workmen's Compensation Act (Cap 97) against his employer, the second Defendant.

#### FACTS

6. The Plaintiff was employed as a labourer by 2<sup>nd</sup> second Defendant. The second Defendant which was a construction company was sub-contracted to carry out refurbishment/maintenance works at the Housing Authority complex building at Valelevu (herein after referred to as The site).
7. The first Defendant was subcontracted to supply and erect scaffolding to the site enable refurbishment works such as painting to be carried out to the exterior of the aforesaid building by the second Defendant's workers.
8. The Plaintiff alleges that on the 2<sup>nd</sup> of April 2008 he was instructed by his foreman to carry out digging works in front of The Site. The Plaintiff alleges that at the material time, the 1<sup>st</sup> Defendant's workers were dismantling the scaffold within the vicinity

where the workers were digging following instructions from the second Defendant's foreman.

9. That in the process of dismantling, a iron rod fell from the scaffold and hit him on the back of his head, causing him severe injuries. Due the extent and nature of injuires, the Plaintiff has not been able to return to his work .

#### **Evidence and Analysis**

10. The 1<sup>st</sup> Defendant's witness Joshua Waqawai **1D1W** who was employed as the Operations Supervisor at the material time gave evidence and said that the scaffold which belonged to 1<sup>st</sup> Defendant was erected at the building. Instructions from the 2<sup>nd</sup> Defendant were that scaffold was erected on one side first then dismantled.
11. He confirmed that 2<sup>nd</sup> Defendant requested for the scaffolds on or about November 2007 and that on or about March 2008, he received a letter from the second Defendant to remove the scaffold from the front of the building. He said that since March 2008 he has been inquiring with his Operations Manager for the removal of the scaffolds. He was finally informed to remove the scaffold on 2/4/08.
12. He said that he had seen some "boys working inside and outside the barricaded area", a total of approximately six boys and the Plaintiff was one of them. He said that they were workers of 2<sup>nd</sup> Defendant and doing plastering and block laying works.
13. He had spoken to 2<sup>nd</sup> Defendant's Foreman (Raven Kumar) at the Site. He stated that Raven said they were behind the schedule with work and requested to wait a little longer while they finished off. So he had waited 30 minutes or so then he had called his Operations Manager of Imtiaz Khan, and he had told that since they had already got letter to remove the scaffold to go and see, the Managing Director (MD) of the 2<sup>nd</sup> Defendant named Sugarim.( **SDW1**)

14. He said that he met with Sugrim Prasad in the office at about 10 a.m and that he assured him not to worry about his workers, but to continue with dismantling. He had also assured that he would tell the workers to clear off.
15. He had spoken with Managing Director (MD), and workers from 1<sup>st</sup> Defendant started dismantling from the top. He stated that none of the workers for 2<sup>nd</sup> Defendant were working under the scaffold at that time. He said that he did not tell the 2<sup>nd</sup> Defendant's workers to move as he felt that they would not listen to him as he was not the employer.
16. He said that there were five workers and each worker was stationed on each level for passing the iron components of the scaffoldings. The steel pipes and rods were dismantled and lowered /passed down by hand from one level to another level below.
17. In his examination in chief, he stated that no ropes or hoist were used to lower the steel rods. He stated that that they don't use hoist as a practice since it is time consuming. The mechanical hoist is used when the parts were assembled presumably that due to the weight of the iron components this was needed, but this was not done when dismantled.
18. He also confirmed that no safety nets were used when dismantling. If safety nets were used prior to the dismantling it would be removed first. So, safety nets are used when the scaffoldings were in upright position to prevent any accidental falls to the people below, but in the dismantling process such a net is removed as first measure. The use of the net is not mandatory and only done with the request of the client whom they serve.
19. He said while passing a dismantled iron rod by a worker called Senitiki it had dropped. Senitiki was the one who took out that piece of scaffolding roughly 760

mm, he passed it to Aquila though he had a firm grip of the metal and he let go but Aquila didn't catch it and fell, hit another piece of scaffold and hit Rajesh right on the head. The iron rod had fallen from the top (5<sup>th</sup> Level) and this evidence confirms that the initial negligence was with the workers of the 1<sup>st</sup> Defendant. He said that Plaintiff was inside the barricade area when he was injured.

20. He further added that he saw that none of the workers including the Plaintiff were wearing any safety helmets that day prior to the incident. The Plaintiff in his evidence said the reason for not wearing a safety hat.
21. On cross examination, **1D1W** was asked whether he received any specific training on safety guidelines and or procedures for erection or dismantling of scaffolds, to which he replied in negative. He said that he only went to workshops but no specific training on scaffolding was given. He agreed that the manual that he referred in evidence did not specifically deal with scaffolding erection/dismantling or specific safety measures involved in such activity.
22. From his evidence it is evident the second Defendant had requested the scaffold to be removed, while they were still engaging in some work inside as well as outside the area where the scaffolding were being dismantled.
23. **1D1W** was the Operations Supervisor and in charge of dismantling scaffold first he had seen and talked with the 2<sup>nd</sup> Defendant's MD who had told that they were behind the schedule and needed more time. He had then waited some time and called his superiors for directions. The workers including the Plaintiff were working within the immediate vicinity where the scaffold was going to be removed but continued nevertheless to dismantle and/or instructing the dismantling.
24. Apart from asking the foreman and managing director of 2<sup>nd</sup> Defendant he failed to take any steps or action to stop the work being carried out by 2<sup>nd</sup> Defendant's workers whilst the scaffolds were being dismantled.

25. There was no proper supervision of the dismantling works and 2<sup>nd</sup> Defendant's workers at some point had returned to continue work even in the barricaded area, but the dismantling continued, being aware of the danger involved.
26. The Plaintiff and his co-workers testified that they were not told to move away when the scaffold was being dismantled.
27. There was no one to prevent even accidental encroachment to barricaded area and he had seen some workers of the 2<sup>nd</sup> Defendant not only entering but also working there. If proper care was taken dismantling works should have stopped when the workers entered the 'alleged barricaded area'. The fact that workers continued to work near the scaffold strongly suggests that there was clear lack of supervision of dismantling works, or lack of proper care for others including the Plaintiff.
28. FDW1 in fact relied on the second Defendant's assurances that it was safe for first Defendant to continue with the dismantling works whereas if FDW1 had been more prudent and careful, he should have refused to dismantle the scaffold with eminent danger to the workers of the 2<sup>nd</sup> Defendant.
29. The first Defendant was always at liberty to charge 2<sup>nd</sup> Defendant with some form of penalty fees for delay in having the scaffold dismantled. If he insisted complete clearance before and continuation of dismantling this accident would have prevented. However taking the risk to dismantle the scaffold when workers were working nearby was negligence on the part of the 1<sup>st</sup> Defendant.
30. The 1<sup>st</sup> Defendant's servants and /or agents foresaw the risks and there was lack of supervision. According to evidence they had seen the 'boys' working in the restricted area and had even warned the supervisor of the said workers that they were not wearing hard hats and might get hurt. He admitted that he was ordered to dismantle despite all these factors prevelant. He also said Sugarim asked him to continue with

work without any proper supervision other than 'a security and caretaker'. So with a security and caretaker the workers had commenced the work.

31. FDW1 admitted that he did not refuse and /or stop the dismantling of works despite being aware that workers continued to work within the immediate vicinity of the scaffold. He did not take any steps to warn the Plaintiff or request the Plaintiff to move away when the scaffold was being dismantled. FDW1 confirmed that when the angle- iron a part of dismantled scaffolding slipped, it hit the scaffold and fell on the Plaintiff who was meters away from the scaffolding.
32. The metal rods were being passed from worker to worker by hand from one level to the other without being in anyway safely hoisted to avoid it from slipping from the hands of workers and falling below. If an iron rod is to fall it will have a free fall and depending on the center of gravity of the part and the height etc it is hard even to predict the path of such fall, as it may hit another iron part or object and become a even more dangerous projectile. So dismantling is a hazardous type of work and extra care is needed.
33. The 2<sup>nd</sup> Defendant's witness also described that the steel rod was "heavy". He went to the extent of saying that even if the Plaintiff was wearing a hard hat, he still would have suffered injuries. This indicate how dangerous they can be in a free fall situation due to an accidental slip of a hand.
34. There was a foreseeable risk of metal rods accidently falling by the mere passing of the metal rods from one level to the level below by workers and the vicinity within which dismantling was taking place should have been strictly condoned off. From the evidence it is evident that any person could easily enter the barricaded area with or without knowledge of the risk involved.
35. It was also established by evidence that there was a lack of proper signage. FDW1 was cross examined that when dismantling works were being carried out, whether

there were any signs put up to warn that scaffolding was dismantled, to which he replied negative and said that , because he had already informed the foreman and spoke with 2<sup>nd</sup> Defendant's MD it was not needed. This again is a gross negligence on the part of the 1<sup>st</sup> Defendant.

36. FDW1 did not produce any work plan that he had prepared on 2/4/13 which would have substantiated his claim that as a supervisor he had planned and coordinated the dismantling works. This again shows the approach of the 1<sup>st</sup> Defendant for such work that would have inherent risks.
37. FDW1 in cross examination admitted that when scaffoldings are fixed a hoist was used but not in dismantling. The reason for not using such devise is time taken for such a procedure again indicating lack of proper safety procedure and concern for workers including the workers of the 2<sup>nd</sup> Defendant.

#### **The Negligence of the Second Defendant**

38. The Plaintiff claims that the second Defendant was negligent (see paragraph 9 of the Statement of Claim) in following manner:
  - (i) Failed to provide the Plaintiff with a safe system of work, safe equipment, failing to warn him of dangers and exposing him to a risk of injury
  - (ii) Failing to provide the Plaintiff with a “ hard hat” or a safety helmet
  - (iii) Failing by instruction, supervision, warning or otherwise to ensure that hard hats were worn at all times
39. The Plaintiff's MD, Sugrim Prasad gave evidence on behalf of the second Defendant (SDW1). He stated d that on 2/4/08, he went to the job site in the after lunch at about 2 p.m. and he was at the site when the Plaintiff was injured. He said that the Plaintiff was not there in the front of the building. He was unaware of whether the Plaintiff was instructed to work (digging) in front of the building. It is strange that he did not ascertain such a vital fact. It is also highly improbable that he was unaware of his

workers working within the barricaded area. The witness for the 1<sup>st</sup> Defendant stated that 2<sup>nd</sup> Defendant's workers continued work within the barricaded area.

40. SDW1 confirmed that both the foreman and supervisor of the 2<sup>nd</sup> Defendant were on the job site. On further clarification by the Court, SDW1 admitted that he thought some digging works may have been done before he came to the job site. He also admitted this in cross-examination by Plaintiff's counsel. He admitted that some work needed to be done in front of the building where scaffoldings were dismantled.
41. The Plaintiff gave evidence that the company had safety helmets but it did not have enough for everyone because some helmets didn't have straps so it could not be used. If there is no strap, it cannot be considered as proper gear to be used in such a site. He said they were supposed to wear helmets. But the company only had 15 good helmets available whereas there were 25 workers. He said there were other helmets but with straps missing. On 2/4/08, the Plaintiff said there were about 25 workers and only 15 helmets and he did not get one. He said he was in charge of stock and equipment and usually the workers got the good hats on "first come first serve basis". He explained why he couldn't get a hard hat.
42. In his evidence the Plaintiff stated that he informed the foreman that new hats were needed and he was assured that "new hats were coming" but none were purchased. He also said that on 2/4/08 by the time he got to do manual work no good safety hats were left for him and all the good ones had been taken by other workers before him.
43. He said by 9 am he was instructed by the foreman, to dig a footing and by that time all good helmets had been issued to other workers therefore he could not get a helmet before he started. The second Defendant also did not produce any log books or register to prove that safety helmets were issued to workers, in particular whether the Plaintiff on 2/4/08 had a safety helmet.

44. FDW1 was also asked if any purchase records could be produced to shown that safety equipment had been purchased but these were also not produced. This indicates either lack of proper supervision or care for workers including the Plaintiff.
45. Lawrence Raj Kumar who was called by the Plaintiff, in his evidence stated that he also did not have a helmet. He confirmed that only a few workers had helmets on. He said that he asked for helmets but the helmets didn't have straps so they were unsuitable for their type of work. So the reason for not wearing hard hats was lack of proper hats.
46. FDW1 stated in his evidence that 2<sup>nd</sup> Defendant gave them instructions to remove the scaffolding. The Plaintiff and Lawrence Kumar in their evidence stated that on previous occasions the scaffold was only removed on weekends when 2<sup>nd</sup> Defendant's workers were not at the site. FDW1 in his evidence stated that when he went to the Housing Authority complex to remove the scaffold he had seen the 2<sup>nd</sup> Defendant's workers were working and there was a danger to them if the scaffoldings were removed. He was also informed that the working was due to delay in the completion of work schedule of the 2<sup>nd</sup> Defendant.
47. The Plaintiff said hat at that time he had no regard for his safety simply because he wanted to finish his work which his foreman instructed him to complete on that day. So there is a considerable contributory negligence on the part of the Plaintiff, too.
48. Both the Plaintiff and PW2 maintained that they could not stop work even if they wanted to as they both feared they would be terminated from employment. But they are mature enough to understand the danger and risk associated.
49. On cross examination by Plaintiff's counsel, SDW1 said that workers should know about the danger of working near scaffolding. He denied giving any assurance to 1<sup>st</sup> Defendant to dismantle the scaffolding while their persons are on the ground near to the scaffolding. So, it is a pointing fingers at each other by the two Defendants after the damage had done to the Plaintiff. This is very unsatisfactory nature of such

'partners' in construction industry, where each other has to synchronize their activities and adjust, but keep the workers safety as paramount consideration as opposed to commercial, or monetary interests.

50. In the case of Ajay Kumar v Fltech er Construction (Fiji) Limited<sup>1</sup> applying the case of Caranagh v Ulster Weaving Company Limited<sup>2</sup> that in common law, an employer has a duty to take all reasonable care for the safety of his workmen in all the circumstances of the case. This duty exists whether the employment is inherently dangerous or not.
51. In the case of Paris v Stepney Borough Council<sup>3</sup> stated:
- "the duty of an employer towards his servant is to take reasonable care for his servant's safety in all the circumstances of the case"*
52. In the case of Emperor Gold Mining Company Limited v Josaia Lepolo<sup>4</sup>, the Court of Appeal applying English authorities stated:
- "negligence is the failure to use the requisite amount of care required by the law in the case where duty to use care exists"*
53. 1<sup>st</sup> Defendant as well as 2<sup>nd</sup> Defendant owed a duty of care to ensure that its workers including the Plaintiff were safe at all time in the site.
54. Plaintiff said *"because I had a task to complete so I was not worried about my safety"*. So the Plaintiff was aware of the danger but took risk as he was assigned a work to be completed, in such a condition *volunti non fit injuria* has no application.
55. English Court of Appeal in Bowater v Rowley Regis Corp<sup>5</sup> it was held:

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<sup>1</sup> Civil High Court Action No.316 of 1997, date of judgment 19 November 1999

<sup>2</sup> [1960] AC 145

<sup>3</sup> [1951] AC 367 at 388

<sup>4</sup> Civil Appeal No.13 of 2010, date of judgment 29 September 2011

<sup>5</sup> [1944] KB 476

*"For the purpose of the rule, if it be a rule, a man cannot be said to be truly "wiling" unless he is in a position to choose freely, and freedom of choice predicates, not only full knowledge of the circumstances on which the exercise of choice conditioned, so that he may be able to choose wisely, but the absence from his mind of any feeling of constraint so that nothing shall interfere with the freedom of his will. Without purporting to lay down any rule of universal application, I venture to doubt the maxim can very often apply in circumstances of an injury to a servant by the negligence of his master". (emphasis added)*

56. Both the Defendants have been negligent and culpable as such they are both liable for the injuries and losses caused to the Plaintiff. The first Defendant would be vicariously liable for negligence of its employees. The Plaintiff got injured due to the negligence of the 1<sup>st</sup> Defendant as well as vicarious liability. The apportionment of the negligence should be equal among the Defendants. The 2<sup>nd</sup> Defendant engaged 1<sup>st</sup> Defendant to do a particular task and they did it negligently. The 2<sup>nd</sup> Defendant was also negligent towards its workers.
57. The first Defendant has asserted that the Plaintiff was guilty of contributory negligence. The particulars of contributory negligence are set out at paragraph 9 of the first Defendant's amended defence. The second Defendant also asserted that the Plaintiff contributed to his injuries. Particulars of negligence of the Plaintiff are pleaded at **paragraph 8 (a) to (d)** of the second Defendant's amended statement of defence. As I have stated earlier the Plaintiff was also negligent hence there is contributory negligence on the part of the Plaintiff by exposing himself to the known hazard.
58. Plaintiff said that it was a Wednesday and the general public and workers were using the front entrance to enter the building when the dismantling was taking place. SWD1 also confirmed that the public had access to the building from the front entrance.
59. In the case of AC Billings and Sons Ltd v. Riden<sup>6</sup> it was stated:

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<sup>6</sup> [1958] AC 240

*"If the Plaintiff knew the danger, either because he was warned or from his own knowledge or observation, the question is whether the danger was such that in the circumstances no sensible man would have incurred it or, in other words, whether the Plaintiff's exposing himself to the danger was a want of common or ordinary prudence on his part. If it was not, then the fact that he voluntarily or knowingly incurred the danger does not entitle the defendant to escape from liability."*

60. It was further stated in the case of Josaia Lepolo v Emperor Gold Mining Limited, Civil High Court Action No.9/2002, date of judgment 9 April 2010 on the issue of contributory negligence as follows:

*"I take as the leading case in this area: Rauge v Attorney General of Fiji [2003] FJCA 9; ABU0040U.2000S (28 February 2003). The facts were that two professional deep sea divers died of the bends trying to recover an anchor from the bottom of the ocean. The Court found that the supervisor of the diving operation did not properly supervise the divers. This case, in my opinion, established two principles:*

- "1. The onus of proving contributory negligence lies with the employer.*
- 2. If the employer fails to properly supervise the employee and that failure is the cause or principal cause of the accident and the employee's injury, then the employee cannot be found to have contributed to his injury."*

*As a more general proposition, the second principle can be put in this way: Where the person in control allows a chain of events to continue and the plaintiff is thereby injured, that person will be held responsible for the plaintiff's injuries without the plaintiff being found to have contributed to his injuries. I think such a general proposition is supported by the Court of Appeal decision in Singh v Bui [2007] FJCA 2; ABU0112.2005S (9 March 2007). In that case, the Court of Appeal had to decide whether a villager who was injured in an accident involving the carrier that he was travelling in had contributed to his own injury by using the carrier. The Court of Appeal disagreed with the trial Judge's finding of two-thirds contribution by the plaintiff and held that he had not contributed to his injuries at all. In coming to that conclusion, the Court took into account the "economic imperatives" that may have forced him to use this mode of transport. The Court also accepted that the villager may not have appreciated the fact that the vehicle was illegally modified and unlicensed and without seat belts.*

61. The Plaintiff was an experienced worker in construction field. He ought to have known risks. There was inherent danger in working closer to the dismantling scaffolding and the Plaintiff was concerned with the finishing of the work rather than his safety considering the circumstances I assess 20% contributory negligence on the part of the Plaintiff. So the 1<sup>st</sup> and 2<sup>nd</sup> Defendant would be equally negligent for remainder at 40% each.
62. There is no need to consider alternative claims in the statement of claim, as I have held that both defendants owed a duty of care to the Plaintiff and they have been negligent.

**Quantum of Damages**  
**Special Damages**

63. The following evidence was submitted in respect of each item:
- i. Payment for medical report (CWM) - \$5-00 [Refer P11/ Doc tab 15 in Plaintiff's Bundle of Documents]
  - ii. Payment for medical report (CWM) - \$130-00 [refer P12/ Doc 16 Plaintiff's Exhibit 8]
  - iii. Buying prescription, drugs, bandages ( the Plaintiff stated that he was in adult diapers when hospitalized for about a month)- \$214-00
  - iv. Massages at home - Plaintiff kept a record of when he was massaged and how much he paid. He said that he paid \$25-00 to one person named Abdul. He said that he would mark his calendar first then get Abdul to write on his notebook to record. (Refer Plaintiff's Exhibit P10/ Doc Tab 10 in Plaintiff's Bundle of Documents). The Plaintiff has only recorded massage expenses of \$1800-00 up to period September 2009.
  - v. Transport Expenses - \$600-00 – The Plaintiff gave evidence that he was admitted to CWM for 24 days (2/4/08 to 25/4/08). He said that when he was admitted his wife stayed in the hospital everyday with him. She was required to travel from Nausori to Suva. He said sometimes she travelled by bus, taxi or with family members. He further said that the wife used her money to pay for travelling. The Plaintiff also explained he had no receipts to prove travel expenses

because taxi drivers normally do not issue receipts. P10 contains some notes on travelling expenses of \$180-00 only, but it is safe to grant \$600 for transport considering the circumstances.

- vi. Loss of Earnings - \$3507-92 - The Plaintiff stated that he only received 2/3 wages for 2 years. He therefore lost the benefit of his 1/3 wage.
- vii. Loss of FNPf - \$611-52 - The Plaintiff's wage slips clearly indicates that his FNPf was deducted. Therefore the Plaintiff is entitled to claim this amount.

64. The Plaintiff submits that for special damages he is entitled to be awarded a sum of **\$6868-44** and considering the evidence before me I award that sum.

**General Damages**  
**Pain and suffering**

65. The Plaintiff at the date of the accident was **37** years old. The Plaintiff exhibited three medical reports dated 25/4/08, 24/9/09 and 9/10/13. No other medical reports or medical evidence was submitted by the Defendants challenging the findings of or the medical reports by Plaintiff in this matter. Dr. Arun Murari gave comprehensive evidence on the Plaintiff's injuries, his permanent disability and medical condition. The Plaintiff suffered an open wound on his scalp. He suffered a large irregular haematoma in the right parieto-occipital region which extended into the right, 3<sup>rd</sup> and 4<sup>th</sup> ventricle. The Plaintiff as a result of his injuries has left sided hemiplegia and left facial nerve paresis.
66. Plaintiff's permanent incapacity is assessed at **46 %** by Dr. Murari as per his latest medical report dated 9/10/13, who gave an extensive analysis on how this was computed or assessed by him. Dr. Murari described the Plaintiff's injury as a serious head injury with bleeding in the brain. The bleeding on the right side of his brain caused left side hemiparesis. He said that the Plaintiff had to be placed on the *endo tracheal intubation*, which was a ventilator to enable the Plaintiff to breathe given the nature of his injuries. The Plaintiff's eating, breathing was all controlled by the machine.

67. He said that the matters that the Plaintiff complained of were investigated by him when he examined the Plaintiff on 8 September 2009. He said that at that time the Plaintiff could move his hip and arms a little bit. There was no movement in his toes and fingers.
68. He further stated that according to his latest medical examination of the Plaintiff (7/10/13), he said he still had weakness of his muscles which made it difficult for Plaintiff to walk, or getting up from sitting or lying position / or lying down from standing position, he can dress himself but with some difficulty, at home the Plaintiff can manage some household activities with one hand, he was still unsteady on his feet and suffered occasional blackouts.
69. He stated that the Plaintiff muscles are smaller and weaker on the left side of his body. Dr. Murari also stated that even if the Plaintiff had undergone physiotherapy, it is unlikely there would have been "substantial improvement" in his condition. Whilst he has seen the Plaintiff gradually recover, in his medical opinion the Plaintiff will not see a major improvement in his condition.
70. In the case of **Nand v Samy** [2005] FJHC 606, date of judgment 18/08/05, the Plaintiff in this case suffered serious injuries when he was assaulted by the Defendant. He suffered a 35 cm long incision wound on the left side of the parietal skull. As a result of his injuries he had left facial palsy due to divided facial nerve, weakness on the right side of the body. He had permanent scarring and left hemiparesis. The Plaintiff was awarded \$60,000 for pain and suffering.
- (ii) **Lal v Bank of Baroda** [2005] FJHC 578, date of judgment 26/08/05, the Plaintiff suffered injuries in a motor vehicle accident. He has multiple lacerations on scalp over the parietal region. Extradural haematoma. He had left sided weakness and unsteady gait with other complications. His total percentage incapacity was assessed at 44%. The Plaintiff was 37 years of age. He was awarded \$70,000-00 for pain and suffering. He was unlikely to find gainful employment due to his

disability and was awarded \$41,600-00 for loss of earning capacity however on Appeal this figure was reduced to \$33,800-00.

(iii) **Sharma v Waqa** [2004] FJHC 222, date of judgment 07/07/04, the Plaintiff in this matter suffered injuries on a locomotive accident. He sustained a scalp wound extending 25 cm from the bridge of his nose, across his forehead to the vertex (occipital bone). He also suffered a fracture of 2<sup>nd</sup> cervical spine. He had minimal neck movement, unstable and unsteady gait. He had restricted range of movement in his neck and head. He was awarded a sum of \$65,000-00 for pain and suffering.

(iv) **Jovesa Rokobutubutaki v Lusiana Rokodovu**, Civil Action No.1/1997, date of judgment 9/11/98, the Plaintiff in this matter met a motor vehicle accident. She suffered serious injuries and as a result she became paralysed mid chest down. She was 28 years old. The Court awarded \$200,000-00 for pain and suffering but was reduced to \$150,000-00 on appeal.

71. Considering the severe injuries and treatments given to the Plaintiff and the fact that the pain was continuous for a long period of time, the pain and suffering he had gone through the Plaintiff is granted \$125,000 for past pain and suffering

#### **Loss of Future Earnings**

72. The Plaintiff was earning a nett wage of \$101-20 per week. He was 42 years old. He was initially employed as a painter with the second Defendant but also did other duties such as time keeping, stock / inventory keeping and other manual labour duties as assigned to him by the second Defendant. Due to the nature of his injuries, he is unable to return to his normal duties. He can no longer perform manual work. The Plaintiff further stated that he wrote with his left hand and due to the paralysis, he can no longer write. Therefore the Plaintiff is unable to find any gainful employment.

73. The Plaintiff was 37 years old at the time of the accident and a multiplier of **13** years is appropriate. The Plaintiff was healthy and free of disease or illness prior to his accident. He was first employed as a painter and was promoted to time keeper/stock controller and also assisted in other manual work.
74. In *Yohesh Prasad v Mohammed Hakim & Anr*, civil action no.370 of 2006, date of judgment 19 December 2008. This case contains discussions on how multiplier is to be fixed. In this case the Plaintiff was 35 years old at the time of accident. A multiplier of **13** was applied.
75. In *Heather Dianne Lotherington Woloszyn v Maikeli Savou*, Civil High Court Action No.489 of 1993, date of judgment 31 July 1995. The Plaintiff was 37 years old and a senior lecturer. Multiplier of **16** was used to calculate loss of future earnings.
- (i) *Ratu Isei Turaga v Helen Nina Works*, civil Appeal No. 46/95, a multiplier of **14** was used for 36 years old Plaintiff
  - (ii) *Mono Lata v Janla Prasad*, Civil Appeal No.407 of 1997, a multiplier of **14** was used for 36 year old
  - (iii) *Abdul Ismail v Medical Superintendent & AG*, Civil Action No.310 of 1998, date of judgment 25 July 2000, a multiplier of **13** was used for the 38 year old Plaintiff
76. Considering the annual income (multiplicand) is \$101-20X 52 = 5262.40 the loss of income for 13 years is  $5262.40 \times 13 = 68,411.20$ .

#### **Costs of future care**

77. The Plaintiff as per paragraph 12 of his Statement of Claim claims for costs of future care. The particulars of future care are pleaded as follows;

*"he is unable to use his left dominant arm and difficulty walking. His left arm, especially his fingers are stiff. He is dependent on mother to prepare him meals."*

78. The Plaintiff in his evidence has given the difficulties he has and says he requires help. He said he still cannot do things on his own. He has problems with walking and getting up and dressing etc. The Plaintiff is obviously dependent on his mother for cooking, cleaning, mobility etc. when he was discharged, he paid his cousin \$25-00 per day.
79. For discussions on an award for future nursing care [Refer to Jovesa Rokobutubutaki v Lusiana Rokodovu, Civil Action No.1/1997, date of judgment 9/11/98. The Plaintiff was awarded a sum of \$49,920-00 based on a weekly allowance of \$60-00 per week and calculated with a multiplier of 16.
80. In the case of *Abhi Manu v Eddie McCaig*, Civil High Court action No.344 of 2002L, date of judgment 16 February 2011, the Court awarded a sum of \$50-00 per week (wages comparable to a live out housekeeper) x 20 years, awarding a sum of \$52,000-00.
81. Considering the inflation and other factors the future care is calculated at \$100 per week for 13 years

$$\begin{aligned} \$100-00 \text{ per week} \times 52 \text{ weeks} &= \$5200-00 \\ \$5200 \times \text{multiplier of } 13 &= \$67,600-00 \end{aligned}$$

#### **Interest**

82. Under section 3 of the Law Reform (Miscellaneous Provisions) (Death and Interest) Act Cap. 27 there is discretion in the Court to fix rate of interest which should be paid. The section provides:

*"3. In any proceedings tried in the (High) Court for the recovery of any debt or damages the court may, if it thinks fit, order that there shall be included in the sum for which judgment is given interest at such rate as it thinks fit on the whole or any part of the debt or damages... "*

83. An interest at the rate of 6% be awarded from the date of issue of writ 30.9.08 to 25.11.2016 on general damages is awarded and Interest on special damages at 3% (from writ 30.9.08) to 25.11.2016.

#### **Costs**

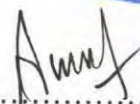
84. The Plaintiff is granted a cost of the sum of \$6,000-00 assessed summarily.

#### **FINAL ORDERS**

- a. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants are equally negligent for the injuries caused to the Plaintiff at 40% each. The Plaintiff's contributory negligence is 20%. (The aggregate of damage with interest be apportioned at 40% to each Defendant.)
- b. The Plaintiff is granted general damages of \$125,000 and interest of 6% per annum from 30.9.2008 to 25.11.2016.
- c. For the future care a sum of \$67,600-00 is awarded.
- d. For loss of earnings in future a sum of \$68,411.20 is awarded.
- e. For special damages \$6868-44 is granted with interest from 2.4.2008 (date of incident) to 25.11.2016 at 3% per annum,
- f. The cost of this action is summarily assessed at \$6,000.

**Dated at Suva this 25<sup>th</sup> day of November, 2016**



  
.....  
**Justice Deepthi Amaratunga**  
**High Court, Suva**