IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 284 of 2017

BETWEEN: **CHRISTINE LOUISE FOWLER** of UNDP Pacific Office, Level 8 Kadavu House, 414 Victoria Parade, Suva.

PLAINTIFF

AND: **SEREIMA RANADI** as the personal representative of the estate of **MELI DELANA KAMA**, deceased.

1st DEFENDANT

AND: **REGENT TAXIS LIMITED** a company duly incorporated in Fiji and having its registered office at 88 Jerusalem Road, Nabua, Suva.

2nd DEFENDANT

Counsel : **Plaintiff: Mr. Katia P**

: **Defendants: Mr. Chand A**

Date of Hearing : **23.03.2020**

Date of Judgment : **30.4.2020**

Catch-words- Stamp Duty Act 1920- general exemptions- Schedule (Part2)- any employment contract- independent contractor or an employee-Taxi owner- paid daily fixed amount by driver – conditions imposed by owner- all damages to third parties and to the vehicle borne by driver- self-employed.

Cases Referred

Hassan v Transport Workers Union [2006] FJSC 11; CBV0006U.2005S (19 October 2006)

Barclays Bank plc v Various Claimants [2020] UKSC 13 (01 April 2020), [2020] 2 WLR 960, [2020] WLR(D) 205

Claimants v Catholic Child Welfare Society [2013] 1 All ER 670, [2012] UKSC 56, [2013] PIQR P6, [2012] 3 WLR 1319, [2013] 2 AC 1, [2013] IRLR 219, [2013] ELR 1, [2012] WLR(D)

WM Morrison Supermarkets plc v Various Claimants [2020] UKSC 12,

Various Claimants v Catholic Child Welfare Society [2012] UKSC 56; [2013] 2 AC 1

JGE v The Portsmouth Roman Catholic Diocesan Trust [2012] EWCA Civ 938, [2013] 2 WLR 958, [2012] PIQR P19, [2013] 1 QB 722, [2012] IRLR 846, [2013] PTSR 565, [2013] Ch 722, [2013] QB 722, [2012] 4 All ER 1152, [2012] WLR(D) 204

Cox v Ministry of Justice [2016] 2 WLR 806, [2016] UKSC 10, [2016] IRLR 370, [2016] AC 660, [2016] PIQR P8, [2016] WLR(D) 110, [2016] ICR 470, [2017] 1 All ER 1

Ng Huat Seng v Mohammad [2017] SGCA 58

Bates van Winkelhof v Clyde and Co LLP [2014] UKSC 32; [2014] 1 WLR 2047

Pimlico Plumbers Ltd v Smith [2018] UKSC 29; [2018] ICR 1511

Woodland v Essex County Council [2014] 1 AC 537, [2013] 3 WLR 1227, [2013] UKSC 66, [2013] WLR(D) 403, [2014] ELR 67, [2014] 1 All ER 482

JUDGMENT

INTRODUCTION

1. Plaintiff filed this action to recover damages to a vehicle from a motor accident. Plaintiff was an expatriate worker attached to international organization and had left Fiji at the time of the trial. First Defendant was the driver of the Taxi that collided with Plaintiff's vehicle and there is an interlocutory judgment entered against the first Defendant. At the time of trial he had also passed away and substitution was done for first Defendant. Second Defendant is the owner of a Taxi business to which the Taxi driven by first Defendant belonged. Second Defendant denies any liability on the basis that first Defendant was an independent contractor. The issues were, whether relationship between Defendants was sufficient to impose vicarious liability to second Defendant and the proof of damage. The claim is only relating to damages to the vehicle. Since Plaintiff's vehicle was covered by the insurance the damage was paid, but insurance company had instituted action under subrogation. Plaintiff had purchased the vehicle from the local agent and dealer on 25.8.2015. The accident was on 14.1.2017. It had not even expired its warranty time period given for new vehicles. It was repaired by the same local agent after the accident and they had also submitted a detailed quotation of the work carried out. There is no alternate assessment of damages produced by second Defendant, though assessment was verbally denied the amount and said it was excessive. So, on the balance of probability damage to the vehicle due to accident is proved through production of assessment and detailed 'Claims Purchase Order' of the insurer. First Defendant's estate did not appear at the hearing of the assessment of damages. So only remaining issue is the liability of second Defendant, which is depended on the relationship between the parties and nature of the wrong doing and its connection to his work. Law relating vicarious liability is *'on the*

move'[1] and new frontiers were made in order to impose vicarious liability to relationships other than employers in UK. This may be so depending on the circumstances of the case when the relationship between the parties are in doubt, but courts should be careful not to let it loose, so as to diminish the character of independent contractors and make them vicariously liable. At the same time courts in UK had applied vicarious liability to expand scope of actives. This is due to novel claims based on rights and obligations of employees.

FACTS

2. There is an interlocutory judgment entered against first Defendant due failure to file acknowledgment of service. Neither first Defendant nor his estate, upon substitution after his death, appeared in this proceeding.

3. Order 13 rule 2 of High Court Rules of 1988 deals with such non participation and accordingly interlocutory judgment was entered against first Defendant and this was not set aside.

4. At the time of assessment in terms of Order 37 rule 3 of the High Court Rules 1988 a notice was served to the estate of the first Defendant as required by Order 37 rule 1(2), but again with no one appearing for first Defendant.

5. So the assessment of damages against first Defendant, was not opposed.

6. Second Defendant's Managing Director and owner gave evidence and he did not denied negligence of first Defendant but denied vicarious liability. According to him first Defendant was an independent contractor who paid a daily fixed sum of $60 to the second Defendant, who is the owner of the Taxi.

7. Driver of the Taxi had made an application to join second Defendant as per terms and conditions imposed on its drivers of second Defendant.

8. Said application and terms and conditions is marked as D1. Plaintiff objected to this document on the basis that it had not been stamped properly. Counsel could not provide statutory provision at the time of hearing to make a ruling. At the hearing I allowed it to be marked subject to objections to be considered at the hearing and exclude from evidence if the objection of the Plaintiff sustained.

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[1] Lord Phillips of Worth Matravers in *Various Claimants v Catholic Child Welfare Society* [2012] UKSC 56; [2013] 2 AC 1,

9. In terms of Section 41 of Stamp Duties Act 1920, there is a complete bar to accept such a document as evidence in a civil suit. And it reads;

> ***"41.*** *Except as aforesaid, no instrument executed in Fiji or relating (wheresoever executed) to any property situate or to any matter or thing done or to be done in any part of Fiji shall, except in criminal proceedings, be pleaded or given in evidence or admitted to be good, useful or available in law or equity, unless it is duly stamped in accordance with the law in force at the time when it was first executed."*

10. The documents exempted from stamp duties are contained in Schedule to the Stamp Duties Act 1920 and in Part 2 as the twenty seventh exempted items reads;

> *'Any employment contract'*

11. Vicarious liability can be imposed when there is a contract of service but even when there is no vicarious liability, under freedom of contract, a party can enter in to a contract with an independent contractor. This is traditionally called contract for service. This can be verbal as well as written.

12. In *JGE v The Portsmouth Roman Catholic Diocesan Trust* [2012] EWCA Civ 938, [2013] 2 WLR 958, [2012] PIQR P19, [2013] 1 QB 722, [2012] IRLR 846, [2013] PTSR 565, [2013] Ch 722, [2013] QB 722, [2012] 4 All ER 1152, [2012] WLR(D) 204, Lord Justice Ward held,

> *"At the first stage the contrast has traditionally been made between the relationship the employer had with his employee and the one he had with an independent contractor. The analysis examined the difference between a contract of service and a contract for services. Control became the important factor"*

13. There can be contracts of service or contract for service, as independent contractors. It is unfair to exclude a contract being presented as evidence, at the hearing when it is not certain as to the nature of the contract and relationship and that is the main contention of the parties.

14. When the line between two contracts is 'on the move' and scope of liability being expanded it will be harsh to exclude a contract at the outset of a hearing and if done so a party will be prejudiced.

15. Plaintiff who is claiming that the relationship between the first and second Defendants for vicarious liability cannot blow hot and cold and claim that contract between the Defendants

is not an employment contract. If so, Plaintiff cannot claim against the second Defendant. Plaintiff cannot blow hot and cold.

16. In my judgment any employment contract includes a contract of service as well as contract for service. Both such contracts are exempted from stamp duties irrespective of nature of the relationship between the two parties. Hence independent contractor's agreement such as taxi driver and owner of vehicle is an exempt item from stamp duties. So it cannot be excluded in terms of Section 41 of Stamp Duties Act 1920.

17. Accordingly objection to admit D1 as evidence in terms of Section 41 of Stamp Duties Act 1920 is overruled and D1 admitted as evidence.

18. The main issue before the court is vicarious liability of the second Defendant for the negligence act that resulted damage to Plaintiff's vehicle.

19. Second Defendant's witness in his evidence denied that first Defendant was an employee and also said at the time of accident he had completed his work hence outside his working time.

20. In his evidence he further said that there are drivers that were employed by the second Defendant for their Taxi business, but majority of the drivers of their vehicles, including first Defendant were independent contractors who provided daily fixed income from a vehicle. According to him they were self-employed and no wages or superannuation paid.

LAW

21. The law relating to vicarious liability had expanded during last few decades and this is geared to allow relief to victims as opposed to protection to the persons or entities that engage such wrongdoers.

22. An employer was held liable for unauthorized disclosure of material. This disclosure was not only outside the employees scope of work but also he had done it deliberately to take revenge from the employer, in the case of *Supermarkets plc v Various Claimants* [2020] UKSC 12.

23. So Lady Haley reiterated that "The Law of Vicarious Liability is on the Move" in UK Supreme Court decision (delivered on 1.4.2020) *Barclays Bank plc v Various Claimants*

[2020] 2 WLR 960, [2020] UKSC 13, [2020] WLR(D) 205 [2](with Lord Reed, Lord Kerr, Lord Hodge and Lord Lloyd -Jones agrreing) held ,

> *"**The law of vicarious liability is on the move.**" So stated Lord Phillips of Worth Matravers in Various Claimants v Catholic Child Welfare Society [2012] UKSC 56; [2013] 2 AC 1, generally known as Christian Brothers, at para 19. The question raised by the current case, and by the parallel case of WM Morrison Supermarkets plc v Various Claimants [2020] UKSC 12, **is how far that move can take it**. Two elements have to be shown before one person can be made vicariously liable for the torts committed by another. The first is **a relationship between the two persons which makes it proper for the law to make the one pay for the fault of the other**. Historically, and leaving aside relationships such as agency and partnership, that was limited to the relationship between employer and employee, but that has now been somewhat broadened. That is the subject matter of this case. The second is **the connection between that relationship and the tortfeasor's wrongdoing**. Historically, the tort had to be committed in the course or within the scope of the tortfeasor's employment, but that too has now been somewhat broadened. That is the subject matter of the Morrison's case."*(emphasis added)

24. So the present test to be applied before imposition of vicarious liability are

    a. Relationship between two parties.

    b. Connection of the wrongdoing and the relationship.(i.e there should be a close relationship between the wrong committed and his work)

25. In application of above two , first test is to consider relationship , and in *The Catholic Child Welfare Society & Ors v Various Claimants & The Institute of the Brothers of the Christian Schools & Ors* [2013] 1 All ER 670, [2012] UKSC 56, [2013] PIQR P6, [2012] 3 WLR 1319, [2013] 2 AC 1, [2013] IRLR 219, [2013] ELR 1, [2012] WLR(D) 335 UK Supreme Court this relationship had been expanded beyond employer employee relationship (Per Lord Phillips).

26. Traditional application of vicarious liability was limited to employers, employments in such other limited circumstances such as agents and partnerships.[3]

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[2] [2020] UKSC 13 (01 April 2020)
URL: *http://www.bailii.org/uk/cases/UKSC/2020/13.html*(30.4.2020)
[3] *Barclays Bank plc v Various Claimants* [2020] 2 WLR 960, [2020] UKSC 13, [2020] WLR(D) 205

27. Again in *Cox v Ministry of Justice* [2016] 2 WLR 806, [2016] UKSC 10, [2016] IRLR 370, [2016] AC 660, [2016] PIQR P8, [2016] WLR(D) 110, [2016] ICR 470, [2017] 1 All ER 1 relationship was extended beyond employment to inmates of a prison, but had cautioned,(Per Lord Reed)

> *"It is important, however, to understand that the general approach which Lord Phillips described is not confined to some special category of cases, such as the sexual abuse of children. It is intended to provide a basis for identifying the circumstances in which vicarious liability may in principle be imposed outside relationships of employment. By focusing upon the business activities carried on by the defendant and their attendant risks, it directs attention to the issues which are likely to be relevant in the context of modern workplaces, where workers may in reality be part of the workforce of an organisation without having a contract of employment with it, and also reflects prevailing ideas about the responsibility of businesses for the risks which are created by their activities. It results in an extension of the scope of vicarious liability beyond the responsibility of an employer for the acts and omissions of its employees in the course of their employment,* ***but not to the extent of imposing such liability where a tortfeasor's activities are entirely attributable to the conduct of a recognisably independent business of his own or of a third party."****(emphasis is mine)*

28. Court of Appeal in *Ng Huat Seng v Mohammad* [2017] SGCA 58, Singapore while discussing two abovementioned UK Supreme Court decisions which had expanded the relationship between the parties beyond employment, held that such expansion cannot be applied to independent contractors, who are engaged to do certain activities.

29. In *Barclays Bank plc v Various Claimants* [2020] UKSC 13, [2020] WLR(D) 205, [2020] 2 WLR 960 , Lady Hale after discussing the recent decision in UK where vicarious liability was expanded to persons who were not employed held that such expansion is possible when it is not certain as to the relationship between parties and held in paragraph 27 as

> *"The question therefore is, as it has always been, whether the tortfeasor is carrying on business on his own account or whether he is in a relationship akin to employment with the defendant. In doubtful cases, the five "incidents" identified by Lord Phillips may be helpful in identifying a relationship which is sufficiently analogous to employment to make it fair, just and reasonable to impose vicarious liability. Although they were enunciated in the context of non-commercial enterprises, they may be relevant in deciding whether workers who may be*

technically self-employed or agency workers are effectively part and parcel of the employer's business. But the key, as it was in Christian Brothers, Cox and Armes, will usually lie in understanding the details of the relationship. Where it is clear that the tortfeasor is carrying on his own independent business it is not necessary to consider the five incidents."

30. So these recent decisions have expanded scope of both tests beyond their traditional boundaries. The relationship of the wrongdoers had expanded beyond traditional employees but this had not diminished recognized independent contractors for a long period of time. The connection of the wrongdoing to the work assigned was also expanded to forceable risks.

31. In the light of the new developments relationship of the first and second Defendant revisited to consider the claim of vicarious liability.

ANALYSIS

32. Second Defendant's Managing Director said that his engagement of first Defendant to drive a Taxi belonging to his Taxi business was independent contractor.

33. First step in recognition of vicarious liability is to examine the relationship between driver of Taxi and second Defendant.

34. Witness for second Defendant, relied on Fiji Supreme Court Case of *Hassan v Transport Workers Union* [2006] FJSC 11; CBV0006U.2005S (19 October 2006).

35. *Hassan* (supra) was a decision regarding judicial review application filed by a taxi company against the recognition of its drivers as "employees" in terms of Trade Union Act.

36. For the said determination long standing decision of UK and commonwealth were considered in detail. The relationship between first Defendant and second Defendant needs to be considered since second Defendants business is to provide taxis and it had also employed taxi drivers for its business, but that number is only 11. According to evidence, majority of the Taxi drivers of second Defendant were self-employed or independent contractors similar to the first Defendant.

37. So it is important to consider latest development in UK and commonwealth jurisdictions in order find out imposition of vicarious liability in this case if fair and justified in the circumstances.

38. *Hassan* (supra) determined that taxi driver and the owner's relationship was of 'bailment' and not employer and employee relationship.

39. Plaintiff contends the findings of the said case regarding employer and employee is *obiter dicta,* as it was judicial review action and not an action relating to tort.

40. In discussing the nature of a precedent in English law Sir John Salmond[4] says:

> *"A precedent, therefore, is a judicial decision which contains in itself a principle. The underlying principle which thus forms its authoritative element is often termed the ratio decidcadi. The concrete decision is binding between the parties to it, but it is the abstract ratio decidcadi which alone has the force of law as regards the world at large." 2*

41. It is correct that matter before Supreme Court in *Hassan* (supra) was not an action relating to damages from a driver of a Taxi, but careful examination of the said decision is needed to deduce the ratio of a case. It was a judicial review application regarding a determination of the nature of relationship between taxi drivers and owners of the vehicles. Though there are statutory provisions to be interpreted in that case, the way Supreme Court had approached the issue without interpreting statutory provision, has a very broad application of the law relating to taxi drivers and owners of the vehicles and their relationship. So one cannot state findings of *Hassan* (supra) as to the relationship between drivers of taxi and the owners, in that case is obiter only because it was a judicial review application.

42. In my judgment this is too narrow determination of ratio, but the application of that is limited to circumstances of that case and proper objection should have been to distinguish the said judgment from the facts of this case.

43. So, the ratio of the said Supreme Court judgment is relationship between taxi driver and owner of the vehicle in said case where the relationship between the two parties were described as

    1. *"Each driver was assigned a Sanyo taxi in which to offer taxi services to members of the public for a fare which was to be paid by the member of the public to the driver.*

    2. *Each driver had to pay $66 daily to Mr Hassan and could retain the rest of his takings.*

    3. *The area in which the driver could operate the cab was defined by reference to Suva, Deuba along Queens Road, and Tailevu along Kings Road. The cab could not be used outside these areas without Mr Hassan's permission.*

[4] Salmond , JURISPRUDENCE (7th ed.) 201

4. *The cab was restricted to the driver's personal use only and could not be made available to others to drive.*

5. *The driver could not undertake repair work on the cab other than in an emergency and then only sufficient to drive it to the nearest garage.*

6. *The driver was liable in the event of an accident for which the driver was at fault while using the vehicle for private purposes. It is implicit in this provision that the driver was free to use the vehicle for his own purposes.*

7. *The driver was required to bring the vehicle in for inspection by management each day.*

8. *Under clause 11 of the agreement it was provided* ***"the company shall have no control over the Employee's daily driving".*** *The reference to employee may have been a slip but in any event it cannot be conclusive. There was no express provision for termination by Sanyo however drivers were required to give one week's notice of termination* ***"except in the casual dismissal"*** *whatever that may mean."*

44. According to undisputed evidence before the court first Defendant paid a fixed amount daily to second Defendant. Payments were made by the commuters to the Driver and he can keep any amount that he receive and pay only the fixed $60 per shift. First Defendant was assigned an area to operate, he had to return the vehicle on day off and take it following day. All the time, except day off the vehicle was with driver and he was required to check its maintenance and maintain it in proper condition. First Defendant could not assign the vehicle to another person to drive but he could drive for his personal use while it was not operating as taxi. All these features are analogous to features contained in Hassan (supra) case quoted above.

45. The only noteworthy deviation in D1, from above features in *Hassan* (supra) is that first Defendant was liable to all damages to all parties from any accident, whereas in *Hassan* (Supra) it was restricted accidents happened during personal use. In my judgment this distinction is not sufficient to distinguish the findings of *Hassan* (supra) as regards to the nature of relationship between taxi driver and owner.

46. Second Defendant had also employed a small number of drivers to its business as permanent employees as 'senior drivers', but according to evidence first Defendant and majority of the drivers are self-employed. In my judgment this feature does not create a

doubt as to the nature of the relationship between Taxi drivers and second Defendant in order to consider policy consideration stated by Lord Phillips.[5]

47. Taxi driver and owner of such vehicle are independent contractors that is recognized in law for a long period of time, but this does not prevent a driver being employed as a taxi driver if the owner desired to do so.

48. At the same time an employer cannot be allowed to exclude vicarious liability for part of their employees deliberately categorizing them as independent contractors. This is possible with the advent of ICT and culture of WFH (Work From Home). In such a scenario application of Lord Phillips five policy considerations[6] is useful. This is not the position between Defendants.

49. First Defendant's employment contract state that he is self-employed and his shift is from 4pm to 9am. The orientation information further stated that first Defendant being the driver was liable for all costs of the damage of the vehicle assigned and its security and he was not entitled for payment of wages or superannuation.

50. In the circumstances the ratio of ***Hassan*** (supra) cannot be distinguished and it is applied to this case and the result is there is no relationship that could impute vicarious liability upon second Defendant for actions of the first Defendant.

51. Even if I am wrong on that, though there are expansion of scope for vicarious liability still distinction of independent contractor is very much a part of law in UK and commonwealth jurisdiction. It had not been entirely discarded, in determination of vicarious liability.

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[5] Paragraph 35 of *The Catholic Child Welfare Society & Ors v Various Claimants & The Institute of the Brothers of the Christian Schools & Ors* [2013] 1 All ER 670, [2012] UKSC 56, [2013] 2 AC 1, Lord Phillip" The relationship that gives rise to vicarious liability is in the vast majority of cases that of employer and employee under a contract of employment. The employer will be vicariously liable when the employee commits a tort in the course of his employment. There is no difficulty in identifying a number of policy reasons that usually make it fair, just and reasonable to impose vicarious liability on the employer when these criteria are satisfied:
i) The employer is more likely to have the means to compensate the victim than the employee and can be expected to have insured against that liability;
ii) The tort will have been committed as a result of activity being taken by the employee on behalf of the employer;
iii) The employee's activity is likely to be part of the business activity of the employer;
iv) The employer, by employing the employee to carry on the activity will have created the risk of the tort committed by the employee;
v) The employee will, to a greater or lesser degree, have been under the control of the employer.

[6] ibid

52. *JGE v The Portsmouth Roman Catholic Diocesan Trust* [2013] 2 WLR 958, [2012] PIQR P19, [2013] 1 QB 722, [2012] IRLR 846, [2013] PTSR 565, [2013] Ch 722, [2013] QB 722, [2012] 4 All ER 1152, [2012] WLR(D) 204 Lord Ward held,

> *"Whilst it may be useful to carry out some sort of comparative exercise for the purpose of ascertaining how close the relationship of Father Baldwin and the bishop is to a relationship of employer/employee as opposed to that of employer/ independent contractor, my judgment is that one should concentrate on the extent to which, if at all, he is in a position akin to employment. The cases analysed in the immediately preceding paragraphs should be noted with a view to abstracting from them, if it is possible, the essence of being an employee.* ***To distil it to a single sentence I would say that an employee is one who is paid a wage or salary to work under some, if only slight, control of his employer in his employer's business for his employer's business. The independent contractor works in and for his own business at his risk of profit or loss.*** *" (emphasis added)*

53. First Defendant was not paid any salary or wages or FNPF and D1 specifically state so, too. He only pays fixed sum to the second Defendant, irrespective whether he earned more or less.

54. In *Barclays Bank plc v Various Claimants* [2020] UKSC 13 (01 April 2020) UK Supreme Court rejected claim on vicarious liability for the conduct of a doctor engaged by them for a considerable time for medical examination of its employees. He was paid for each report he submitted and he had his own clientele and was never paid even a retainer. The Doctor's relationship with the bank was held as independent contractor and vicariously liability of Bank was rejected.

55. *Bates van Winkelhof v Clyde and Co LLP* [2014] UKSC 32; [2014] 1 WLR 2047 dealt with the employment relationship of a solicitor and *Pimlico Plumbers Ltd v Smith* [2018] UKSC 29; [2018] ICR 1511 dealt with issue of relationship of plumbing and heating engineer had with a company that provides such services.

56. In both those cases solicitor's work and plumbing engineer's work was akin to the work of the respective entities where he worked but in both cases it was held that irrespective of that factor they were not employees.

57. In *Woodland v Essex County Council* [2014] 1 AC 537, [2013] 3 WLR 1227, [2013] UKSC 66, [2013] WLR(D) 403, [2014] ELR 67, [2014] 1 All ER 482 Lord Sumption held,

> *"In principle, liability in tort depends upon proof of a personal breach of duty. To that principle, there is at common law only one true exception, namely vicarious liability. Where a defendant is vicariously liable for the tort of another, he commits no tort himself and may not even owe the relevant duty, but is held liable as a matter of public policy for the tort of the other: Majrowski v Guy's and St. Thomas's NHS Hospital Trust [2005] QB 848. The boundaries of vicarious liability have been expanded by recent decisions of the courts to embrace tortfeasors who are not employees of the defendant, but stand in a relationship which is sufficiently analogous to employment: Various Claimants v Catholic Child Welfare Society [2013] 2 AC 1.* ***But it has never extended to the negligence of those who are truly independent contractors,*** *such as Mrs Stopford appears to have been in this case."(emphasis added)*

58. Latest developments find in decisions of UK Supreme Court had applied vicarious liability to relationships other than employment, but had not changed long established relationships such as Taxi drivers and owner of the vehicles.

59. So first Defendant who was a driver of taxi business of second defendant cannot be considered as an employee considering circumstances of the case I described earlier and also long established common law position.

60. There may be positions in gig economy where a parson who is working from home can be vicariously liable as an employee, but that will depend on relationship and type of wrong doing and whether the risk of wrong doing was close for the type of work assigned. Sometimes it may be strict liability depending on the nature of work assigned.

61. When there is no relationship between the parties to impose vicarious liability there is no need to consider the wrong doing and its relationship which is the second stage fulfillment, in order to impose vicarious liability.

62. Without prejudice to what was stated above I consider the nature of wrongdoing and the relationship between the parties for completeness of that issue which had also developed over the years.

63. The owner and managing director of second Defendant in his evidence stated that, there are approximately 46 vehicles used as taxis by the second Defendant.

64. The vehicle driven by first Defendant was a taxi owned by second Defendant.

65. This accident had happened around 7.30am and according to witness, he was supposed to terminate his taxi operation by 6am.

66. According to him the vehicle was given to first Defendant on the basis that he would pay $60 per day and on the date of accident driver was on night shift and his duty started at 4 pm on previous day and ended at 6am on the date of accident.

67. This is contrary to written instructions marked by Defendant as D1 where night shift can be any time from 4pm to 9am on the following day. There was no evidence as to the time he started work and that he had paid his daily payment or returned the vehicle for day off.

68. So on the balance of probability it is proved that first Defendant's negligent act that resulted accident had happened while he was driving his Taxi as taxi driver, and not as stated in evidence outside his night shift.

69. There were no passengers in the vehicle at the time of the accident, but that is not determinate to find determination to deny vicarious liability if he was an employee of second Defendant.

70. The above finding cannot impose vicarious liability, since there was no relationship to impose vicarious liability.

71. Plaintiff had produced details of the damage to the vehicle which was under warranty when accident happened and all the repairs were carried out by the local agent of for the said brand of vehicles. The total repair cost was $55,181.96 and Assessors Fee was $235 (P8) and Towing fee was $94 and a Police Report fee was $21.80 (P12) proved .

CONCLUSION

72. Plaintiff had obtained default judgment against the first Defendant who was the driver of the Taxi that caused damage to the Plaintiff's vehicle. It is proved on the balance of probability that damage to Plaintiff's vehicle was $55,181.96 and further expenses of towing and assessment and total damage incurred due to collision of Taxi driven by first Defendant was $55,181.96.

73. In Fiji Supreme Court decision of *Hassan v Transport Workers Union* [2006] FJSC 11; CBV0006U.2005S (decided on 19 October 2006) it was held 'There is a long history of

court decisions in England, Australia and New Zealand which establish that generally speaking the legal relationship between taxi owners and their drivers is not that of employer/employee. The evidence proved the arrangement between first and Second Defendants was akin to arrangement between the parties in Hassan (supra). I in my judgment this can change with time and also there are policy considerations. This is a long establish position and law should be certain and to deviate from the recognized position there should be sufficient reasons. Hence the claim based on vicarious liability fails. So the claim against second Defendant is struck off and I do not grant any cost to the second Defendant considering circumstances of the case. Plaintiff had proved the damage to vehicle for $55,181.96 and other special damages totalizing to $55,532.76. The cost of this action is summarily assessed at $3,000. The Plaintiff is granted 4% interest for special damages produced from the date of accident to date of judgment.

FINAL ORDERS

a. Special Damages in the sum of $55,532.76 against first Defendant.

b. Interest at the rate of 4% from the date of accident(14.1.2017) to the date of judgment amounting.$ 7315.11

c. Cost of this action is summarily assessed at $3,000 to be paid by first Defendant.

d. The claim against second Defendant is struck off without any cost to the second Defendant, considering the circumstances of the case.

Dated at Suva this 30th day of April, 2020.

HIGH COURT CIVIL SUVA

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Justice Deepthi Amaratunga
High Court, Suva