IN THE HIGH COURT OF FIJI
AT LAUTOKA
CIVIL JURISDICTION

CIVIL ACTION NO. HBC 18 OF 2014

BETWEEN	:	**PARVEEN KRISHNA NAICKER** of Navoli, Ba, unemployed. **PLAINTIFF**
AND	:	**LAND TRANSPORT AUTHORITY** a body corporate established under the **LAND TRANSPORT ACT** No. 35 of 1998. **1ST DEFENDANT**
AND	:	**LEONI KACISAU** of Lot 63, Nasevou Street, Lami, LTA Officer **2ND DEFENDANT**
BEFORE	:	A. M. Mohamed Mackie- J
COUNSEL	:	Mr. R. Chaudhary- for the Plaintiff. Mr. V. Chand -for the 1st Defendant 2nd Defendant appeared in person (as a witness for the Plaintiff)
DATE OF HEARING	:	31st August, 2022.
WRITTEN SUBMISSIONS:		By the Plaintiff on 14th September, 2021. By the 1st Defendant on 31st August, 2022. Plaintiff's Supplementary Submissions on 13th September, 2022. 1st Defendant's Supplementary Submissions on 17th October, 2022.
DATE OF RULING	:	28th April, 2023

RULING

(On Vicarious Liability)

A. INTRODUCTION:

1. Pursuant to the hearing held on 31st of August 2022, the task before this Court is to decide whether the 1st defendant Land Transport Authority (LTA) should be held vicariously liable or not, on account of the accident occurred on Queen's Road, Waimalika on **Saturday 27th July, 2013 at about 8.50 am,** wherein the Motor vehicle bearing registration # FA 187 owned by the 1st defendant LTA and driven by the 2nd defendant bumped on the Plaintiff causing him to suffer severe personal injuries.

2. Prior to the hearing on 31st August 2022, the plaintiff had filed his Affidavit evidence in chief as directed by my predecessor A. Stuart –J on 8th February 2021. The 1st Defendant had filed its Affidavit sworn by one SEMI TUINESEVA on 24th August 2021 as per the sad directions, but did not call any witness to give oral evidence. The Plaintiff called the 2nd defendant

driver to give evidence on his behalf, who was cross examined by the 1st defendant's Counsel. Both the parties have filed respective written submissions as stated above on the question of vicarious liability.

B. BACKGROUND :

3. The Plaintiff on 14th February 2014, filed this action against both the defendants seeking reliefs, *inter- alia,* special and general damages for the severe injuries suffered by him out of the Motor Vehicle accident occurred on Saturday 27th July 2013 at around 8.50 am on Queen's Road, at Wamalika, involving the Plaintiff, who was a pedestrian, and the 2nd defendant being the driver of the Motor Vehicle bearing Registration no. FA 187, admittedly, owned by the 1st defendant LTA.

4. As no an acknowledgement service and Statement of Defence had been filed by both the defendants, an interlocutory judgment was entered on 14th April 2014 against both the defendants, for the damages to be assessed.

5. The 1st defendant through its Solicitors Messrs. QORO Legal, on 18th May 2015, filed Summons for setting aside the default judgment, supported by an Affidavit of TOMASI RADAKUA sworn on 15th May 2015, and after the hearing of the same Hon. Jude Nanayakkara-J, by his ruling dated 14th October 2015, dismissed the 1st defendant's Application as it had relied on a wrong Order and Rule of the High Court Rules.

6. Subsequently, the 1st defendant caused to file its second Application for setting aside on 4th November 2015 pursuant to the relevant Rule of the HCR of 1988, supported by an Affidavit of TOMASI RADAKUA sworn on 29th October 2015. After an inter-partes hearing Hon. Jude Nanayakkara -J by his ruling dated 04th November **2016** set aside the said default judgment against the 1st defendant LTA and accordingly the statement of defence by the 1st defendant was filed on 16th November2016.

7. In the meantime, the Statement of claim being amended to include averments in relation to the conviction of the 2nd defendant driver before the Magistrate's Court, against whom a default judgment had also been entered initially, the Court on 20th April 2017 ordered the amended Statement of Claim be served on the 2nd defendant for him to file his Statement of Defence, if any.

8. In response, the 2nd defendant, appearing in person before me on 01st March 2018, intimated that he will not be contesting the matter, by referring to the letter dated 8th February 2018 addressed to the Registrar, which is filed of record and self-explanatory.

9. Accordingly, an interlocutory judgment was entered against the 2nd defendant on 6th March 2018 for the damages, costs and interest to be assessed. The Trial in relation to the 1st defendant was fixed for two days to be held on 9th and 10th August 2018. However, the trial did not eventuate on the said dates as a Medical Certificate was to be obtained by the Plaintiff, which caused considerable delay and finally when the matter had come up before then Judge Hon. A. Stuart on 8th February 2021, parties were directed to file Affidavit

evidence and call witnesses to decide on the question of vicarious liability of the 1st defendant, as a preliminary issue.

10. The said hearing held before me on 31st August 2022 as aforesaid, wherein the 2nd defendant driver gave evidence in support of the Plaintiff and both the parties filed their respective initial written submissions and thereafter filed supplementary submissions. Accordingly, now this court has been called upon to decide whether the 1st defendant LTA should be held vicariously liable to the Plaintiff or not. The culpability of the 2nd defendant driver now stands determined by the interlocutory judgment entered against him owing to his failure to file and serve the Statement of defence. Since the 2nd defendant has opted not to contest, the said judgment against him remains unassailed.

C. THE LAW ON VICARIOUS LIABILITY.

11. The doctrine of vicarious liability represents not a tort, but a rule of responsibility which renders one person liable for the torts committed by another. Most common application of vicarious liability is in employer and employee relationship. The employers are held liable for what their employees did for their (employers') purposes and benefits.

12. The law either considers that the employees' actions are those of the employers, or the law says that the employers are liable for the actions of their employees. In order to establish vicarious liability, firstly the wrongdoer must be the employee as opposed to an independent contractor, secondly, the employee must have committed the tort, and finally the tort must have been committed in the course of the employment.

13. The owners of the vehicle are held liable for negligent driving of their servant or drivers on the above premise. However, the ownership alone cannot impose liability on any person unless the other requirements are fulfilled. ***DU Parcq L.J in Hewitt v. Bonvin [1940] 1 K.B. 188*** held at page 194 that:

> *"It is plain that the appellant's ownership of the car cannot of itself impose any liability upon him. It has long been settled law that where the owner of a carriage or other chattel confides it to another person who is not his servant or agent, he is not responsible merely by reason of his ownership for any damage which it may do in that other's hands"*

14. Accordingly, the negligent driver must be either the servant or agent of the owner to impute the liability on him. ***Hammett CJ in Ram Pal v. Ise Lun trading as Wing Fat Bakery [1971] 17 FLR 8 held at page 13*** that:

> *"The authorities are quite clear that in order to impute to the owner of a car the negligence of its driver, it must be proved that the driver was the servant or agent of the owner."*

15. In other words, vicarious liability is an instance of no fault liability. It is imposition of legal responsibility on an employer for acts of his employee carried out in the course of employment even though the master himself is free from blame. Professor Fleming in **"The Law of Torts" 7th edition at page 339** says *"we speak of vicarious liability when the law holds one person responsible for the misconduct of another, although he is himself free from personal blameworthiness or fault" and that the modern doctrine of vicarious liability has as its basis "a*

combination of policy considerations". He goes on at page 340 to highlight what those policy considerations are as –

> *"the modern doctrine of vicarious liability cannot parade as a deduction from legalistic premises, but should be frankly recognized as having its basis in a combination of policy considerations. Most important of these is the belief that a person who employs others to advance his own economic interest should in fairness be placed under a corresponding liability for losses incurred in the course of the enterprise; that the master is a more promising source for recompense than his servant who is apt to be a man of straw; and that the rule promotes wide distribution of tort losses, the employer being a most suitable channel for passing them on through liability insurance and higher prices. The principle gains additional support for its admonitory value in accident prevention."*

16. In ***Darling Island Stevedoring and Lighterage Co. Ltd. v. Long – [1957] HCA 26; (1957) 97 CLR 36 at 57. Fullagher J*** stated that the rule for employers liability for his employees act under the common law was adopted not by way of an "exercise in analytical jurisprudence but as a matter of policy", and in ***Bazley v. Curry – 1999 Can LII 692 (SCC); (1999) 174 DLR (4th) 45*** the Supreme Court of Canada stated :

> *"Increasingly, courts confronted by issues of vicarious liability where no clear precedence exists are turning to policy for guidance, examining the purposes that vicarious liability serves and asking whether imposition of liability in the new case before them would serve those purposes" per McLaughlin J. at page 53 paragraph 14."*

17. He considered that the two policy considerations which underpin vicarious liability are first just and fair provision of a remedy from those who create the risk and are able to bear the loss and secondly deterrence of future harm.

18. **Bazley** decided that in considering whether an employer is vicariously liable for an employee's unauthorized intentional wrong, the test is whether 'the wrongful act is sufficiently related to conduct authorised by the employer to justify the imposition of vicarious liability. Vicarious liability is generally appropriate where there is a significant connection between the creation or enhancement of a risk and the wrong that accrues therefrom, even if unrelated to the employer's desires" – page 64 -paragraph 41(2).

19. The House of Lords in ***Lister & Others v. Hesley Hall Ltd. – (2002) 1 AC 215*** adopted the test of sufficient connection between the work an employee was employed to do and the wrongful act committed. In Lister the defendants owned and managed a school for problematic children. The school had a boarding where a warden was employed to look after the children. The warden sexually abused the children and the school was held vicariously liable.

20. Their lordships expressed reservations about the test for vicarious liability enunciated by Salmond in "Law of Torts" to the effect that a wrongful act is deemed to be done by a servant in the course of his employment if it is either "(a) a wrongful act authorised by the master or (b) a wrongful and unauthorized mode of doing some act authorised by the master". The test was applied in ***Aldred v. Nacano – 1987 IRLR 292***. Lord Steyn was of the view that the above test ought not to be taken mechanically or literally but considered with

a view to achieving "principled but practical justice" – p. 224. Lord Millet cautioned that the Salmond test is *"not a statutory definition of the circumstances which give rise to liability, but a guide to the principled application of the law to diverse factual situation" p. 245 and at page 246 "an excessively literal application of the Salmond test must also be discarded".*

D. DISCUSSION:

21. The claim against the 1st defendant LTA is based on vicarious liability. The 1st defendant does not deny the facts that the 2nd defendant was its employee and it was the registered owner of the Motor vehicle bearing registration no. FA 187 during the times material to the accident. But, the 1st defendant's stern position is that the 2nd defendant was not supposed to be driving on Saturday 27th July 2013, he was driving the vehicle not under the scope of his employment, he was driving under the influence of alcohol and he was driving on his own frolic.

22. Thus, the pivotal questions that beg answers in deciding the issue of vicarious liability, if any, on the part of the 1st defendant LTA, are whether the 2nd defendant driver, who was an officer at the LTA, was supposed to report for work at 8:00 Am on Saturday 27th July 2013 at the LTA office Lautoka? And whether he was proceedings towards the said LTA office at the time material to the accident.

23. On 13th March 2014 the Second defendant was convicted of the following offences under the Land Transport Act Cap 35 of 1998 by the Magistrate's Court of Nadi:-

    a) ***COUNT*** *1- Driving motor vehicle having an alcohol concentration in blood in excess of the prescribed limit pursuant to section 103 (1) (a) and Section 114 of the Act.*
    b) ***COUNT*** *2- Dangerous driving Occasioning Grievous Bodily Harm pursuant to Section 97 (4) (a) (b) (8) and Section 114 of the Act. He has been punished and dealt with accordingly.*

24. The aforesaid convictions are relevant to the issue of negligence and in deciding the question of vicarious liability in the within matter and the plaintiff seems to be relying on it as evidence for the assessment of damages as well.

25. In this case, the accident occurred on the Queen's Road in close proximity to the 1st defendant's office. It is common knowledge that it could have taken more than 10 to 15 minutes' drive for the 2nd defendant to reach his desired destination. The accident occurred during working hours of the day, albeit it was a Saturday. The 2nd defendant wrongdoer was, admittedly, a servant of the 1st defendant. This is the 2nd defendant's usual way that he takes from his residence in Lami to go to, and return from, his work by the said vehicle provided by his employer 1st defendant.

26. The evidence in the present case establishes, with no ambiguity, that an authority or an implied authority had been there for the 2nd defendant to travel on the fateful day by the said vehicle assigned to him in order to attend his given task of conducting the exam for driving Examiners' Permit at the LTA Lautoka office at 9:00 am.

27. Not even a suggestion was made by the learned Counsel for the 1st defendant to the 2nd defendant during his cross examination, to the effect that he was not supposed to work on that day or that the LTA office in Lautoka was closed and/ or no such an examination was scheduled to be held on Saturday 27th July 2013, for him to have travelled all the way from Lami on the previous evening, spent the night in a paid Hotel in Nadi and to have proceeded toward Lautoka in the next morning.

28. Instead, Counsel for the 1st defendant in his written submissions alleges that if the 2nd defendant was in fact coming to work , he should have marked his attendance at the office by 8:00 Am in that morning. This is a tacit admission on the part of the 1st defendant that the LTA office in Lautoka was in fact open for work (for exams as the 2nd defendant averred) on that fateful day, which was the Saturday 27th July 2013.

29. If, in fact, the LTA office was closed or no such an exam was to be held on that day for the 2nd defendant to have come all the way from Lami, the best witness who could have spoken on this was **Semi Tuinecewa**, who swore the Affidavit on 24th August 2021 on behalf of the 1st defendant or some other witness from the LTA office. The 1st defendant for the reason best known to it, did not call any witness to speak on it.

30. Parties are not at variance on the facts that at the time material, the relevant Motor vehicle was owned by the 1st defendant LTA and the 2nd defendant was an employee of it. The LTA in its Affidavits filed to set aside the default judgment or in the Amended Statement of Defence had not taken up a stance that the 2nd defendant, was not in the course of his employment when the accident occurred and was driving on his own frolic.

31. But, in the Affidavit filed on 24th August, 2021, for the first time, the deponent for the 1st defendant LTA states that the accident "did not happen in the course of employment" (paragraph 29) . In paragraph 30 thereof, the deponent continues to state that the 2nd defendant's paid hours of work, like other employees, were from 8.00 am to 4:30 pm from Monday to Thursday and from 8:00 am to 4:00 pm on Fridays and on the day of the accident, which was Saturday and not a workday, the 2nd defendant was not on any authorized overtime on that day nor authorized to work on weekends. In my view, these are only after-thoughts advanced by the 1st defendant to avoid the liability.

32. Whether the 2nd defendant was to work on overtime and to conduct the exam on the day in question or not, was also depended on the documentary evidence that could have been produced through a witness from the LTA, who should have had custody of those relevant documents. The 2nd defendant adduced acceptable reason for not having any document in his possession, particularly as he was giving evidence after nearly 10 years from the date of accident.

33. The 2nd defendant, being a senior Mechanical Engineer at the 1st defendant's office, appeared to be speaking truth. From the inception, he maintained the position that he had consumed liquor on the previous night and also admitted driving at a speed 90 km / hour. He pleaded guilty at the Magistrate's Court at the first instance. In the caution interview, he stated that he was going to conduct the exam. If not for reporting to his duty, he would not have travelled alone all the way from Lami, spent the night in a Hotel in Nadi, and driven at

the speed of 90 K.M/H at the time material in the early hours of the day in question. He said that he was rushing as he was to conduct the exam. Not even a single suggestion was made during his cross examination that he was going elsewhere and not to work.

34. Driving under influence of alcohol, undoubtedly, is an offence and violations of the rules the 2nd defendant, as a driver, was bound to strictly observe when in duty. He has been charged accordingly and punished for it on his own plea. However, it is not a ground for the 1st defendant owner-employer to be absolved from the liability, irrespective of the fact that the alleged act was endorsed or not by the 1st defendant employer.

35. Plaintiff's latest Affidavit evidence is mainly focused on the assessment damages. But the 2nd defendant's oral evidence before me on the question of liability has immensely assisted this court in identifying the correct legal position discussed above as far as the issue of vicarious liability is concerned. His evidence has remains unassailed, though he was subjected to cross examination. On the other hand, the 1st defendant, who was at a better position to adduce some evidence to substantiate its, purported, position failed to adduce such evidence.

36. Learned Counsel for the 1st defendant has in his written submissions maintains the allegation that the 2nd defendant had failed to report to work at 8.00 Am on the day in question, knowing very well that that the 2nd defendant had met with the accident at the relevant time. The 2nd defendant has given clear evidence that soon after the accident, the Police arrived at the scene and he had to go to the Namaka Police Station. He has given his caution interview from 7 .00 pm till 20.52 pm on the same day and this shows that he has remained at the Police station during the whole day. Thus, he cannot be faulted for not reporting at 8.00 Am for work. However, this again goes as an admission on the part of the 1st defendant that the 2nd defendant was expected to attend for work on that day.

37. In 1st defendant's Affidavits for both setting aside Applications, it had not been averred that the 2nd defendant was not supposed to be driving and reporting to work on the Saturday 27th July 2013 or that he was on some other mission on that day. Though, driving on this day was most relevant, it had not been taken up in those Affidavits.

38. The Memo dated 29th July 2013 and the letter dated 29th April 2014 addressed to the 2nd defendant by LTA do not utter a word about him being frolic or he had not been allowed to drive or was not supposed to come to work on that fateful day.

39. Learned Counsel for the Plaintiff has very correctly relied on the Fiji Court of Appeal decision in ***Colonial Mutual Life Assurance v Attorney General (1974) FLR 102*** in which facts are almost similar to the case in hand , wherein the Crown was found to be vicariously liable for its driver's negligence.

40. As alluded by the learned Counsel for the 1st defendant in his submissions, in order to establish vicarious liability, two Tests are need to be satisfied, namely, 1. **The Relationship Test** and 2. **The close connection Test.** The first Test need not be gone in to as there is an admission that the 2nd defendant was an Employee of the 1st defendant. Thus, the Relationship Test is satisfied.

41. As far as the second test is concerned, which is "Close Connection Test", I do not find that the 2nd defendant driver was engaged in any unauthorized or illegal activity, other than driving his official vehicle, of course under the influence of liquor and at 90 km/h speed, heading towards his usual work place. All what he was doing was driving in order to attend his assigned task for that day at the LTA office Lautoka and did not engage in any other act legal or illegal or had not derailed from his given task. Then, no necessity would arise to go into the close connection Test.

42. For instance, had he engaged in some other extra activity like giving a lift to a third party, transporting prohibited goods by his official vehicle or embroiled in a brawl with an outsider on his way, then the requirement to go for the test of close connection would arise. Here, there is no such an additional act committed by the 2nd defendant, except for being under the influence of liquor and speeding, which are only unauthorized ways of doing an authorized act of driving.

43. The 2nd defendant has in his caution interview, given a clear answer to the question no. 38 that he was heading to Lautoka to conduct the exam. He cannot be found fault for not producing any document in proof of his assertions. The 1st defendant could very well have confronted the 2nd defendant under his cross examination by producing relevant documents in order to challenge 2nd defendant's position and substantiate its position. The 1st defendant deliberately suppressed such documentary evidence which, if produced, would have gone against it.

44. By relying on the submissions made by the 1st defendant's Counsel in paragraph 19 of his initial written submissions, this court cannot arrive at a finding that the 2nd defendant had not been working within his scope of employment at the time of the accident, just because the 2nd defendant had not reported to work on that day, as he was supposed to in terms of his employment contract.

45. In the letter dated 29th April 2014 addressed to the 2nd Defendant informing his summary dismissal , one of the breaches alluded as per paragraph (i) i thereof was " ***Breach of clause 12.1 (b) of the Partnership Agreement which states, that an employee must act with care and diligence in the course of employment in the Authority***" . This shows that the LTA has conceded the fact that the summary dismissal was warranted owing to reasons, *inter-alia*, that the 2nd defendant had committed the tortious act in the course of his employment.

E. CONCLUSION:

46. For the reasons adumbrated above, my considered decision is that the accident in this matter occurred, involving the Plaintiff, on Saturday 27th July 2013 , while the 2nd defendant was driving the said vehicle no. FA 187 towards his usual place of work at LTA office in Lautoka and it so occurred in the course of his employment with the 1st defendant. Accordingly, the 1st defendant, as the Employer of the 2nd defendant, is vicariously liable for the damages payable to the Plaintiff, however, after the process of assessment, if not the parties agree on quantum thereof.

F. FINAL ORDERS:

a. The 1st defendant Land Transport Authority is hereby found to be vicariously liable unto the Plaintiff on account of the tortious act committed by the 2nd defendant.

b. There shall be a hearing for the assessment of damages, if the quantum is not agreed upon between the parties.

c. Order on costs reserved.

A.M. Mohamed Mackie
Judge

At High Court Lautoka this 27th day of April 2023.

SOLICITORS:
For the Plaintiff: **Messrs. CHAUDHARY & ASSOCIATES.**
For the Defendant: **LAND TRANSPORT AUTHORITY OF FIJI.**