

**IN THE RESIDENT MAGISTRATE'S COURT**  
**AT SUVA-CIVIL DIVISION**

Civil Action No. MBC 113 of 2012

**BETWEEN:** LUCIA KAFOA

**1<sup>st</sup> PLAINTIFF**

**AND:** QBE Insurance (Fiji) Limited

**2<sup>nd</sup> PLAINTIFF**

**AND:** SALEND.K.LAL

**DEFENDANT**

**For the Plaintiffs** : Mr. Suguturaga (*Haniff Tuitoga Lawyers*)

**For the Defendant** : Mr. P.Kumar (*Patrick Kumar Lawyers*)

**Date of Hearing** : 21<sup>st</sup> February 2019 & 13<sup>th</sup> May 2020

**Date of Judgment** : 10<sup>th</sup> February 2022

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**Judgment**

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1. Listed below herein are the pleadings:

- i. Writ and Statement of Claim : 27<sup>th</sup> February 2012;
- ii. Statement of Defence (filed in person) : 24<sup>th</sup> October 2012;
- iii. Amended Statement of Claim : 25<sup>th</sup> September 2017;
- iv. Statement of Defence and Counter  
Claim to the Amended Statement of Claim } 9<sup>th</sup> January 2018
- v. Reply to Defence and Defence to Counter-claim : 21<sup>st</sup> February 2018

2. The matter also proceeded to a hearing where the Plaintiff called two (2) witnesses whom were the 1<sup>st</sup> Plaintiff and a representative from the 2<sup>nd</sup> Plaintiff, whilst the Defendant alone gave evidence.

3. A total of seventeen (17) exhibits<sup>1</sup> were tendered by the Plaintiff
4. Arising out of the afore-said pleadings and hearing is the following.
5. It is claimed that on the 14<sup>th</sup> of August 2011, the 1<sup>st</sup> Plaintiff whilst driving motor vehicle registration no. FH-334 along Grantham Road, Raiwaqa, Suva collided into motor vehicle registration no. LT1345.
6. She then lodged a Police complaint on the basis that the driver of motor vehicle registration no. LT1345 made a sudden U-turn in front of the motor vehicle she was driving, resulting in damages to the left rear side of her motor vehicle.
7. She also as a result of the damages made a claim to the 2<sup>nd</sup> Plaintiff wherein her claim was approved and her motor vehicle FH -334 was repaired.
8. The 2<sup>nd</sup> Plaintiff bore the total cost of the repairs which they stated amounted to \$9,783.65 (Nine thousand seven hundred and eighty three dollars and sixty five cents).
9. This is the amount which they now seek to recover from the Defendant.
10. The Defendant's position as garnered from his pleadings and evidence in chief highlight that motor vehicle registration LT1345 belonged to him.
11. It also highlighted from the pleadings that on the 14<sup>th</sup> of August 2011 his driver, one Neil Kishan Goundar was driving motor vehicle registration no. LT1345 when it collided into FH-334.
12. Further it is his position from the pleadings that the 1<sup>st</sup> Plaintiff was driving very fast, lost control of the vehicle which led to the accident. As a result his motor vehicle registration no. LT1345 suffered damages which led to a counter claim in terms of the repair cost of \$3000.00
13. When he gave evidence however he backtracked from his pleadings and stated that he had no recollection of the events of 14<sup>th</sup> August 2011.

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<sup>1</sup> Appendix A

**Proven Facts**

14. Out of the above summary, the following are considered by the court as proven facts:
- i. There was a motor vehicle accident which occurred on 14<sup>th</sup> August 2011 between motor vehicle registration FH-334 and LT1345;
  - ii. Motor vehicle registration FH-334 and LT1345 are owned by the 1<sup>st</sup> Plaintiff and Defendant respectively;
  - iii. The 1<sup>st</sup> Plaintiff and the Defendant's employee were driving the motor vehicles at the time of the accident;
  - iv. There were pictures to confirm the damage to FH-334;
  - v. There were invoices and reports to highlight the extent of the damage and cost of repairs for FH-334;
  - vi. The repairs were paid for by the 2<sup>nd</sup> Plaintiff as a result of a claim (comprehensive motor vehicle Insurance) from the 1<sup>st</sup> Plaintiff.
15. As a result of the above-stated proven facts, the following questions need to be asked:
- i. Which party was negligent on the day in question?
16. In order to prove this, the standard of proof in civil matters is one of proof on the balance of probabilities.
17. In *Miller v. Minister of Pensions* 1947 2 All E.R. 372 Lord Denning stated the standard of proof regarding balance of probabilities as;

*"That degree is well settled. It must carry a reasonable degree of probability, not so high as is required in a criminal case. If the evidence is such that the tribunal can say: 'we think it more probable than not', the burden is discharged, but if the probabilities are equal it is not."*

18. In this matter it is one which involves a motor vehicle accident and as such the court cites with approval the sentiments of his Lordship *Guneratne.A JA* at paragraph 22 in *Sun Insurance Company Ltd v Qaqanaqele* [2016] FJCA 123; ABU0035.2013 (30 September 2016), in terms of the negligence.
19. It is regurgitated herein as follows:

“[22] Negligence is, doing or omitting to do something what a reasonable man would not do or would not omit to do in a given situation. That standard is partly objective and partly subjective. Objective, if the alleged wrongdoer's personal

equation, (such as temperament and experience), is taken into account; subjective, in so far as the standard takes account of the circumstances in which he found himself.”

20. The law expounded in the seminal English decisions such as **Donoghue v Stevenson** [1932] AC 562 per Lord Atkin; **Heaven v Pender** [1883] 11QBD 503 per Brett, M.R; **Bouhill v Young** (per Lord Denning, *supra*), make a determination on “Negligence” encompassing within that concept, principles relating to the criteria of foreseeability, duty and breach of that duty<sup>2</sup>.
21. In the context of this matter, the only version of the accident comes by way of the evidence-in-chief of the 1<sup>st</sup> named Plaintiff which confirmed her position as per her pleadings, that is, the driver of motor vehicle registration LT1345 by his manner of driving, that is making a U-turn without indicating as such caused the accident.
22. Plaintiff exhibits highlight that the matter was reported to the Police and there were damages to the 1<sup>st</sup> named Plaintiff’s motor vehicle.
23. The 1<sup>st</sup> named Plaintiff was not discredited during cross-examination as reflected from the court record and as such this court accepts her version of events is *prima facie* evidence of the Defendant’s employee being a negligent driver.
24. It was open to the Defendant to rebut the version of the 1<sup>st</sup> named Plaintiff.
25. This was mentioned in his pleadings, that is, he alleged that the 1<sup>st</sup> named Plaintiff was driving fast and was the cause of the accident.
26. However, very bizarrely the Defendant’s evidence suggested that he was not personally aware or could not recall any accident from the 14<sup>th</sup> of August 2011. He even stated that he was not aware or could not recall if his driver informed him of any accident.
27. This did not support his contentions as per his pleadings.
28. His driver was not called to give evidence which means that there is no evidence to support the claim of negligent driving by the Defendant against the 1<sup>st</sup> named Plaintiff or that his motor vehicle registration LT1345 suffered damages.

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<sup>2</sup> Per *Lordship Guneratne.A JA* at paragraph 30 in ***Sun Insurance Company Ltd v Qaqanaqele*** [2016] FJCA 123; ABU0035.2013 (30 September 2016)

29. As a result, the Defendant has not been able to establish a prima facie case.
30. In fact as result of the same, the failure on the part of a defendant to adduce evidence to rebut the evidence of the 1<sup>st</sup> named plaintiff adds a new factor in favour of the plaintiffs, as was held in *Prest v Prest* [2013] 2 AC 415 and *Gordon Ramsay v Gary Love* [2015] EWHC 65<sup>3</sup>.
31. Considering the above discussions this court finds as follows:
- The 1<sup>st</sup> Plaintiff has established on the balance of probabilities via evidence that the employee of the defendant was negligent in the manner of his driving, leading to the accident;
  - The Defendant has not established on a balance of probabilities that the 1<sup>st</sup> named Plaintiff was negligent in the manner of her driving.
32. Given the finding as pronounced under paragraph 31, is the Defendant vicariously liable?
33. In *Ram Pal v. Ise Lun trading as Wing Fat Bakery* [1971]17 FLR 8 Hammett CJ (as he was then) held at page 13 that:
- ‘The authorities are 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.’
34. The pleadings of the Defendant suggest that his driver was driving on 14<sup>th</sup> August 2011 and when cross examined he confirmed that he had a driver.
35. This confirms that there was a servant or agent relationship and therefore proves that since it is established that the defendant’s driver was negligent, the defendant is vicariously liable as result.
36. As such given the courts finding, the 2<sup>nd</sup> named Plaintiff is entitled the sum claimed to recover their costs of repairing the 1<sup>st</sup> named Plaintiff’s motor vehicle.

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<sup>3</sup> Per *Lordship Guneratne.A JA* at paragraph 33 and 34 in *Sun Insurance Company Ltd v Qaqanaqele* [2016] FJCA 123; ABU0035.2013 (30 September 2016)

37. The court therefore orders as follows against the Defendant:

- i. Judgment in the sum of \$9,783.65 ( Nine thousand seven hundred and eighty three dollars and sixty five cents);
- ii. Parties to bear their own costs.

38. Any aggrieved party is at liberty to appeal to the High Court, wherein the statutory appeal period (7 days) shall apply.

  
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**JEREMAIA .N.L SAVOU**  
**RESIDENT MAGISTRATE**



## Appendix A

- Plaintiffs Exhibit No.1 – Copy of photos for MV Reg No. FH-334
- Plaintiffs Exhibit No.2 – Copy of Lucia Kafoa Police Statement
- Plaintiffs Exhibit No.3 – Copy of Lucia Kafoa Drivers Licence
- Plaintiffs Exhibit No.4 – Copy of Quotation for Asco Motors for repairs
- Plaintiffs Exhibit No.5– Copy of Motor Vehicle Repair release from QBE
- Plaintiffs Exhibit No.6 – Copy of Lucia Kafoa’s QBE Claim form
- Plaintiffs Exhibit No.7 – Copy of Assessment of damages for MV FH-334
- Plaintiffs Exhibit No.8 – Copy of Invoice prepared by the Assessor
- Plaintiffs Exhibit No.9 – Copy of demand letter issued by QBE to Salend Lal
- Plaintiffs Exhibit No.10 – Copy of letter of instruction to O’Driscoll & Co
- Plaintiffs Exhibit No.11 – Copy of Interim Bill of Cost from O’Driscoll & Co
- Plaintiffs Exhibit No.12 – Copy of letter of instruction to Haniff Tuitoga Lawyers
- Plaintiffs Exhibit No.13 – Copy of Bill of Cost from Haniff Tuitoga Lawyers (10<sup>th</sup> May 2013)
- Plaintiffs Exhibit No.14 – Copy of Bill of Cost from Haniff Tuitoga Lawyers (31<sup>st</sup> July 2013)
- Plaintiffs Exhibit No.15 – Copy of Bill of Cost from Haniff Tuitoga Lawyers (31<sup>st</sup> March 2014)
- Plaintiffs Exhibit No.16 – Copy of the LTA Vehicle Registration Certificate for MV No. LT1345
- Plaintiffs Exhibit No.17 – Copy of Local Purchase Order from the Assessor.