IN THE HIGH COURT OF FIJI AT SUVA

CIVIL JURISDICTION

Civil Action No. HBC 274 of 2011

BETWEEN

KALESI SEINI ADIDAMU of Delainavesi, Lami as the widow and the Administratrix of the estate of her late husband Semiti Molilevu, deceased.

PLAINTIFF

AND

ELI AKIMO GUCA of Naimaitaga Settlement, Veisari, Police Officer.

FIRST DEFENDANT

AND

COMMISSIONER OF POLICE, 3rd Floor, Ratu Sukuna House, Suva.

SECOND DEFENDANT

AND

ATTORNEY GENERAL OF FIJI, 7th Floor, Suvavou House, Suva.

TRIRD DEFENDANT

Counsel	:	Mr. D. Singh for the Plaintiff Mr. M. Khan for the 1st Defendant Ms. O. Solimailagi with Ms. Baravilala for the 2nd and 3rd Defendants
Date of Hearing	:	13th March, 2017
Date of Judgment	:	18th April, 2017

JUDGMENT

[1] The plaintiff as the widow and the administratrix of the estate of Semiti Molilevu instituted these proceedings to recover damages from the defendant for the death of her husband caused by the negligent driving of the 1st defendant who, at the time of the accident, was a police officer of the Fiji Police Force. The second and third defendants have been made parties to the action on the basis that they are vicariously liable for the negligence of the first defendant.

[2] The 1st defendant in his statement of defence averred:

i. That he was an employee of the 2nd defendant and was driving the vehicle registration No. GN 294 during the course of his employment as an agent or servant of the 2nd defendant.

ii. That he was authorised by the Commissioner of Police under the Force Routine Order to drive the vehicle registration No. GN 294.

iii. That on 27th June, 2009 the 1st defendant was authorised by the Director Administration of Police, SSP Mr. Taufa to take the vehicle registration No. GN 294 to his residence to enable him to pick Director Administration of Police and Superintendent of Police, Mr. Naca to the early morning police church service.

iv. That on the same night the 1st defendant suddenly became sick and due to the seriousness of his sickness and under such necessity he took help of the police vehicle and drove towards the CWM Hospital.

[3] The 2nd and 3rd defendants in their statement of defence while denying that they were vicariously liable for the negligence of the 1st defendant averred that the 1st defendant was charged for a disciplinary offence of Conduct Prejudicial to Good Order and Discipline of the Force where he has conducted himself in an unethical manner when he drove the police vehicle registration No. GN 294 from Suva to Veisari without authorisation and the said vehicle was involved in an accident causing damage.

[4] It is common ground between the parties that the 1st defendant was charged for dangerous driving occasioning death and for dangerous driving occasioning grievous bodily harm but *nolle prosequi* was entered. The first defendant admits that on 27th June, 2009 he drove the vehicle registration No. GN 294 at Veisari, Lami and knocked down the deceased while driving the vehicle registration No. GN 294 and bumped the deceased who died shortly thereafter.

[5] At the trial the plaintiff testified that her deceased husband was born on 15th September, 1970 and she has four children by the marriage. At the time of the death of her husband all four children were below twenty one years of age. She also testified that her deceased husband worked for Fiji Gas Company for twenty years and his weekly salary was $168.52. Before his death it was the deceased who had maintain the family but after the death of the husband the plaintiff has found an employment. She also said that she spent $3500 as funeral expenses.

[6] The 1st defendant testified that he was assigned to drive for SSP Taufa, the Chief Administration Officer and the Church Co-ordinator and for ASP Veremalua. It is the evidence of the 1st defendant that since he had to pick these officers at 7.00 am on Monday to Friday for the Church Service he kept the vehicle with him and nobody questioned him as to why he kept the vehicle at home. In cross-examination he testified that even before the accident he was not well and he took the vehicle home and parked it there between 6.00 pm to 7.00 pm. He testified further that at about 11.00 o'clock in the night he took the vehicle to go to the CMW Hospital and he could not remember what happened on the road. He also said that the trip to the hospital was not an official trip.

[7] The witness was shown his Record of Interview and questioned him on what he has told the police and the learned counsel for the 2nd and 3rd defendants drew the attention of the court and the 1st defendant to questions No. 46 and 47 of the Record of Interview which is as follows;

Q: Where were you supposed to park the vehicle?

A: Lami Police Station.

Q: Then who had authorized to drive the vehicle to your home?

A: No one but because of early pick up.

[8] In the same evidence the witness later said that the authority was given orally to take the vehicle home and park it there overnight. He stated further that he knew very well that he did not have the authority to take the vehicle to the hospital.

[9] The first issue to be determined is whether the 1st defendant, at the time of the accident, was driving the vehicle in the course of his employment. He admitted that he went to the hospital to see a doctor and that was not an official trip. He could not produce any instructions in writing authorising him to park the vehicle at his home overnight. The witnesses called by the 2nd and 3rd witnesses specifically stated that they did not authorise the 1st defendant to take the vehicle home and park it there.

[10] Instruction No. 12 of the Transport Instructions 1993 provides as follows;

> Vehicle must at all times be securely parked at Government Stations. It is forbidden to park a vehicle overnight at the driver's home unless prior permission has been obtained in writing from the Permanent Secretary of the Finance and Economic Development.

[11] The extent of the liability of employers in cases of road traffic accidents was discussed in following cases:

In ***Storey v Ashton*** (1869) LR 4 QB 476 Cockburn CJ said;

> I am very far from saying, if a servant when going on his master's business took a somewhat longer road, that owing to this deviation he would cease to be in the employment of the master, so as to divest the latter of all liability; in such cases, it is a question of degree as to how far the deviation could be considered a separate journey. Such a consideration is applicable to the present case, because here the cabman started on an entirely new and independent journey which has nothing at all to do with his employment.

In ***Holton v Thomas Burton (Rhodes) Ltd.*** [1961] 1 WLR 705 the plaintiffs husband was killed while being driven in the defendant's car by a fellow employee. They were returning after having refreshment in a coffee shop.

Diplock J held;

> Although the driver was using the car with the defendant's permission, he was doing something he was no employed to do, and therefore, the defendant was not vicariously liable.

[12] The learned counsel for the 1st defendant that in ***Shell (Fiji) Ltd v Chand*** [2012] FJHC 5; CAV0003.2011 the Supreme Court adopted the following observations of Lord Denning in the case of ***Rose v Plenty*** [1976] WLR 141;

> In consideration whether a prohibited act was within the course of employment, it depends very much on the purpose for which it is done. If it is done for his employer's business, it is usually done in the course of his employment, even though it is a prohibited act.

[13] He also submitted that in the case of ***Khan v Prasad*** [2014] FJHC 814; Civil Action 40.2010 followed the following observations made in ***Rose v Plenty*** (*supra*);

> This dictum ... brings in a wider concept based on public policy by which an employer is made liable if he initiates some action which may some un-fortuitous events bring about some damage to a person which borders more on personal liability than on vicarious liability when an employer engages a driver to drive a vehicle for the employer's purposes. Irrespective of any prohibitions or instructions given to the driver the employer is liable for the negligent driving of the vehicle.

[14] The court is not concerned whether taking of the vehicle home after working hours was done with the authority of the employer. The accident occurred when he drove the vehicle from home to the CWM Hospital. The issue before this court is whether the driving of the vehicle from home to the CWM Hospital was in the course of employment which is certainly not.

[15] In support of his position that the 2nd defendant is vicariously liable for the acts of its employees the learned counsel for the 1st defendant also relied on the decision in ***Dubai Aluminium Co Ltd v Salaam and others (Livingstone and others, third parties)*** [2003] 1 All ER 97/[2002] UKHL 48.

[16] It is important, before considering the applicability of the decision of that case to the facts of the case before this court, to consider the factual background of that case.

[17] In that case the claimant company was the victim of a fraud by which it had been induced to pay a large sum of money under a bogus consultancy agreement. The proceeds were shared among the participants in the fraud including S and T (the participants), under an equally bogus sub-agreements. In subsequent proceedings, the company alleged that the participants had dishonestly assisted in a breach of fiduciary duty owed to it by another participant in the fraud; that the agreements had been drafted by the senior partner of two successive firms of solicitors of which S had been a client; the senior partner, though not receiving any of the proceeds of the fraud, had dishonestly assisted by drafting the bogus agreements in his capacity as a partner and also by giving direct advice and assistance to wrongdoers who had not been clients of the firms; and that his partners, though personally innocent, were vicariously liable under section 10 of the Partnership Act 1890 which applied where loss was caused to a non-partner by 'any wrongful act or omission' of any partner 'acting in the ordinary course' of his firm's business.

[18] The learned counsel cited paragraph 121 of the said judgment which reads as follows;

> In that case I observed that it was no answer to a claim against the employer to say that the employee was guilty of intentional wrongdoing, or that his act was not merely tortious but criminal, or that he was acting exclusively for his own benefit, or that he was acting contrary to express instructions, or that his conduct was the very negation of his employer's duty. Vicarious liability for tortious and even criminal acts had been established well before the end of the 19th century. Lloyd v Grace, Smith & Co [1912] AC 716, which Lord Steyn described as a breakthrough, finally established that vicarious liability is not necessarily defeated if the employee acted for his own benefit. The consequence, he said, at p 224, was that "an intense focus on the connection between the nature of the employment and the tort of the wrongdoer became necessary."

[19] The fact of ***Dubai Aluminium Co Ltd v Salaam and others (Livingstone and others, third parties)*** (*supra*) is completely different to that of the case before court and in that case at page 122 the court has held, following the decision of Denning LJ in Navarro v Moregrand Ltd [1951] 2 TLR 674 at 680, that the vicarious liability of an employer does not depend upon the employees authority to do the particular act which constitutes the wrong. It is sufficient if the employee is authorised to do acts of kind in question.

[20] The learned counsel for the 2nd and 3rd defendant cited the following paragraph from Halsbury's Laws of England (5th Edition) Volume 79 (2010) which deals with the question of vicarious liability;

> If at the time when the injury takes place the employee is engaged, not on his employer's business, but on his own, the employer's vicarious liability does not arise because the employee is not acting in the course of employment. In such a case it is immaterial whether the employee is using his employer's property with his employer's permission, so long as he is clearly acting on his business, or whether he is using it surreptitiously, and is therefore, as regards his employer, a trespasser. Where, however, the employee, whilst using his employer's property in the course of his employment, embarks upon his business of his own, and the injury is occasioned afterwards, the employer's liability continues unless the employee, in deviating from the business which he was employed to perform, can no longer be considered to be acting in the course of his employment, and must be regarded as engaged in a separate transaction.

[21] The 1st defendant may have had authority to take the vehicle home and park it there overnight but he did not have authority to take it to the hospital. The employer cannot be held responsible for the 1st defendant's act of using the vehicle for his personal use without any authority. The principle of law cited by the learned counsel for the 1st defendant are therefore of no relevance the matter before this court.

[22] In view of the above the court is of the view that the 2nd defendant cannot be held liable for the negligence of the 1st defendant.

[23] The next issue for determination is whether the accident was due to the negligence of the 1st defendant. There is no evidence as to the manner in which this accident occurred. The 1st defendant, who should have been aware of how the accident occurred, stated in his evidence that he could not say how it happened. In such circumstances the will apply the doctrine *res ipsa loquitur* which means *'the event speaks for itself'*.

[24] The 1st defendant put the vehicle on to the road knowing very well that he was sick and feeling uncomfortable. If a driver who drives his vehicle on a public road knowing very well that he is not fit to drive it, cannot be said to have had any regard for the lives of the others who use the road. Therefore, the court holds that the death of the plaintiff's husband was caused due to the negligent driving of the 1st defendant.

[25] The plaintiff in her evidence stated that she spent $3500.00 as funeral expenses which fact was not challenged by the defendants. It is the evidence of the plaintiff that her deceased husband at the time of his death was working for the Fiji Gas Company Limited and was earning $168.52 per week. However, according to the salary particulars annexed to the agreed bundle of documents his salary after taxation was $155.22. The court will calculate damages on the basis that his weekly income was $155.22.

[26] At the time of the death of the deceased he was married to the plaintiff and had four children by the marriage. According to the marriage certificate and the certificates of birth the date of birth of the deceased was born on 15th September, 1970 and at the time of his death he was 38 years and 09 months old. The deceased could have, if not for his untimely death, till he attain the age of retirement which is 55 years that is another 16 years and 03 months. The amount, therefore, he could have earned as salaries were $30267.90 out of which the court is of the view that he would have spent for the family 80% that is $24214.32. Since the plaintiff is getting

this amount as a lump sum the court reduces another 10% of the said amount which will come to $21,792.89.

[27] The plaintiff is therefore entitled to recover from the 1st defendant $21,729.89 as general damages and $3500.00 as special damages.

[28] Order of the Court:

1. The 1st defendant is ordered to pay the plaintiff $25,279.89 as damages with interest on the said sum under the Law Reforms (Miscellaneous Provision)(Death and Interest) Act (Cap 27) as amended.
2. The 1st defendant shall also pay the plaintiff $5000.00 as costs of the action.
3. The action against the 2nd and 3rd defendants is dismissed.

Lyone Seneviratne

JUDGE

18th April, 2017