

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No.: HBC 180 of 2017

BETWEEN : **SISA VOLAU** as Administrator of the **ESTATE OF MACIU DELAI** of Lot 4 Salumi Settlement, Ratu Dovi Road, Nasinu, in Fiji.

PLAINTIFF

AND : **SAILOSI BALEISUVA MARA** of Roshni Place, 8 Miles Nasinu in Fiji, Taxi Driver.

1ST DEFENDANT

AND : **JOHN JITENDRA PRATAP** of Lot 9 Sawau Road, Bay View Heights, Tamavua, Suva in Fiji, Taxi Proprietor.

2ND DEFENDANT

Counsel

Plaintiff : Mr. Prasad. D and Ms. Kumar K
First Defendant : Ms Narayan. P and Mr. T. Rabuku
Second Defendant : Mr. Kumar. S
Date of Judgment : 27.10.2022

JUDGMENT

INTRODUCTION

1. Plaintiff is the parent of late Maciu Delai (the Deceased) who died on 26.12.2015 after collision with motor vehicle registration No LT 6512. The Deceased was a pedestrian and vehicle bearing registration No LT6512, was driven by first Defendant as a Taxi for a fixed sum, to its owner second Defendant. First Defendant denied he was the driver at the time of accident, on pleadings but refused to give evidence in court. Plaintiff through eye witnesses had established on balance of probability that the Deceased while being a pedestrian on the edge of road, collided with LT 6512 driven by its driver first Defendant in a negligent manner. The fact that vehicle registration no LT 6512 was assigned to first

Defendant to be used as a taxi, on payment of fixed sum was stated to the Police in the statement and this fact is proved at trial. According to the relationship between the owner of the said vehicle, first Defendant is an independent contractor and there is no vicarious liability on the part of the owner. The rash and negligent manner of driving of first Defendant at material time is proved through circumstantial evidence. Even after the accident first Defendant was unable to stop the vehicle at the place of impact and had not applied breaks to mitigate excessive speed that had made a very loud noise and victim thrown aside, instantly making fatal injuries that resulted death shortly. Due to excessive speed and uncontrolled impact with the victim front buffer of the vehicle had got completely dislocated and fallen to the ground. Negligence of first Defendant is further corroborated by his subsequent conduct in not making a statement to the Police promptly and denying the knowledge about the accident to Police officer who arrested him till he was identified by people who saw him at the scene of accident. Then first Defendant conveniently changed his position as to Good Samaritan! He had valiantly attempted to implicate another person, there after. Subsequent conduct and circumstantial evidence corroborate the only eye witness, hence gross negligence on the part of first Defendant is proved on balance of probability.

FACTS

2. Following Facts were admitted in the pre-trial commence;
 - a. Plaintiff is the Administrator of the estate of Maciu Delai (the Deceased).
 - b. First Defendant was taxi drive of vehicle registration No LT 6512.
 - c. Second Defendant was the registered owner of the vehicle registration No LT 6512.
 - d. On 26.12.2015 the Deceased was found lying at the roadside.
 - e. LT 6512 took the Deceased to hospital.
 - f. Deceased was pronounced dead at hospital, and he was 22 years of age and resided with the parents at the time of death.
3. There is no dispute that Plaintiff is a parent of the Deceased.
4. The Plaintiff called the following witnesses at trial;
 - a) Sisa Volau (Plaintiff)
 - b) Doctor Praneel Kumar had medically assessed the *Deceased*.
 - c) Asena Radinakelo was a witness at the alleged scene of the accident.
 - d) Kelera Rogovinaka was a witness at the alleged scene of the accident.
 - e) Timaleti Naqamu was a witness at the alleged scene of the accident.
 - f) Shane Franklin was a witness at the alleged scene of the accident and also one of the person who had helped convey the *Deceased* to the Hospital.

- g) Sitino is the eyewitness of the accident.
- h) Nitin is the Officer who drew the imaginary sketch plan of the scene of the accident.
- i) Keshwan is the investigating officer.

- 5. First Defendant had filed a joint statement of Defence with second Defendant but at the trial first and second Defendants were represented by separate legal practitioners. First Defendant did not give evidence or call any witness to give evidence.
- 6. Second Defendant gave evidence and confirmed that vehicle bearing registration no LT6512 was owned by him and was assigned to first Defendant to be used as a Taxi for a fixed sum of money in terms of a written agreement, at the material time of this action.
- 7. The facts relating to the nature of relationship between two Defendants were also corroborated by second Defendant's statement to the Police.

ANALYSIS

- 8. In this action first Defendant had denied any knowledge about the fatal accident to investigating police officer but later had changed the position to a Good Samaritan, but elected not to give evidence or adduce evidence for him.
- 9. Second Defendant is the owner of vehicle bearing registration no LT 6512 at all material time to this action. It was a Taxi and there is no dispute that all material time to this action LT 6512 was assigned to first Defendant to be driven as a Taxi for a fixed sum of money.
- 10. The burden is with the Plaintiff to establish that first Defendant was an employee of second Defendant and LT 6512 was involved with the fatal accident of the Deceased. Later was established through direct eye witness of the evidence of PW 7, as well as circumstantial evidence of rest of the witnesses.
- 11. There was no evidence to show vicarious liability of second Defendant. This is discussed later.
- 12. Negligence on the part of first Defendant is proved through excessive speed and huge sound created by collision that corroborate with circumstantial evidence. The sound of collision was massive and had attracted people in neighbourhood. This again shows excessive speed and also not being able to stop immediately after collision, with the deceased. Subsequent conduct of first Defendant and circumstantial evidence also corroborated negligence.

13. The impact was such that front buffer of the vehicle LT 6512 had got dislocated and fallen to ground, indicating extreme speed and force of impact. This also shows the excessive speed of said vehicle and disregard of users of road by first Defendant. It is noteworthy that despite huge sound and impact there were no tyre marks on the road indicating failure to apply breaks by the driver. All together proves gross negligence of the driver of vehicle bearing no LT 6512.
14. The accident happened in early hours on 26.12.2015. There was an eye witness (PW 7) who was driving another Taxi on a hire, on the road at the time of the accident. Vehicle driven by first Defendant had overtaken PW7's vehicle at a speed and had collided with the Deceased who was on the side of the road. The speed of the vehicle was excessive and hence there was no time to apply brakes even after accident, and had fled the scene, but had returned after being identified by PW7.
15. According to him first Defendant had proceeded some distance in front and stopped the vehicle and had asked PW7 to take the victim to hospital. The hirer of PW7's taxi had got scared and refused to take victim in the Taxi to Suva, so he had proceeded with the hire, without taking the victim.
16. Counsel for the first Defendant tries to attack the credibility of PW7's evidence drawing contradictions. Most of the contradictions are immaterial to the motor accident. Contradictions in a statement by a witness, are natural and shows the genuineness of statement. One such immaterial contradiction was whether hirer of the vehicle had to take a flight or boat to leave Labasa at that time, which is not a material contradiction as to this action.
17. PW7's evidence as a whole can be considered as truthful. He is a disinterest person to the outcome of this action, and an independent witness. Credibility of his evidence is high considering overall evidence.
18. PW7's statement to the Police was late, and this can be understood as he was not at the accident scene when Police arrived. He gave evidence in court as to the identity of the vehicle. As there was no dispute as to the vehicle involved in the accident through this witness, it is proved on balance of probability that first Defendant had driven this vehicle at the time of the accident. He also said he had seen the same taxi with same driver several times after the accident, as he was also a Taxi driver who operated in the same area.
19. Apart from that it was also proved by this eye witness that first Defendant had driven it negligently at an excessive speed and hit the Deceased who was a pedestrian at that time and had not stopped at the site of collision but proceeded to front some distance. There

were no marks on the road to show application of brakes. The road was dry, and if breaks were applied there should be marks on the road. No sound of breaks heard. The fact that even after accident proceeding without stopping shows high degree of negligence and attitude of first Defendant specially responsibility towards other users or road.

20. According to the evidence there were no vehicles other than these vehicles, on the road. This can be the reason for excessive speed of LT 6512 and attempt by its driver to flee the scene of accident without reporting. First Defendant was evasive in his conduct in this matter.
21. PW7's evidence is corroborated by other witnesses as to what had happened after the accident. On the evidence of PW7, it is proved that Deceased who was a pedestrian at the time of the accident was hit by vehicle bearing Registration No LT6512 driven by first Defendant in negligent manner without proper lookout of other users of the road.
22. Without prejudice to above witnesses who gave evidence at trial, are analysed below, The evidence except PW7 are all circumstantial, but analysis of them individually and collectively prove on balance of probability that the Deceased was involved with a road accident while he was a pedestrian and the vehicle involved with the accident was LT 6512.
23. Evidence of witnesses are analysed below in the order they gave evidence.

SISA VOLAU (PW1)

24. PW1 gave evidence that on 26.12. 2015 around 5am, he heard a loud sound and he was awoken by this at early hours. This indicate the loudness of the sound in turn proportionate to the huge impact of vehicle with the Deceased. This shows the rash and negligent manner of driving at excessive speed.
25. He had come outside his house to main road, and saw his son lying on the road and instantly knew that he had an accident. He had not seen the road accident but had seen his son and a bumper of a vehicle near the accident.
26. PW1 said that his late son was lifted *and* put in the vehicle which was a Taxi while the taxi driver was searching for front buffer that was lying on the road. He also said the driver of the Taxi wanted to leave quickly, indicating evasive manner of action. The massive impact had dislocated buffer.

27. PW1 saw that the taxi driver was out of the taxi looking for the bumper of his taxi, a girl at the scene pointed out the bumper to the driver. He said that he had stated this to Police but it was not included in his statement.
28. The driver then lifted the bumper and kept it in the luggage compartment of his taxi and took off with the Deceased. The Taxi was orange gas taxi and this same taxi was seen by others who had not only recognized it along with first Defendant on following day when the Police arrested first Defendant and brought to the scene for identification.
29. First Defendant had denied any knowledge about the fatal accident when he was questioned by Police at the point of arrest. First Defendant had changed his position when he was identified by people who saw him on the day of accident. This identification was on the following day of the accident.
30. Shane and Josaia who were the neighbours gathered at the accident scene, carried the Deceased into the taxi and took him to the hospital at the emergency ward PW1 was then taken to the hospital by his relative and at the hospital the Police informed PW1 that his son had passed away.
31. The Deceased was 22 years old and had finished school and started work as a cleaner at a printing company. He used to give money to family and it was approximately \$70 a week. PW1 said it was a casual work hence he stated that deceased was unemployed. Deceased had no disability to be gainfully employed.
32. PW1 and his wife took care of all their expenses associated with funeral. It cost him the sum of \$4,000 for the funeral. PW1 used from his savings and the sum of \$1,500 was withdrawn from his FNPf account. PW1 paid \$400 for the coffin and hearse hire cost was included. PW1 started preparations for the funeral and the body was brought and traditional funeral ceremony was held. PW1 prepared for the two-day function.
33. PW1 instructed his solicitors to lodge Probate Application in the estate of the Deceased which cost him \$1,500 a tax invoice was produced, at trial.
34. During Cross Examination, PW1 stated that he did mention to the Police that he saw the Driver of the orange taxi pick up the bumper and how he put it in the boot of his taxi but he was not aware why the police did not include it in his statement which he gave to Police. This can be accepted as his statement was recorded on 26.12.2015, (P1) soon after tragic incident where he lost his son and his state of mind was not clear to check each and every detail in his statement.

Medical Doctor PRANEEL KUMAR (PW2)

35. He marked P1 which confirmed age of the Deceased and injuries of the Deceased as
- a. Massive Subarchonical Heamorrhage.
 - b. Severe traumatic head injury.
 - c. Multiple traumatic injuries.
36. The above injuries prove massive impact and this was through the road accident through collision of the Deceased by vehicle LT 6512 driven at excessive speed.

ASENA RADINAKELO (PW3)

37. This witness was a neighbour who heard loud sound 26.12. 2015. PW3 went to the scene with another neighbour when she heard a loud sound of vehicle colliding with the Deceased. She reached the footpath and saw someone lying there, she was the first person to arrive at the scene. Her cousin sister came after her, thereafter more people came after that. She had used her light in the phone to see clearly the wounds.
38. PW3 realized that the person lying by the road side was her cousin brother. The incident took place before morning break around 5am. PW3 stated that the accident took place on the road which is beside her house.
39. She saw an Orange Taxi came and stopped , and driver asked PW3 if the Deceased is alive or dead to which PW3 did not reply then the driver asked for them to be fast and get the Deceased into the Taxi quickly. Then the driver lifted the bumper on the road and put it in the luggage compartment of his taxi.
40. This clearly indicate that Driver of the Taxi that stopped had lost its bumper and that was the bumper that was lying nearby. No reasonable person would take a bumper that does not belong to him or his vehicle, in front of a crowd as it should contain the registration number. This indicates that the taxi that took the Deceased had a massive impact and as a result its front buffer was dislocated and lying on the ground, indicating that was the vehicle that was involved with the fatal accident of the Deceased.
41. She stated that the colour of the bumper was black and an Orange taxi came from the opposite side of the road. This corroborate with the evidence of eye witness who said Taxi proceeded to front after the accident and had even asked PW7 to take the victim to hospital. It had taken a turn and come back primarily to collect its lost front bumper and also could not proceed as PW7 had identified the vehicle and also driver.

42. PW3's house is on the same side of the service station. After the Deceased's body was taken to the hospital the police took PW3's statement. The Deceased's body was on the road but his head was near the footpath.

KELERA ROGOVINAKA (PW4)

43. This is the person that accompanied PW 3 hence corroborated her evidence.
44. During Cross Examination, PW4 further stated that the Deceased's house is next to her parent's house. She knows that the Deceased was working at a printing company.
45. A taxi driver came and just asked if the Deceased is still alive or not. The driver then came out of the taxi to take the front buffer of vehicle that had dislocated and fallen to ground and lying near the scene of accident.
46. During Cross Examination, PW4 stated that she recognized the taxi as the gas powered taxi because her granddad had the same kind of taxi with a different colour.

TIMALETI (PW5)

47. This is another neighbour who on 26.12. 2015, heard a loud bang on the road and she and her daughter came to road check what happened.
48. Her daughter called her, so she went outside and saw that the Deceased was lying near the footpath. Her neighbours also came to the scene for help
49. An orange taxi came and the driver asked if the victim was still alive or not. He then looked for a lost front buffer, which was near the body and lifted it and put it in his car trunk, but didn't help in carrying the *Deceased* into the taxi.
50. During Cross Examination, PW5 stated that when the taxi arrived, she saw the taxi making the U-turn from the Pacific Service station. The headlight of the taxi was switched on and the body was beside footpath.

SHANE FRANKLIN (PW6)

51. On 26th December, 2015, PW6 was at home and heard a loud sound and thought, something happened on the road. When he went to check, he saw PW3 and PW4 already present.

52. He saw the deceased lying on the road and the head was near the footpath. He then tried stopping a vehicle to take the victim to the hospital, thereafter he saw a taxi turned around and reached the scene.
53. He and his brother took the Deceased in the taxi while the driver was outside. The driver entered the taxi and they went straight to the hospital which took almost thirty minutes.
54. During their journey to the hospital they never spoke to the driver. Whilst he was seated in the taxi he noticed that the cover of the compartment on the dash board was damaged which was lying on the floor.
55. As they reached the hospital, he tried calling a doctor or a nurse, a security then came and brought a stretcher then they put the *Deceased* on the stretcher and by then the driver had taken off without saying a word before leaving.
56. This subsequent behaviour is very unusual of an innocent person who was brought a victim to the hospital. There was positive identification of first Defendant by the witnesses who gathered to the scene and this fact is later admitted by first Defendant to the Police. So subsequent conduct of the first Defendant left an explanation as to the strange behaviour of first Defendant. This is lacking as he did not give evidence.

SITINO RATUNIMATARI (PW7)

57. PW7 who is an eye witness to the fatal accident was at Laucala Beach, returning from Nadera and taking a passenger on 26.12.2015 morning.
58. On his way to Suva a taxi overtook him and hit a pedestrian. The accident took place near Total Service station. PW7 was on the side lane when he was passed by the driver of the Taxi registration No. LT 6512.
59. After the accident hitting the pedestrian who was standing beside the road. The driver did not stop the vehicle immediately as required by law and proceeded some distance and stopping near the service station got out of the taxi and stopped. Once PW7 stopped his vehicle, the driver asked PW7 to take the injured to the hospital but PW7 informed him that he had passengers who have a flight to catch to Labasa. PW7 noticed that the driver's vehicle was empty and asked the driver to take the injured to the hospital.
60. Considering the above facts the accident had happened around 5-6 am and not at dawn as written on the statement of PW7. The time of the accident was not at 3am, but this is not a reason to disbelieve his evidence.

61. He was almost one hundred meter behind from the other taxi during the impact. PW7 saw the driver of the vehicle who hit the pedestrian.
62. During Cross Examination, PW7 said that he has driving been since 2012. He give his statement to the police three years after the accident because the Police did not ask for his statement earlier. He also said since both first Defendant and himself were taxi drivers at the time of accident he had met first Defendant more than once and they operate in the same area. So his recollection about the driver of fatal accident was refreshed through those subsequent meetings.
63. PW7's evidence regarding Vehicle Registration Number can be accepted. After the accident PW7 saw the driver driving the same taxi than he got to know the taxi number. This shows the truthfulness of PW7 who did not lie to state that he wrote it or memorized it when he talked to first Defendant soon after the accident.
64. He required few months to recall the taxi number. He also again saw the same vehicle parked at the market stand. He was standing beside his car whereas the other driver was sitting in his car.
65. The police didn't read the statement back to him once recorded. PW7 still can recognize the taxi driver if he gets to see him again. He only had two minutes conversation with the driver at the accident scene.

NITIN CHAND (PW8)

66. 26.12.2015 he was based at Valelevu Station and was on duty from 25.12.2015 when he received information about the accident. He reached the scene and drew the imaginary sketch plan. Imaginary sketch plan is drawn when vehicles are not present on the accident scene, in this case the victim was taken to hospital and was also pronounced dead at hospital.

KESHWAN KRISHNA (PW 9)

67. He stated that he worked as traffic and criminal investigator. In 2015 PW9 was based at Valelevu branch as a traffic investigator. PW9 reported to work at 6:30am on 27.12.2015 and was given instructions to investigate a case of a hit and run. He received instructions to locate a vehicle which caused an accident.
68. After 3pm on the 27.12.2015 PW9 was driving from Khalsa road and was stopped at the junction on the red light where he spotted an orange taxi, he saw description matched the driver of the alleged hit and run. PW9 switched on the emergency light

immediately and went in pursuit of the taxi. This Taxi was suspected due to behaviour of its driver when he saw them.

69. The Taxi was told to pull over his taxi registration number LT6512. PW9 got off the vehicle and walked towards the driver whose descriptions matched the description which the witnesses had provided about the taxi driver who conveyed the Deceased to the Police Station.
70. PW9 noticed that there were damages to the Vehicle that matched with the damages from the impact of fatal accident. The left head light was damaged, the windscreen had cracks, recent painting was done partly covering the white lines on both sides of the taxi and foremost there were cracks on the buffer of the Vehicle and it was not fixed as normally it should be and was tied with a binding wire. The front left mud flap was not fixed properly.
71. It is not clear whether all the damages described by witness in P8 were a result of the fatal accident that killed the Deceased or not. First Defendant's counsel in the submission tried to highlight these but that is not material as the damage described by eye witness and others who had gathered after the accident had described dislocated buffer and this matched with the vehicle.
72. More than this behaviour of first Defendant and denying driving 26.12.2015 morning till he was identified proves his involvement and vehicle on balance of probability. Apart from that he had admitted taking the victim to hospital in his statement to Police.
73. The front left fender had fresh paint sprayed which covered the white strips. The colour of the bumper was black.
74. The driver was tall fair and medium build and his name was Sailosi Baleisuva (first Defendant). While questioning the driver, PW9 saw a lady sitting in the taxi sitting on the front seat. PW9 asked the first Defendant if she was a passenger or hirer and was informed that she was the wife of the driver.
75. PW9 then proceeded to question the driver whether he was driving on 26.12.2015 at around 5 am, to which first Defendant responded that he did not drive and he was home. Upon being question the Defendant looked pale and uneasy. This behaviour is explained later in the analysis.
76. The wife of first Defendant who was inside the vehicle at the time of questioning promptly replied, on behalf of first Defendant and said that, he was at home from

- 7pm on the 25.12.2015 till next morning of 26.12.2015 and did not leave house. Admittedly this is not correct and there was no reason to state incorrect fact to a Police officer without a reason to hide his whereabouts. The reason was to conceal the truth and specifically the fatal accident had first Defendant's culpability in that.
77. If first Defendant had helped to take victim why should he and his wife both state incorrect things to Police officer.
 78. PW9 had asked the first Defendant if he was aware about any fatal accident along Ratu Dovi Road to which he had replied negative. This was again incorrect and this position was changed when he was positively identified by people who gathered at the scene of accident when he was taken to the scene of accident on 27.12.2015.
 79. PW9 had asked first Defendant, whether he conveyed any accident victim to CWM hospital on 26.12.2015 at 5.30hrs to 0600hrs to which he had answered negative. PW9 had then told first Defendant about the witnesses of fatal accident, who has given description of the person and the vehicle used to convey the Deceased to the Hospital.
 80. First Defendant was also told that description of witnesses matched his description and also of his vehicle's description .After these findings PW9 told the first Defendant that they have reasonable grounds to suspect he was involved in a hit and run incident on the morning of 26.12.2020 thus he would be taken to the accident scene for identification.
 81. As they reached the scene of the accident, neighbours of the Deceased were at the footpath and PW6 informed the police officers that the first Defendant was the same driver who picked the bumper from the accident scene and put it in his luggage compartment and took the Deceased to the hospital and fled at hospital , the previous day.
 82. After he was identified by more than one witnesses first Defendant started to panic and had changed his position. He then had said he only helped in taking the Deceased to CWM hospital. This is contradictory to his earlier position which was also contradictory to position of his wife.
 83. Then he changed his position further and stated that PW7's vehicle was the one that hit the Deceased. This shows how he changed his position within few hours of his identification. His subsequent behaviour proves that he was driving the vehicle that involved with fatal accident. How could a person who knew nothing about a fatal accident

suddenly become the person who take victim to hospital and also became aware of the person who drove the vehicle that caused accident.

84. During Cross Examination by the 1st Defendant's Counsel, PW9 stated that he has tried to fit the bumper of a Toyota Crown and it does fit into the boot of the Vehicle as the boot of the Vehicle is quite big. There was no evidence that it fitted and boot was closed before proceeding to hospital with the victim. These questions were not asked from the witnesses who took the Deceased to hospital. So it is not clear whether luggage compartment was open when buffer was transported in that with the Diseased.
85. During Cross Examination, PW9 stated that the first Defendant was charged for Dangerous driving causing Death and the criminal action is still pending in court.
86. PW9 also stated that first Defendant looked pale and sweating after he was positively identified by witnesses.

JOHN JITENDRA PRATAP (Second Defendant)

87. Second Defendant confirmed that he is the owner of Vehicle Registration No. LT 6512 which was being driven by first Defendant during material time of this action. It was assigned to first Defendant on the agreement that it will be used as a Taxi and a fixed amount is paid for a time period.
88. He stated that he was informed about the accident and he went to Police station and upon inspection, Vehicle Registration No. LT 6512, the buffer was not fixed tightly as in a normal vehicle. He admitted that he told the Police, which has been recorded in his statement that the damages on the front bumper was new and there is glue to patch it up. This corroborates with the type of collision and it was a fresh one.
89. His statement to the Police indicated that he had assigned LT 6512 to first Defendant for a fixed sum of money for a period, which is not an employment but an independent contractor.
90. So the existence of written contract is not necessary to prove engagement of independent contractor. Though he produced such a document at hearing, when he was asked why he did not disclose such a document he stated that he was not asked about such a document. It is noted that till the hearing one solicitor had appeared to both Defendants.
91. There is no need to have a written agreement when the facts and circumstances show that there was such a relationship. Second Defendant had stated in his statement to the Police the terms of his

92. When taken as whole it is proven on balance of probability that the fatal accident to the Deceased was caused by LT 6512 driven negligently and rash manner by first Defendant.
93. Due to the impact of the collision the Vehicle Registration No LT 6512 which was being driven by the first Defendant was damaged due to which the black bumper of the Vehicle came off which he did not notice at that instance and proceeded to front but being noticed that PW7 had noticed the accident had turned back to scene of accident.
94. As the front buffer was fallen he could not proceed as it contains registration number.
95. The impact of the collision was due to the fact the first Defendant was speeding and he was no control of vehicle at the time of accident to stop the vehicle on the spot of the collision. There was no attempt to do so as there were no tyre marks on the road.
96. PW9 saw that there were damages to the bumper of the Vehicle and also that the first Defendant was changing his position and uneasy while being questioned. He was sweating and looked pale upon being questioned by PW9. Initially first Defendant had denied that he had any knowledge about the fatal accident on the previous day, but this changed when he was identified.
97. First Defendant later stated to PW9 that he saw another vehicle colliding with the Deceased the day before. When he was asked the color of the said vehicle he told different colors to each of the Police Officers.
98. The issue before the court is whether there was negligence on the part of first Defendant. From the evidence it is clear that he had driven the vehicle at excessive speed without proper look out for other users specially pedestrians on the road.
99. As first Defendant had not adduced any evidence to prove contributory negligence on the balance of probability it is proved that first Defendant was negligent and even after accident had proceeded without stopping indicating excessive speed and also evasive nature which amounts to negligence on the part of first Defendant.

Is the Second Defendant vicariously liable for the actions of the First Defendant?

100. 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.

101. Lady Hale 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 agreeing) 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)
102. Presently the 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)
103. 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).
104. 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)*

105. Singapore Court of Appeal in Ng Huat Seng v Mohammad [2017] SGCA 58, 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.
106. The above is more applicable when such relationships are usually considered as independent contractors. Consistency in business relationship is another factor to favour widely accepted engagements of persons for money.
107. 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.”

108. Fiji Supreme Court Case of *Hassan v Transport Workers Union* [2006] FJSC 11; CBV0006U.2005S (19 October 2006) has considered engagement drivers by providing a vehicle for a fixed sum of money for a period as independent contractor.
109. *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.
110. 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 from the available evidence.
111. As first Defendant did not give evidence the evidence of second Defendant is the only evidence relating to relationship which is corroborated by his statement to the Police when he was asked to come to Police for investigations relating to LT6512.
112. In the said statement as well as in his evidence stated that first Defendant was free to use LT 6512 for hire in terms of the licence issued to be used as a Taxi, and Fiji Supreme Court in *Hassan* (supra) classified such relationship as independent contractors.
113. *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)

114. First Defendant was not paid any salary or wages or FNPf He only pays fixed sum to the second Defendant, irrespective whether he earned more or less. He is free to use the vehicle on days convenient to the Driver and earn more or less than the specified sum.
115. 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.
116. *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.
117. 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. This can be applied to the relationship between first and second Defendants.
118. 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)

119. In my judgment having considered the evidence of second Defendant and his statement to the Police and other evidence, first Defendant is an independent contractor in terms of the contract between first and second Defendants. Hence no vicarious liability establish. So claim against second Defendant fails. Accordingly the claim against second Defendant is struck off.
120. So the liability for damages is restricted to first Defendant.

Assessment of Damages

121. Plaintiff is suing the Defendants in his capacity as the Administrator of the Deceased's Estate for the benefit of the Estate and also for the benefit of herself and the beneficiaries of the Estate. The claim is in terms of Law Reform (Miscellaneous Provisions) (Death & Interest) Act 1935. Section 4 of Compensation to Relatives Act 1920 allows a parent to institute an action for damages.

Special Damages

Funeral Expenses

The Plaintiff claims the sum of \$4,000 for funeral expenses. This is a reasonable expense considering the circumstances.

Letter of Administration & Post Mortem Report Costs

122. Plaintiff claims legal costs in the sum of \$1,500 in order to make application for Grant of Letters of Administration and also incurred the sum of \$57.50 being cost for the post mortem reports thus is claiming the said sums. For obtaining letters of administration Tax invoice of law firm is included for \$1500.22. So claim for \$1500.00 and \$57.50, granted.

123. Accordingly a total of \$5557.50.

Damages under the Compensation to Relatives Act

124. The action is based upon financial loss and this is described as lost years. This was held in Fiji Court of Appeal case in Daya Ram v. Peni Cara & ors 29 FLR 147, 1983

125. Section 3 of the Compensation to Relatives Act 1920, states:

"3. Where the death of a person is caused by wrongful act, neglect or default, and the act, neglect or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, the person or persons or body of persons, incorporated or unincorporated, who would have been liable if death had not ensued shall be liable to an action for damages notwithstanding the death of the person injured, and although the death was caused under such circumstances as to amount in law to a crime."

126. In *Ram v Cara* [1983] FJLawRp 14 ; [1983] 29 FLR 147 (28 March 1983), the Court of Appeal said:

"We turn now to the larger item namely loss of earnings for what are described as "the lost years". It is essential to remember throughout one's consideration of this topic the basis upon which such an award is made. It is not an award to dependants for the loss of support which they would have been entitled to expect had there not been the death of the breadwinner.

Such claims are brought in Fiji under the Compensation to Relatives Act (Cap. 29). In such cases, in this and other jurisdictions, such a claim is calculated by examining the amount of money which dependent relatives had been receiving in the past for their support and which they might legitimately have expected to have received in the future provided the deceased had had the means to make such payments and could have been expected to continue making them.

This was a purely mathematical calculation of how much he would have been worth in money terms to his dependants for whatever was the expected period of dependency...

Accordingly **the claim on behalf of a deceased estate for loss of earnings for lost years is now firmly established as on the same footing as the same claim by a living person**, subject to the reservation as to deduction of personal living expenses. Authorities relied upon before this Court were *Pickett v. British Rail Engineering Ltd.* (1980) AC 136; *Gammell v. Wilson* (1980) 2 All ER 557 (CA.) and (1981) 1 All ER 578 (H..L.) and *White & Anor. v. London Transport Executive* (1982) 1 All ER 410, and are not the subject of challenge. (Emphasis in bold provided)."

In *Sigavolavola v Mati* [1986] FJCA 14; Civil Appeal No 85 of 1985 (21 March 1986), the Court of Appeal held:

"In the present case we have a healthy man of 30 who neither drank nor smoked and was obviously a hard worker with many fruitful years ahead of him. Kearsley J. concluded that the Respondent's prospects of remarriage were not bright and that she seemed in good health. There are of course other factors to be taken into account in determining the multiplier. But there has been no suggestion that there is any particular factor which would justify treating this case as outside the norm. The decided cases show that a **multiplier** of 16 is commonly used in cases where a deceased was in his 20's and in Halsbuty 4th Edition Vol. 12 at para. 1156 is the observation that: -

"For a plaintiff in his thirties having a normal expectation of working life a multiplier of 14 or 15 has often been taken."

In our opinion a multiplier of 14, 15 or 16 could have been used in the present case. It follows that we are not satisfied that the Trial Judge erred"(emphasis added)

127. The Plaintiff being the father said that the Deceased was giving the Plaintiff's wife a fixed sum of \$70.00 per week from his pay which was used for the house hold expenses or to pay bills. Deceased was unmarried and stayed with parents. Considering that Deceased was a casual worker a sum of \$50 is considered as his weekly contribution to family.
128. The Deceased died at the age of 22 years where he had at least 33 years more to work as cleaner or any other occupation for a higher wages. He could have continued working till the age of 55. However he may get married and give lesser sum or more to his parents. These are uncertain in future so considering a multiplier of 18 is suitable.
129. \$50.00 week loss to family x 52 weeks = \$2,600.00 x multiplier of 18 years =\$46,800.00.

Damages under Damages under the Law Reform (Miscellaneous Provisions) (Death and Interest), Act, Cap 27.

A sum of \$2,500.00 under this.

Interest

3% p.a interest for special damages from the date of incident to date of judgment.
6%p.a. interest is granted to general damages.

Calculation

Quantum

Damages under the Compensation to Relatives Act \$46,800.00

(no interest added to this award as this is a future loss approximation to present value using the relevant multiplier)

Damages under the Law Reform (Miscellaneous Provisions) (Death and Interest), Act, Cap 27.

Damages (General) \$2,500.

For \$2,500.00 interest of 6% from date of writ 23.6.2017 to 20.10.2022. (five years and 102 days) $\$750.00 + 41.92 = \791.92 .

General Damages with interest $\$2,500 + 791.92 = \$3,291.92$.

Special Damages

Special damages \$5,557.50.

\$5,557.50 Interest at 3% from 26.12.2015 to 20.10.2022 (seven years and 288 days) \$1,298.63.

Special damages including interest \$6,856.13.

Total Damages \$56,948.05.

CONCLUSION

Cost of this action is summarily assessed at \$5000 to be paid by first Defendant to Plaintiff. Claim against second Defendant is struck off. First Defendant is ordered to pay damages amounting \$56,948.05 to Plaintiff.

Dated at Suva this 27th day of October, 2022.



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Justice Deepthi Amaratunga
High Court, Suva