

**IN THE MAGISTRATES COURT  
OF THE REPUBLIC OF VANUATU**  
*(Civil Jurisdiction)*

**Civil  
Case No. 16/3728 MC/CIVL**

**BETWEEN: PETER NALIU**

Claimant

Claimant's Lawyer:

Pauline Malites of PUBLIC SOLICITOR  
LAWYERS  
Port Vila, Efate  
Republic of Vanuatu

**AND: LEE SANG YEOL**

First Defendant

First Defendant's Lawyer:

James Tari of JAMES TARI LAWYERS  
Port Vila, Efate  
Republic of Vanuatu

**AND: AMOS KALIS**

Second Defendant

Of Efate Area

**AND: TERRY PETSY**

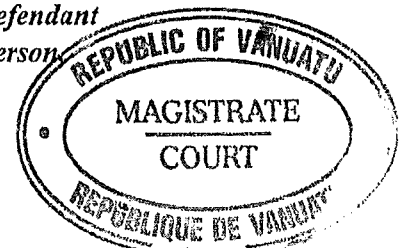
Third Defendant

Of Efate Area

***Before:*** *SM M Peter*

***In Attendance:*** *Ms. Pauline Malites for the Claimant.  
Mr. James Tari for the First Defendant  
Second Defendant appear in Person*

***Copy:*** *Parties*



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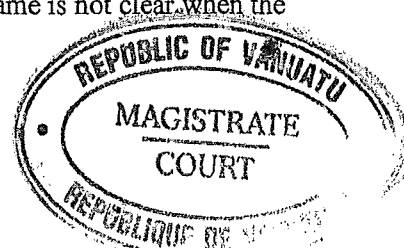
## JUDGMENT

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1. Claimant filed proceedings against the defendants seeking damages from negligent driving and vicarious liability.

### **Background**

2. Claimant owns and operated a bus service business up to a stage where he encountered mechanical issues requiring fixing by a mechanic. He then visited the First Defendant's garage at Salili Road and had new parts fitted at cost of VT 13,000.
3. He took his bus away but it appeared the mechanical problem remained unfixed so he return with his bus on 13<sup>th</sup> June 2016 for further inspection and repair.
4. At the garage, the claimant discussed the defect with the Second Defendant who is the First Defendant's chief mechanic and he undertook a test drive on the claimant's bus to identify the defect and recommend repairs. Upon driving off the garage he took the direction towards Salili Area and along the way he collided onto the rear of a Tico car.
5. The First Defendant said as he was following a Tico car and suddenly another vehicle (mini bus) driven by another person (third defendant) swerved away from his right of way towards Port Vila and head towards the Tico car on the left side of the road. The Tico car had to apply full brake to avoid collision and at that same time he tried to apply his brakes also but was too late.
6. Before the Police arrive the First Defendant drove the claimant's bus off the scene and returned to the garage.
7. The claimant's bus sustained damages from the accident particularly the front bumper panel and its bracket, Right signal, headlamp and right corner panel.
8. The claimant had asked the first and second Defendant to fix the damage but they refused.
9. Another letter was send to First and Second Defendant by claimant's counsel and yet they refused to fix the damage.
10. The Third defendant on the other hand had admitted liability because he caused the accident but he failed to pay claimant the damages as promised. Before trial, the claimant applied to remove third defendant and to which the court granted his application.
11. The claimant asked to withdraw the case against the third defendant because he could not be located and that his address and name is not clear when the claim was filed.



### Admitted Facts

12. All parties admitted that
- Claimant is legal owner of service bus Registration no.13341.
  - Second Defendant is employed as chief mechanic for the First Defendant.
  - Claimant delivered his bus to the First Defendant's garage on 6<sup>th</sup> of June 2016 and
  - Had parts fitted at amount of VT 13,000.
  - Second Defendant undertook test drive on claimant's vehicle and during the course thereof he collided onto rear of a Tico car causing damage on the claimant's bus.
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### Issues

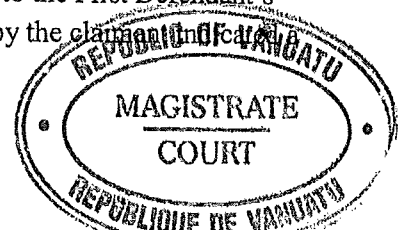
- 1) *Whether the Second Defendant is negligent when test driving the claimant's bus?*
- 2) *Whether the First Defendant is vicariously liable for the Second Defendant's negligent driving?*

### The law

13. Claimant pleaded negligence on the part of the second defendant resulting in the damage of his bus. Negligence has two meaning in law. First, it may signify the attitude of the mind of a party committing the tort, that is to say mental inadvertence or carelessness. Secondly, it can be an independent tort resulting from a breach of a specific duty. For this reason, there are three elements to negligence that must be proven for liability to stand. 1) is the duty of care 2) that that duty of care was breach resulting in 3) damages.

### Apply law to the facts

14. It transpires in the evidence adduced by Second Defendant that he had obtained instructions from the First Defendant to check the claimant's bus for the reported defect. Besides clarity in evidence of their family relationships, it is stated in evidence of the First Defendant that the claimant did purchased his bus from another Korean company but has used their service for repairs several times.
15. The recent repair done by First Defendant was on 6<sup>th</sup> June 2016 when the claimant's bus was fitted with new left lower arm and left stabilizer link. Despite these repairs there appear to be defects in the bus particularly a noise coming from under the bus.
16. This prompted the claimant to bring the bus back to the First Defendant's garage on 13<sup>th</sup> June 2016 for fixing. This pursuits by the claimant on 13<sup>th</sup> June 2016 for fixing.



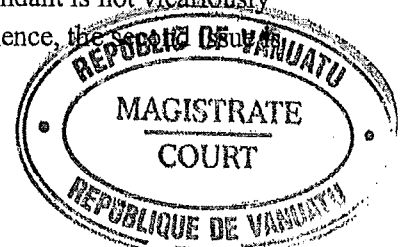
relationship established with the First Defendant Company for fixing of mechanical problems he had with his bus.

17. As he entered the garage he briefly discussed the problem with the Second Defendant who is the Chief Mechanic at the First Defendant's garage, he opted for a test drive to actually diagnose the defect and recommend its repair.
18. The Second Defendant upon driving off the garage has a duty of care towards other road users and also towards himself and the bus he is driving. In the circumstances, the claimant is closely and directly affected by Second defendant's failure to pay due attention and care to his driving when he was undertaking test drive on the claimant's bus.
19. The Second defendant deposed in evidence that he had to escape the scene before the police arrive because he did not want to expose his company from any liability.
20. Obviously, the Second defendant was driving too close to the other vehicle that was ahead. Had he maintained some distance away from the vehicle ahead of him, he could have possibly avoided the collision.
21. I therefore form the firm view that the second defendant is negligent in his driving causing the collision that resulted in the claimant's bus sustaining damages. I therefore answer the first issue in the affirmative.
22. In respect to the question of liability as to whether vicarious liability fall squarely on the First Defendant company who is the employer of the second defendant, it is clear in evidence that the claimant brought his bus back to the First defendant company several days after the previous visit on 6<sup>th</sup> June 2016. It appears the claimant was quoted with prices for several parts that need replacement. The parts that needed to be replaced are right and left lower arm and stabilizer link. The claimant then paid for left lower arm and stabilizer link only but the right lower arm remain unfixed. On 12<sup>th</sup> June 2016, the claimant brought his bus back to the first defendant company complaining about a noise that is coming from under the bus. The first defendant knew the noise is coming from the right lower arm that is yet to be replaced.
23. On the invoice issued by the First Defendant which was recorded in evidence as exhibit FD1, it shows that the claimant had gone again and pay for the right lower arm and a lower arm bolt on 12<sup>th</sup> July 2016. This confirms that the right lower arm remained unfixed and may have been the result of what appears to the claimant to be a defect.
24. From the evidence of the claimant, he said he spoke with the First Defendant first and she authorized the job which was carried out by the



defendant. However when he brought his bus to the garage again on 13<sup>th</sup> June 2016, he clearly did not follow the same procedure of 6<sup>th</sup> June 2016. He said when he went into the garage, the second defendant was already at work, he spoke to him about the defect and to which he drove the bus away for a test drive.


25. The evidence of the first defendant that they have working procedures that are highly emphasized and implemented to ensure all works done are authorized by the office persuades me.
26. They have regular morning meetings with their employees and these procedures are always addressed to the employees.
27. It is also a policy of the company that all vehicles checks are done internally whereby the vehicle is elevated on the electric lifter. No mechanic is permitted to test drive a vehicle that is brought into the garage for fixing.
28. In the case of Temar v Government of the Republic of Vanuatu [2005] VUCA 30; [2006] 2 LRC 33, the court followed the persuasive authority of Racz v Home Office [1994] 1 All ER 97, where the following test was posed “... *if the unauthorized act and wrongful act of the servant is not so connected with the authorized act as to be a mode of doing it, but is an independent act, the master is not responsible: for in such cases a servant is not acting in the course of his employment but has gone outside it...*”
29. It transpire in evidence that the claimant took his bus to the garage when the company has not commence business and without the authorization of the company, the second defendant took the bus away for test drive, an act which is in breach of the company procedures and policies.
30. The claimant confirm in evidence that he is related to the second defendant and it may have flowed from that relationship that such arrangements are made outside the scope of the working procedures.
31. The third defendant who was removed as party in the subsequent proceedings before trial hearing admitted liability as he swerved to the right of way of the tico car resulted in tico hitting his brake hard followed by the second defendant who tried to avoid collision to his detriment.
32. While the second defendant would be in a financial position to meet any cost incurred from the action, yet it will be unfair to impose such liability on action of the employee where such act is against the working protocols and procedures of the company.
33. I therefore form the firm view that the second defendant is not vicariously liable for the damages sustained by the claimant; hence, the second defendant answered in the negative.



- 34. It flows from the findings that the second defendant is personally liable for the damages caused in his act of negligent driving.
- 35. He is ordered to pay claimant VT 208, 125 for specific damages, punitive damages and cost.

**DATED at Port Vila this 8<sup>th</sup> day of October 2019**

**BY THE COURT**

  
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**MOSES FETER**  
Senior Magistrate

