IN THE COURT OF APPEAL, FIJI
[On Appeal from the High Court]

CIVIL APPEAL NO. ABU 053 OF 2023
[In the High Court at Lautoka Civil Action No, HBC 18 of 2014)

BETWEEN : **LAND TRANSPORT AUTHORITY** a statutory authority established under the Land Transport Act 1998 having its registered office at Lot 1 Daniva Road, Valelevu, Nasinu.

Appellant
(Original First Defendant)

AND : **PRAVEEN KRISHNA NAICKER** of Navoli, Ba, unemployed.

1st Respondent
(Original Plaintiff)

: **LEONI KACISAU** of Lot 63, Nasevou Street, Lami, LTA Officer.

2nd Respondent
(Original Second Defendant)

Coram : **Prematilaka, RJA**
Morgan, JA
Heath, JA

Counsel : **Ms. N. Prasad and Mr. V. Chand for the Appellant**
Mr. R. P. Chaudhary for the 1st Respondent
2nd Respondent - absent and unrepresented

Date of Hearing : **08 July 2024**

Date of Judgment : **26 July 2024**

JUDGMENT

Prematilaka, RJA

[1] This is an appeal against the Ruling of the High Court delivered on 28 April 2023[1] which *inter alia* found the appellant ('LTA') to be vicariously liable to pay damages to the first

[1] ***Naicker v Land Transport Authority*** [2023] FJHC 330; HBC18.2014 (28 April 2023)

respondent ('Naicker') on account of the tortious act committed by the second respondent ('Kacisau'). At the outset, based on the Supreme Court decision in ***Jivaratnam v Prasad*** [2023] FJSC 11; CBV0005.2020 (28 April 2023) and many other previous decisions, I determine that this is a final appeal and not an interlocutory appeal requiring leave to appeal and accordingly proceed to consider the merits of the appeal, as the liability for the first respondent's personal injury on the appellant and second respondent was finally determined with only the damages yet to be assessed, which means that the impugned Ruling of the substantive action is final on the vicarious liability of the appellant.

Factual matrix

[2] On 27 July 2013, Kacisau, whilst being employed by the appellant was driving vehicle bearing registration no. FA 187 belonging to the appellant along Queen's Road and he was heading towards Lautoka when he bumped into Naicker at Waimalika who was crossing the road and as a result Naicker sustained injuries.

[3] Upon his plea of guilty, Kacisau was convicted of the following offences under the Land Transport Act Cap 35 of 1998 by the Magistrates' Court in Nadi in Traffic Case No. 5763 of 2013 on 13 March 2014:

> ***COUNT 1*** – *driving a 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.*
>
> ***COUNT 2*** – *dangerous driving occasioning grievous bodily harm pursuant to section 97(4)(a)(b)(8) and section 114 of the Act.*

[4] Kacisau had admitted in the said court proceedings that he had 52 micrograms of alcohol per 100 milliliters of breath which was equal to 114.4 milligrams of alcohol per 100 milliliters of blood. The prescribed concentration of alcohol present in blood for the purpose of section 103 (1) (a) of the Land Transport Act in Fiji in terms of Land Transport (Breath Tests and Analysis) Regulations 2000 is 80 milligrams of alcohol per 100 milliliters of blood. According to his record of interview to the police, Kacisau had consumed liquor from around 11.00pm on the previous day till around 02.00am on the

day of the incident and the accident had happened around 8.50am. He had also admitted in his police interview that he was driving at about 90 km/h at the time of the accident as he was rushing to Lautoka to conduct the exam. The Open Country maximum speed limit of the place of the accident was 80km/h.

[5] Naicker had instituted proceedings against the LTA and Kacisau by way of a writ of summons filed on 14 February 2014 wherein the former had claimed damages for personal injuries occasioned by the motor vehicle accident caused by the alleged negligence on the part of Kacisau who was at the material time an employee of the LTA, the registered owner of the vehicle.

[6] Naicker had subsequently filed an amended statement of claim on 18 November 2016 seeking, among other things, special damages in the form of medical and travel expenses in a sum of $704.00, loss of earnings in a sum of $12,957.50 and general damages for pain and suffering. LTA had filed its amended statement of defense on 23 January 2017.

[7] An interlocutory judgment had been entered against Kacisau on 06 March 2018 as he indicated to court that he would not be contesting Naicker's claim.

[8] The matter had proceeded to hearing on 31 August 2022 on the question of vicarious liability of the LTA and the learned High Court judge had delivered the impugned ruling on 28 April 2023 wherein he (i) found the LTA to be vicariously liable to pay damages to Naicker on account of the tortious act committed by Kacisau, (ii) ordered a hearing for the assessment of damages, if the quantum is not agreed upon between the parties and (iii) reserved the order on costs.

<u>Grounds of appeal</u>

[9] The LTA being aggrieved by the decision of the High Court has urged the following grounds of appeals before the Full Court.

> *(i) THAT the Learned Judge erred in law in holding that the Appellant was not absolved from liability considering that the Second Respondent at the material time of the incident had been driving under the influence of alcohol and at high speed of 90 km/h considering the fact that this particular action was not*

endorsed by the Appellant and was committed by the Second Respondent at a frolic of its own and the evidence in the case feel short of establishing an authority or an implied authority or a close connection for the Second Respondent to have taken such illegal action where none was needed and the incident being so spontaneous could not have been avoided with any amount of supervision by the Appellant and therefore to sheet home vicarious liability in the said matter would be extending the boundaries of such liability too far under the common law.

(ii) THAT the Learned Judge erred in law and in fact when it concluded that the Second Respondent actions of driving the Appellant's official vehicle under the influence of alcohol causing the material accident had been punished for by virtue of his guilty plea in the Magistrate's Court in Nadi and therefore would not form a ground for the Appellant to be absolved form liability as a result of said action.

(iii) THAT the Learned Judge erred in law and in fact in holding that the Second Respondent did not engage in any unauthorized or illegal activity and did not derail from his given task that would require the High Court to ponder on the issue of close connection test when it is undisputed that the Appellant had not given any authorization or endorsement for the Second Respondent to engage in the illegal activity by driving under the influence of alcohol whilst in control of the LTA official vehicle.

(iv) THAT the Learned Judge erred in law by failing to take into dire consideration that the Appellant was caught by ambush when the First Respondent called upon witness to testify on the day of the Hearing when no such prior notice was given to the Appellant and therefore the opportunity to present oral evidence by calling of witnesses to stand on the day of the Hearing to further the Appellant's case and rebut the oral evidence of the Plaintiff's witness taking into paramount importance that the Appellant denied the assertions that the Second Respondent was authorized to drive under the influence of alcohol was a deprivation of the right to a fair trial as enshrined in the 2013 Fijian Constitution which in itself is a miscarriage of justice and in denial of natural justice.

01st (and 03rd) grounds of appeal

[10] Under the first ground of appeal the LTA argues that that the learned trial judge erred when he failed to consider that there was no vicarious liability attributable to the LTA for the actions of Kacisau. LTA relies primarily on ***CCIG Investments Pty Ltd v Schokman*** [2023] HCA 21 (2 August 2023) and ***Purton v. Marriott International*** [2013] 218 Cal. App. 4th 499 in support of its argument. ***Purton*** had not been cited in the High Court Judge by the LTA and ***CCIG Investments*** had not been delivered by the High Court of

Australia then. ***Purton*** is a decision of the Court of Appeal, Fourth Appellate District Division One State of California. In response, Naicker relies on ***Colonial Mutual Life Assurance v Attorney General*** (1974) FLR 102; [1974] FJLawRp 24, ***Canadian Pacific Railway Co v Lockhart*** (1942) AC 591 and ***Attorney General of Fiji v Singh*** [2015] FJCA 161; ABU69.2007 (3 December 2015) in support of the ruling being challenged.

[11] Before arguing the appeal based on the principles derived in ***CCIG Investments*** and ***Purton***, the LTA has also submitted that Kacisau was not required to work on the day in question and did not indicate in his caution interview that he was on his way to work, only mentioning he was going to conduct an exam without specifying where and, according to his employment contract, his fixed working hours did not include Saturdays, the day of the incident, and no evidence contradicted this position. The gist of the LTA argument is that Kacisau was not acting in the course of his employment with LTA. For convenience, I shall first deal with this factual contention.

[12] Kacisau has said in his record of interview made on the day of the accident that when the accident happened he was going to Lautoka from Nadi and he was rushing to Lautoka to conduct an exam. In his oral evidence before court, he has said that he started his journey in the self-driven car provided by the LTA (admittedly as part of his employment package – see paragraph 6 LTA Human Recourse Manager's (HRM) affidavit in October 2015) on the previous day from Suva, stayed in a hotel in Nadi at LTA's expense and was on his was way to LTA Lautoka office to conduct driving examiners' written examination at or around 9.00am carrying examination papers with him. Kacisau was cross-examined as to whether he could produce any documentary proof of those matters and his reply was that all the documents were with the LTA. The accident happened on 27 July 2013 and Kacisau had been taken away from the scene of the accident to Namaka police station and cautioned-interviewed on the same day from 7.00pm to 8.52pm. He had been suspended from employment with effect from 29 July 2013, directed to handover all LTA properties and prohibited from entering LTA premises. He was giving evidence on 31 August 2022 and one cannot reasonably expect him to have documentary proof of any of the matters deposed to by him on that day whereas LTA may have still had them in its possession. No application was made by the LTA's trial counsel for an adjournment of the trial to take Kacisau's evidence or at least to cross-examine him using

the relevant documents on another day after listening to his evidence; neither was there any application to call any evidence in rebuttal after the conclusion of Kacisau's evidence to challenge him on material points. On the other hand, the suspension memo does not speak to Kacisau having undertaken any unauthorised journey to Lautoka from Suva during 26-27 July and the suspension was based ***only*** on driving the vehicle 'under the influence of liquor' and 'bumping into a pedestrian'. The gist of Kacisau's evidence was already there in his record of interview, albeit not in all details, and the LTA was well aware of the contents of the cautioned interview submitted to court through LTA HRM's affidavit in October 2015 *i.e.* more than 07 years before Kacisau's evidence in court and also via the affidavit by Semi Tuinaceva on behalf of the LTA as part of his affidavit dated 24 August 2021 *i.e.* a year before Kacisau's evidence in court. LTA had ample time to check whether Kacisau's trip to Lautoka was unauthorised, whether his hotel bill was settled by the LTA, whether he was in fact going to conduct an exam at Lautoka office on behalf of the LTA, whether he was carrying examination papers with him etc. In the circumstances, I do not have any reason to doubt the veracity of Kacisau's account under oath as far as the whole journey is concerned. Without doubt, it was a trip fully authorised by and known to the LTA.

[13] To elaborate further, the termination of Kacisau's employment as per the LTA letter dated 29 April 2014 is based on his guilty plea in the Magistrates court and several alleged breaches of Partnership Agreement which was part and parcel of his letter of employment. Nowhere has the LTA said in the termination letter that Kacisau's using LTA vehicle, his trip to Lautoka was unauthorised and he had no business of conducting an examination in Lautoka on 27 July 2023; in other words, he was not acting in the course of his employment with LTA. On the contrary, Kacisau's testimony in court was that as part of his employment he was given that vehicle and when there was a need on operation times (according to him 27 July was an operation day) he could take it home and back. He also said that operation times could be on Saturdays, Sundays and at nights. Thus, he said that he had the authority to take the vehicle from Suva to Lautoka and LTA Suva unit did the booking and paid for him at a hotel in Nadi for his overnight stay on 26 July. He had specifically said that the LTA was aware that he was going to conduct an examination on 27 July.

[14] In fact HRM's affidavit in October 2015 and the statement of defence also do not say that Kacisau was on an unauthorised trip. Neither does the amended statement of defence of the LTA in January 2017. They only say that he was not authorised to drive the vehicle under the influence of liquor as stipulated in clause 8 of Motor Vehicle and drivers Rules and Instructions 2010) and therefore 'he was acting on his own frolic'. There is no mention of clause 14 (a) of the said Rules and Instructions which specifically prohibits detours or journeys for private purposes, in HRM's affidavit in October 2015, the statement of defence and the amended statement of defence. Nor is there any such mention in Kacisau's suspension or termination letters issued by the LTA. Although Kacisau's contract of employment specifies his working hours as 8.00am to 4.30pm from Monday to Thursday and from 8.00am to 4.00pm on Friday, there is no absolute prohibition of work during the rest of the week if the exigencies of work so demands. Given that Kacisau was employed as a technical officer of the LTA (at the time of the accident he was an acting mechanical engineer) it is unthinkable that his work hours would have been limited only to the weekdays and the hours stipulated. According to the Partnership Agreement, hours of work in a week excluding Saturdays and Sundays could be flexible. Similarly employees working on all gazetted public holidays are to be paid accordingly. Sub-clauses (a) & (c) in clause 8 on 'Travel and Meals' of the Partnership Agreement shows that employees are reimbursed the cost of meals on official travel, if not provided free of charge by the LTA and those requiring accommodation away from their normal places of work should either stay at prearranged accommodation or get reimbursed for the same. Clause 1.4 of 'The End' attached to the Partnership Agreement further confirms that employees are paid meal allowances when traveling on the duty outside the regional boundary and they could be required to work for two hours or more before or after normal working hours. Clause 1.6 of 'The End' reiterates the same position in clause 8 on 'Travel and Meals' of the Partnership Agreement. It is clear that Kacisau had used hotel accommodation at Nadi prearranged by the LTA for his stay in the night of 26 July 2013. Thus, these stipulations unmistakably demonstrate that the so called working days and hours are not inflexible and the employees could be required to work outside those and that they may be required to travel away from their normal work places (in the case of Kacisau it was Suva) and stay at prearranged places or get paid for the same.

[15] Therefore, I am not persuaded at all by the LTA's argument referring to his trip to Lautoka that Kacisau could not have been employed on a Saturday by the LTA outside his normal working hours and LTA would not have paid for his hotel stay in Nadi. I also do not accept the LTA's position that Kacisau had no authority to take his car on this trip to go to Lautoka. I accept Kacisau's position that he had the authority to take the vehicle from Suva to Lautoka and, LTA did the booking and paid for him at a hotel in Nadi for his overnight stay on 26 July and that the LTA was aware that he was going to conduct an examination in Lautoka on 27 July 2013.

[16] I am inclined to believe that Kacisau had answered the questions honestly and spoken the truth in his record of interview, for he never attempted to shy away from the responsibility on his part for the accident. Similarly, for the reasons already highlighted, I have no reason to doubt the credibility of his evidence under oath either. I do not accept the LTA's position that Kacisau was on a frolic of his own when he met with the accident. The question of his intoxication and speeding at the time of the accident are different issues and would be dealt with later.

[17] As for the breaches, the termination letter has no mention of clause 8 of the LTA Motor Vehicle and Drivers Rules & Instructions 2010 but refers only to some general matters under clause 12 of the Partnership Agreement. Clause 12.1 (b) of the Partnership Agreement cited in the termination letter states that an employee must behave honestly, and with integrity ***in the course of employment*** in the Authority. Does the LTA tacitly admit that Kacisau breached clause 12.1(b) in the course of his employment?

[18] However, HRM in his affidavit, LTA's statement of defence and the amended statement of defence rely on clause 8 (not clause 12) of the LTA Motor Vehicle and Drivers Rules & Instructions 2010 to say that Kacisau was not allowed to drive under the influence of alcohol. Acting Branch Manager Semi Tuinaceva's affidavit in August 2021 is no different. Interestingly, there is no offence called driving a vehicle under the influence of liquor under the LTA and that explains why Kacisau was charged with the offence of exceeding the prescribed limit of alcohol in blood. Be that as it may, clause 8(1) prohibits consumption of liquor ***in*** a LTA vehicle while clause 8(2) prohibits driving a LTA vehicle if the driver has consume alcohol ***during the preceding four hours***. In my view,

both are not applicable to Kacisau, for he had not consumed alcohol in the car; neither had he consumed alcohol in the last four hours before driving as he had stopped drinking at 2.00am on 27 July. Given that a trip by vehicle from Nadi to Lautoka would take around 30 minutes and the accident happened at 8.50 am at a place when he had finished more than half of the journey (he was aiming to be at Lautoka around 9.00 am), Kacisau may not have started driving from Nadi any time before 8.15 - 8.30 am. However, though not referred to by the LTA, clause 8(3) prohibits driving a LTA vehicle if the driver is affected by liquor, and Kacisau had admitted in his record of interview that he would have avoided the accident if he was not over speeding and was not under the influence of liquor but added that he could not avoid it as it happened so quickly and he could not apply breaks except swerving his vehicle to the left. He also admitted that he was crossing the double-line as he was speeding and the point of impact had been in the middle of the road. Thus, I tend to believe that Kacisau may have been affected by alcohol to some degree (to what extent, I am not sure) and certainly the high-speed of the vehicle may have made the accident unavoidable.

[19] Kacisau was also charged with dangerous driving occasioning bodily harm. However, LTA HRM's affidavit and statement of defence in October 2015 had taken up the position that the accident was due to ***contributory negligence*** of Naicker by failing to take precautionary measures and proper lookout when crossing the road at a place where there was no pedestrian crossing and by standing in the middle of the road as indicated in the Police Accident Report. HRM had further said based on Kacisau's record of interview, that the latter had not seen Naicker until he was close for Kacisau to avoid the collision on time because his views were obstructed by the road bend. In fact, the Magistrates court in passing the sentence on Kacisau on 13 March 2014 had stated more or less the same as Kacisau's version of the accident. The amended statement of defence filled by the LTA in 2017 states that the accident was contributed to or was caused ***solely*** by Naicker.

[20] Additionally, the LTA has argued that Kacisau did not include in his oral statements any court documents, only presenting them during the hearing, which contradicted his caution interview. Out of those documents, Kacisau's record of interview was available to LTA and was part of HRM's affidavit in October 2015 and also attached to Naicker's

affidavit in November 2015 as an annexure to opposing the HRM's affidavit in October 2015 seeking to have the default judgment set aside and referred to in HRM's reply affidavit in January 2016 also. Kacisau's suspension letter and termination letter were LTA's own documents served on Kacisau in 2013 and 2014 respectively and caused no surprise to the LTA either. None of those documents contradict Kacisau's testimony but he had only spoken to additional matters relevant to the questions put to him by Naicker's counsel. Obviously, those answers were not required in the case of questions put to him at the record of interview by the police officer; the former being a case of trying to establish the vicarious liability of the LTA and the latter being an investigation into a criminal offence arising from a road accident. As far as I can see there was not a single document that Kacisau had produced at the trial which was not available to the LTA many years before the hearing. Thus, the LTA's complaint is totally unmeritorious.

Vicarious liability

[21] As Lord Pearce has said in ***Imperial Chemicals Industries Ltd. v. Shatwell*** [1965] A.C. 565, 685 'the doctrine of vicarious liability has not grown from any very clear, logical or legal principle but from social convenience and rough justice.' 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.[2] I take the liberty to cite a passage from the trial judge's ruling which vividly explains vicarious liability.

> *15.* '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*

[2] ***Darling Island Stevedoring and Lighterage Co. Ltd. v. Long*** – [1957] HCA 26; (1957) 97 CLR 36 at 57

channel for passing them on through liability insurance and higher prices. The principle gains additional support for its admonitory value in accident prevention."

[22] If I may summarise, the rationales for vicarious liability are as follows:

1. The employer has deeper pockets[3] ('financial' basis)
2. The employer is empowered to select the employee and control the tasks to be performed by the employee[4] in order to meet the requirements and standards of the business operations ('control' basis)
3. The employer stands to generate profits from the employee's work and hence should also bear the potential liabilities[5] ('enterprise liability' basis)
4. The employer is more able to insure against liabilities arising from legal actions by third parties and spread the losses more efficiently[6] ('loss distribution' basis)

[23] However, each of them, standing alone, does not fully justify the imposition of vicarious liability on the employer. At a broader level, at least, there are competing policy considerations between[7] :

'... on the one end, the social interest in furnishing an innocent tort victim with recourse against a financially responsible defendant; on the other, a hesitation to foist any undue burden on business enterprise.'

[24] Nevertheless, these rationales, collectively, are in tandem with the overall objectives of the doctrine to provide just and practical remedies to a third party injured by the torts of the employee as well as to serve as a deterrence to the employer to prevent future harm through better administration and supervision of the employees.[8] Therefore, beyond the significant issue of compensation and financial capability and burden, it is ultimately a question of fairness in balancing the interests of the injured person and the employer with reference to societal concerns.[9] However, whether it was fair and just to impose liability, is not to be understood as an invitation to judges to decide cases according to their

[3] Granville Williams, "Vicarious Liability and the Master's Indemnity" (1957) 20 MLR 220.
[4] Rolfe B in ***Reedie v The London & North Western Railway Co*** (1849) 4 Exch 244; 154 ER 1201.
[5] Rix LJ in ***Viasystems (Tyneside) Ltd v Thermal Transfer (Northern) Ltd*** [206] QB 510.
[6] P S Atiyah, Vicarious Liability in the Law of Torts (Butterworths, 1967).
[7] Per Lord Steyn in ***Lister v Hesley Hall Ltd*** [2002] 1 AC 215 at [14].
[8] Per MaLachlin J in ***Bazley v Curry*** (1999) 2 SCR 534.
[9] Peter Cane, "Vicarious Liability for Sexual Abuse" (2000) 116 LQR 21 at 26.

personal sense of justice; rather it requires them to consider how guidance derived from decided cases furnishes a solution to the case before the court. Judges should identify factors or principles which point towards or away from vicarious liability in the case before the court and which explain why it should or should not be imposed.[10]

[25] A master is liable for the negligence of the servant, if committed in the course of his employment, but is not liable for negligence, which is committed outside the scope of his employment. As Lynskey J. has stated in ***Marsh v. Moores*** [1949] 2 K.B. 208, 215:

> *"It is well settled law that a master is liable even for acts which he has not authorised provided that they are so connected with the acts which he has authorised that they may rightly be regarded as modes, although improper modes, of doing them. On the other hand, if the unauthorized and wrongful act of the servant is not so connected with the authorised act as to be a mode of doing it but is an independent act, the master is not responsible for, in such a case the servant is not acting in the course of the employment but has gone outside it."*

'Salmond test'

[26] Finnemore J. said in ***Staton v National Coal Board*** [1957] 1 W.L.R. 893, at 895 that the question whether a wrongful act is within the course of employment is ultimately a question of fact for decision in each case, and no simple test is appropriate to cover all cases. The hitherto most frequently adopted test was that propounded by Salmond[11], to wit: a wrongful act is regarded as done by a servant ' in the course of employment' if it is either (a) a wrongful act authorised by the master; or (b) a wrongful and unauthorised mode of carrying out an act authorised by the master ('Salmond test').

'Close connection test'

[27] However, in ***Lister v Hesley Hall Ltd*** [2002] 1 A.C. 2015, Salmond test was found to be inadequate to deal with cases involving an employee's intentional wrongdoing particularly where the employee sets out to benefit himself. The issue in ***Lister*** for the House of Lords was whether the employers of a warden of a school boarding house could

[10] **CCIG Investments Pty Ltd v Schokman** [2023] HCA 21 (2 August 2023)
[11] R F V Heuston & R A Buckley, *Salmond and Heuston on the Law of Torts* (Sweet & Maxwell, 21st Ed, 1996) at p.443.

be vicariously liable for the acts of sexual abuse perpetrated by that warden on boys in his care. As Lord Steyn put it at para 28, the test for whether an employee has acted in the course of his employment was whether the employee's tort was 'so closely connected with his employment that it would be fair and just to hold the employer vicariously liable'. Lord Steyn concluded that sexual abuse was 'inextricably interwoven with the carrying out by the warden of his duties' and rather than the employment merely furnishing an opportunity to commit the sexual abuse, the connection between the employment and the torts was very strong. According to the majority of the Law Lords the test for vicarious liability is whether the tort in question was closely connected to the nature of the employment. Lord Clyde and Lord Millett indicated that mere opportunity provided by the employment for the employee to commit the tort was not sufficient. Subsequent to ***Lister***, close connection test and the criterion of a material increase of risk were endorsed in the House of Lords.[12] However, as Lord Nicholls accepted in ***Dubai Aluminium Co Ltd v Salaam*** [2003] 2 A.C 215 the close connection test tells nothing about what type or degree of connection is necessary in order to invoke the vicarious liability of the employer.

[28] In Fiji, the Court of Appeal applied the 'Salmond test' in ***Colonial Life Insurance v Attorney General*** [1974] FJLawRp 24; [1974] 20 FLR 102 (04 November 1974) and both 'Salmond test' and 'close connection test' in ***Attorney General of Fiji v Singh***; [2015] FJCA 161; ABU 69 of 2007 (03 December 2015) in order to conclude that in both instances the employer was vicariously liable.

[29] In ***Colonial Mutual Life Assurance,*** the Fiji Government had assigned visiting delegations a liaison officer, a motor vehicle and a driver. The driver was instructed by the assistant secretary for foreign affairs to obey the liaison officer. The learned Magistrate had accepted the evidence of the driver when he stated that he was invited by the liaison officer to the party before dropping him home. At the party both the liaison officer and the driver consumed alcohol. On the journey back to the liaison officer's house, the driver was involved in an accident. It was held that the driver was well within

[12] ***Maga v Archbishop of Birmingham*** [2010] 1 WLR 1441 at [53] and [55] and ***Various Claimants v The Catholic Welfare Society*** [2012] 3 WLR 1319 at [87] and [93].

the scope of employment as he was instructed by the liaison officer to attend the party and then drop him home, and the driver was told to obey the instructions of the liaison officer and drop him home. The Court of Appeal said that the driver's dereliction of duty in rendering himself unfit by consumption of liquor was no more than a factor which made him unsafe to carry out an authorized task and it provided no support for a finding that the driver was not acting, albeit negligently, in the course of what he was employed to do.

[30] In the case of ***Singh,*** the plaintiff was abducted, assaulted, tortured and inflicted with injuries by the collective acts of the first to fifth defendants who were members of the Fiji Military Forces and the sixth defendant (Attorney General of Fiji) was held to be vicariously liable for the acts of the said defendants as the designated task by the Fiji Military Forces was to "ensure the security, well-being of Fiji and its people" as was mandated by section 94 (3) of the (1990) Constitution and this is precisely what the first to fifth defendants did when interrogating the plaintiff, Mr ***Singh***. The Court of Appeal said that the defendant were certainly not authorized to torture and inflict injuries on the plaintiff but what the defendants did was a wrongful and unauthorized mode of doing what was required of them to do. Consequently, the "connection test" and the criterion of "a wrongful and unauthorized mode of doing an act authorized to do" stood satisfied. The court further concluded that the said five defendants did not go on "a frolic of their own".

A broader approach

[31] A broader approach was adopted in ***Kooragang Investment Pty v Richardson and Wrench Ltd*** [1982] A.C. 462 at 471 where it was held that in establishing a particular employee's 'course of employment', the court should not dissect the employee's task into component parts but should ask in a general sense; 'what was the job at which he was engaged for his employer?'. The matter must be looked at broadly, not dissecting the servant's task into component activities.[13] Sometimes the court will use the phrase 'was the employee on a frolic of his own?'[14] or whether the employee was engaged solely in

[13] Per Diplock L.J in ***Ilkin v Samuels*** [1963] 1 WLR 991 at 1004.
[14] ***Joel v Moroison*** (1834) 6 C. & P. 501, at 503; ***Rose v Plenty*** [1976] 1 WLR 141

his own interest or acting as a stranger[15], to decide whether the tort was committed during the course of employment. In other words, as per Comyn J. in ***Harrison v Michelin Tyre Co Ltd*** [1985] I.C.R 696, 'was [the incident] so divergent from the employment as to be plainly alien to and wholly distinguishable from the employment?' This involves a finding that the employee has so clearly departed from the scope of his employment that the employer will not be liable for his acts.

[32] However, despite the confusion referred to in ***Dubai Aluminium Co Ltd***, 'close connection' test serves as a guide to the principled application of the law to diverse factual situations. It has been held the test applies to both intentional and inadvertent acts of the employee.[16]

[33] The Canadian Supreme Court in ***Bazley v Curry*** [1999] 2 SCR 534 said that in determining whether an employer is vicariously liable for an employee's unauthorized, intentional wrong in cases where precedent is inconclusive, courts should be guided by the following principles. First, they should openly confront the question of *whether liability should lie against the employer*, rather than obscuring the decision beneath semantic discussions of "scope of employment" and "mode of conduct". Second, the fundamental question is *whether the wrongful act is sufficiently related to conduct authorized by the employer to justify the imposition of vicarious liability*. The court listed five factors for applying the close connection test.

> *A. the opportunity that the enterprise afforded the employee to abuse his or her power;*
> *B. the extent to which the wrongful act may have furthered the employer's aims (and hence be more likely to have been committed by the employee);*
> *C. the extent to which the wrongful act was related to friction, confrontation or intimacy inherent in the employer's enterprise;*
> *D. the extent of power conferred on the employee in relation to the victims; and*
> *E. the vulnerability of potential victims to wrongful exercise of the employee's power.*

[15] Per Isaacs J in ***Bugge v Brown*** [1919] HCA 5 at [57]; (1919) 26 CLR 110
[16] ***Skandinaviska Enskilda Banken AB (Publ), Singapore Branch v Asia Pacific Breweries (Singapore) Pte Ltd*** [2011] 3 SLR 540 at [86].

[34] The Australian courts have also referred to the close connection test and other tests for determining vicarious liability in ***New South Wales v Lepore*** (2003) 212 CLR 511 and the criterion of enhancement of risks by the employer was also applied in Australia in ***Withyman v State of New South Wales and Blackburn*** [2013] NSWCA 10 at [143]. It was held in Singapore that the close connection test requires the court to consider whether the tortious acts committed by the employee in the course of employment were foreseeable.[17]

[35] In order to decide whether the employee's tort is so closely connected with his employment that it is fair and just that the employer should be held vicariously liable for the employee's tort, I am inclined to adopt the two-stage test propounded by the Supreme Court of Canada in ***John Doe v Bannet*** 2004 SCC 17; [2004] 1 SCR 436 at [20]. The Chief Justice said:

> *'[20] In Bazley, the Court suggested that the imposition of vicarious liability may usefully be approached in two steps. First, a court should determine whether there are precedents which unambiguously determine whether the case should attract vicarious liability. "If prior cases do not clearly suggest a solution, the next step is to determine whether vicarious liability should be imposed in light of the broader policy rationales behind strict liability": Bazley, at para. 15; Jacobi, at para. 31.'*

[36] An act is done in the course of the employment, not only when the servant is actually doing the work, which he is employed to do, but also when the act is an incident in performing something he is employed to do and when he is about business which concerns the master and the servant.[18] It must follow that, for a servant to be in the course of his employment, he must be doing something which it is his duty to his employer to do.[19] That is to say that he must be obliged so to do by the terms of his employment.[20] A servant does not cease to act in the course of his employment, unless he has plainly gone beyond bounds.[21]

---

[17] ***Skandinaviska Enskilda Banken AB (Publ), Singapore Branch v Asia Pacific Breweries (Singapore) Pte Ltd*** [2011] 3 SLR 540 at [105]
[18] ***Staton v N.C.B.*** [1957] 1 W.L.R 893
[19] ***Paterson v. Costain & Press (Ocersees)*** [1978] 1 Lloyd's Rep. 86
[20] ***Vandyke v. Fender*** [1970] 2 Q.B. 292
[21] ***County Plaint Hire v. Jakson and Lane Bros. (Builders) (Third Party)*** (1970) 8 K.I.R. 989 (C.A.)

Examination of precedents

[37] The following are some reported cases where courts have found employers vicariously liable for the wrongful acts of employees committed within the scope of employment, even when those acts involved misconduct.

1. ***Lister v Hesley Hall Ltd*** *[2001] UKHL 22 where a warden at a boarding house for boys sexually abused some of the residents. The House of Lords held that the employer was vicariously liable because the wrongful acts were closely connected with the employee's duties, which involved caring for the boys.*

2. ***Dubai Aluminium Co Ltd v Salaam*** *[2002] UKHL 48 where a partner in a law firm committed a series of fraudulent acts. The House of Lords found the law firm vicariously liable because the fraudulent acts were carried out in the ordinary course of the employee's work.*

3. ***Mattis v Pollock (trading as Flamingos Nightclub)*** *[2003] EWCA Civ 887 where a nightclub bouncer attacked a customer outside the club after being involved in a confrontation inside. The Court of Appeal held the nightclub owner vicariously liable because the assault was closely connected to the employee's duties, which included maintaining order in the club.*

4. ***Mohamud v WM Morrison Supermarkets plc*** *[2016] UKSC 11 where an employee at a petrol station attacked a customer. The Supreme Court found the employer vicariously liable, ruling that there was a sufficient connection between the employee's duties and the wrongful act.*

5. ***Smith v Stages*** *[1989] AC 928 where an employee was involved in a car accident while traveling back to work after completing a job assignment. The House of Lords held that the employer was vicariously liable because the journey was part of the employee's employment duties.*

6. ***Century Insurance Co Ltd v Northern Ireland Road Transport Board*** *[1942] AC 509 where a petrol tanker driver caused an explosion by smoking while refuelling. The House of Lords found the employer vicariously liable, determining that the driver was acting within the course of his employment despite the negligent act in that the driver's negligent act (smoking) occurred within the scope of his employment duties, even though it was unauthorized and dangerous.*

7. ***Rose v Plenty*** *[1976] 1 WLR 141 where a milkman, contrary to his employer's instructions, allowed a child to assist him on his rounds, and the child was injured. The Court of Appeal held the employer vicariously liable because the employee's act was done for the employer's business, even though it was unauthorized.*

[38] These cases illustrate that courts consider whether the wrongful acts are closely connected to the employee's duties. Courts examine if the act was done in the course of performing job duties. Even if an act is unauthorized or involves misconduct, the employer can still be liable if the act is closely connected to the employee's duties, to ensure that employers take responsibility for employees' actions promoting accountability and safer practices. In the case of Kacisau, despite his intoxication and speeding, his actions were connected to his employment duties (driving to a work-related destination), which supports the High Court's ruling that LTA is vicariously liable.

[39] The courts have found employers vicariously liable for the actions of employees who were intoxicated, provided the acts were sufficiently connected to their employment. Some relevant examples are:

1. ***Smith v Crossley Brothers Ltd*** *[1951] 1 All ER 822 where an employee, while driving a company vehicle, caused an accident due to intoxication. The court held the employer vicariously liable because the employee was acting within the scope of his employment duties when the accident occurred, despite being intoxicated.*

2. ***Weaver v Tredegar Iron & Coal Co Ltd*** *[1940] 4 All ER 191 where an employee, who had consumed alcohol, caused an accident while driving a company vehicle. The court found the employer vicariously liable, noting that the employee was engaged in his employment duties at the time of the accident.*

3. ***Hilton v Thomas Burton (Rhodes) Ltd*** *[1961] 1 WLR 705 where* ***e****mployees, after consuming alcohol during their lunch break, caused a fatal accident while returning to work in a company vehicle. The court held that the employer was vicariously liable because the journey back to work was within the scope of employment, despite the employees' intoxication.*

4. ***Warren v Henlys Ltd*** *[1948] 2 All ER 935 where a petrol pump attendant, while intoxicated, assaulted a customer. The court found the employer vicariously liable because the attendant was performing his duties, despite being intoxicated.*

[40] These cases demonstrate that courts consider whether the employee's actions, though involving misconduct such as intoxication are sufficiently connected to their employment duties. Courts assess if the employee's actions occurred while performing job-related duties. Even if the act involves misconduct, the employer can still be liable if the act is closely connected to the employee's duties in order to ensure that employers take

responsibility for their employees' actions and to promote accountability and safer practices. In the case of Kacisau, his actions (driving to conduct an exam) were within the scope of his employment duties, despite his intoxication. The above cases support the reasoning that LTA could be held vicariously liable for Kacisau's actions since his driving of the LTA vehicle with an over the limit alcohol concentration in his blood occurred while he was performing his job-related duty of driving to the work-related destination with examination papers to conduct an examination.

[41] There are also reported cases where courts have found employers vicariously liable for the actions of employees who were speeding while acting within the course of their employment. Here are some relevant examples:

1. ***Limpus v London General Omnibus Co*** *[1862] 1 H&C 526 where a bus driver employed by the defendant company was racing with another bus and caused an accident. The court held the employer vicariously liable because the driver was engaged in his employment (driving the bus) when the accident occurred, despite the reckless act of racing.*

2. ***Canadian Pacific Railway Co. v. Lockhart*** *[1942] AC 591 (Privy Council) where an employee, driving a company vehicle, caused an accident while speeding. The court found the employer vicariously liable because the employee was performing his job duties (driving the vehicle) when the accident occurred, despite the speeding.*

3. ***Jones v. Hart*** *[1698] 2 Salk 441 where a servant driving his master's cart caused an accident while driving recklessly and at excessive speed. The court held the master (employer) vicariously liable for the servant's actions, as the servant was engaged in the master's business (driving the cart) at the time of the accident.*

4. ***Twine v. Bean's Express Ltd*** *[1946] 1 All ER 202 where an employee driving a van for his employer picked up a hitchhiker and subsequently caused an accident while speeding. The court found the employer vicariously liable for the accident, despite the unauthorized act of picking up a hitchhiker, because the employee was performing his job duties (driving the van) when the accident occurred.*

5. ***Smith v. Stages*** ***[1989] AC 928*** *where an employee, driving back to his workplace after completing an assignment, caused an accident while speeding. The House of Lords held the employer vicariously liable because the employee was engaged in his employment duties (traveling for work) when the accident occurred, despite the speeding.*

[42] The above cases support the reasoning that LTA could be held vicariously liable for Kacisau's actions since his misconduct (speeding) occurred while he was performing his job-related duty of driving to a work-related destination. These cases illustrate that courts consider whether the employee's actions, including speeding, are sufficiently connected to their employment duties to hold the employer vicariously liable. Courts assess if the employee's actions occurred while performing job-related tasks. Even if the act involves misconduct such as speeding, the employer can still be liable if the act is connected to the employee's duties because employers are expected to ensure that employees adhere to laws and company policies while performing their duties. In the case of Kacisau, he was driving to conduct an exam, a task related to his employment and therefore despite his speeding, Kacisau's actions were closely connected to his job responsibilities.

[43] Therefore, both on judicial precedents and in the light of the broader policy rationales behind vicarious liability, the High Court was right in concluding that the LTA was vicariously liable for Kacisau's tortious act.

[44] I may further analyse the key question here *i.e.* whether the employer (LTA) is vicariously liable for the torts committed by its employee, Kacisau. Admittedly, Kacisau was employed by the appellant (LTA) and was driving a vehicle owned by LTA at the time of the accident and therefore, there was an employment relationship between the LTA and Kacisau. For vicarious liability to apply, the tort must be committed in the course of employment. It is clear that Kacisau was driving the vehicle as part of his duties. However, the incident occurred while he was under the influence of alcohol and driving above the speed limit.

[45] Kacisau was driving the LTA vehicle heading towards Lautoka to conduct an examination on behalf of the LTA. He certainly was not on a detour (which is a minor deviation still connected to the employee's work), keeping the LTA liable. He was not on a personal errand or engaged in his own interest or on a frolic of his own either. Frolic is a substantial deviation from employment for personal reasons, typically breaking the connection to the employer's liability. By no stretch of imagination could it be said that Kacisau'a act of driving of the LTA vehicle was that of a stranger in relation to his employment. If you apply the test in ***Bugge v Brown*** [1919] HCA 5; (1919) 26 CLR 110

at 118 which says that *"in the course of" or "scope of employment" is "when the servant so acts as to be in effect a stranger in relation to [their] employer with respect to the act [they have] committed, so that the act is in law the unauthorized act of a stranger"*, Kacisau did not stand in the position of a stranger. Because, as Isaacs J further explained in ***Bugge*** that '*the act of an employee may be regarded as that of a stranger when the employee does something "so remote from [their] duty as to be altogether outside of, and unconnected with, [their] employment". If the act done was "utterly unconnected" with anything the employee was employed to do it would be outside the sphere of the employment'.* There cannot be a serious argument that Kacisau's driving of the LTA vehicle was unconnected, remote or outside his employment. It aligns with his employment duties. Again, applying Isaacs J's test it could be safely concluded that Kacisau's tortious act was sufficiently or closely connected to his duties or powers of employment so that it could be said to have been performed in the course of his employment.

[46] Kacisau consumed alcohol the night before and had an alcohol concentration above the legal limit while driving. This is a violation of traffic laws and his employer's expectations. He was also speeding, which is against traffic regulations. Even though Kacisau was intoxicated and driving above permitted speed limit, courts have found employers vicariously liable if the employee was acting within the scope of employment. The critical question is whether his conduct was closely connected with his duties. Despite the two acts of misconduct (intoxication and speeding), Kacisau was still performing his employment duty of driving to the work-related destination at Lautoka carrying examination papers with him to perform his job responsibility of conducting the examination as expected of him by the LTA. He had not deviated from the core function assigned to him and for which he undertook the whole journey from Suva on the previous day. He was driving a vehicle owned by LTA, further linking his actions to his employment. LTA had control over the vehicle and, by extension, over ensuring that their employees operate vehicles safely and within the law. While Kacisau's intoxication and speeding were against company policy and the law, these actions did not amount to a "frolic" but rather a serious, albeit connected, deviation within the course of employment. Despite the serious misconduct (driving under the influence of alcohol and speeding), Kacisau was performing his job duty (driving to conduct an exam) and the

employer (LTA) is therefore vicariously liable for the tort committed by its employee (Kacisau) because the actions, though misconduct, occurred within the scope of his employment duties.

[47] Historically, courts have often found employers vicariously liable for employees' actions if those actions are performed in the course of employment, even if the employee acted against explicit instructions or the law. As for policy considerations, vicarious liability serves to ensure that employers take responsibility for their employees' actions when those employees are engaged in work-related activities, promoting safer practices and accountability. The High Court's ruling that the LTA is vicariously liable for Kacisau's actions aligns with the principles of vicarious liability. Despite Kacisau's misconduct (intoxication and speeding), his actions were sufficiently connected to his employment duties (driving to a work-related destination), thus holding LTA responsible for the resulting damages to Naicker.

[48] If however, Kacisau had committed a tort whilst staying in the hotel in the night and before he resumed his journey in the morning driving the LTA car, on the authority of ***Crook v Derbyshire Stone Ltd*** [1956] 1 WLR 432, he might not have been held to have been acting in the course of his employment. In ***Crook***, a lorry driver stopped en route for refreshment – a practice which the company was aware of – when crossing the road he was involved in a collision with the plaintiff, a motorcyclist, and the court held that the driver was not performing his employer's duties until he returned to the lorry and resumed his journey. It was held that at the time of the accident the driver 'was a stranger to his master from the moment when he left the lorry' and therefore the company was not responsible for his negligence. However, this case received mixed or mildly negative judicial treatment.

[49] In ***CCIG Investments Pty Ltd v Schokman*** **[2023] HCA 21** relied on by the LTA, the High Court unanimously held that an employer was not vicariously liable for an employee who urinated on a colleague while he was in a state of semi-consciousness whilst intoxicated in shared accommodation provided by the employer. In doing so, the High Court has provided a number of key takeaways which are instructive in terms of reconciling the tests to be applied where vicarious liability is alleged. The judgment

draws a careful distinction between circumstances where the employment may provide the very occasion for the relevant act to occur (as in ***Prince Alfred College Inc v ADC*** [2016] HCA 37) and those where the acts committed are so remote as to be altogether outside of, and unconnected with, employment.

[50] The key findings in ***CCIG Investments*** could be summarised as follows:

- *It is too simplistic to say that an employer will be held liable for the wrongful act of an employee if the act is committed in the course or scope of employment. Establishing whether a tortious act has occurred during the course or scope of employment depends on the facts and circumstances of each individual case, informed by reference to previously decided cases.*

- *The attribution of vicarious liability reflects the policy of the law which posits that it would be unjust to make the employer responsible for every act of the employee. Whilst an employer can be vicariously liable for unauthorised, intentional or criminal acts of an employee, there are limits on its application. Relevantly, the policy of the law presupposes that an employer should not be held liable for acts totally unconnected with the employment and a 'greater connection' must exist between the employee's tortious act and their employment, rather than just the opportunity for the incident.*
- *The enquiry as to the connection between the wrongful act and the employment is apposite in terms of reconciling whether it occurred during the course or scope of employment. The range of acts to be considered fall on a wide spectrum, however the High Court has reinforced that the common law distinguishes between:*

    - *the acts of a "stranger" (which includes circumstances where an employee does something so far removed from their duty as to be altogether outside of the scope of their employment such that the only connection is that the employment provided the mere occasion for the act[22]); and*

    - *the acts of an employee who, because of the special nature of their role (such as an employee who is placed in a particular position of authority, power and trust in relation to a vulnerable category of potential victims, such as a school boarding master with responsibility for boarding students), gives occasion for the wrongful act and is therefore regarded as ostensibly being within the scope of their employment[23].*

[22] ***Deatons Pty Ltd v Flew*** [1949] HCA 60 where a bartender was found not to have acted within the scope of her employment when she assaulted a customer with a glass when he asked to speak to the licensee.

[23] ***Prince Alfred College v ADC*** [2016] HCA 37 where the relevant enquiry was directed to whether the role of a housemaster (in the context of allegations of sexual abuse of a child that took place in a school) was imbued with features of employment such as authority, power, trust, control and the ability to achieve intimacy such that the role could be said to have provided the very occasion for abuse.

[51] The High Court in ***CCIG Investments*** confirmed that a finding of vicarious liability requires the tortious act of the employee to be committed in the course or scope of employment and that making this determination will depend on the facts of each case. An employer will not be liable if the act was unconnected to the employment. On this point, the court found "… *without more the drunken act of urinating on another employee whilst they are asleep was not connected to anything the employee was required to do*[24]".

[52] In my view, by applying the principles of vicarious liability of employers *vis-à-vis* employees' actions propounded in ***CCIG Investments*** to the facts and circumstances of this case, I see no reason to arrive at a finding different to what I have already reached with regard to the vicarious liability of the LTA. The facts in this appeal are materially distinguishable from those of ***CCIG Investments*** which explains why the High Court came to the finding of non-liability of the employer.

'Going and coming rule' and 'proximate cause theory'

[53] The LTA also relies on ***Purton v Marriott International*** [2013] 218 Cal. App. 4th 499 and urges that the going and coming rule is a rule of non-liability to an employer for the negligent acts of its employees. Going and coming to work rule operates under the rationale that, absent certain exceptions, an employee is not deemed to be acting within the scope of employment while traveling to and from the workplace. The argument seems to be that Kacisau was simply on his way to work when the accident happened and therefore the LTA is not vicariously liable. LTA also argues based on ***Purton*** that in any event ***the*** proximate cause for the accident was Kacisau's intoxication and therefore no vicarious liability could be attributable to the LTA.

[54] In ***Purton*** an employee of Marriott, after attending a company-sponsored party, drove home while intoxicated and caused an accident. The court considered whether the employer could be held vicariously liable for the employee's actions under the "coming and going rule" and the "proximate cause theory". Under coming and going rule, generally, employers are not liable for torts committed by employees while commuting

[24] At paragraph [25]

to or from work[25], as these actions are outside the scope of employment. Exceptions include situations where the commute itself is part of the employment duties or where the employer benefits from the employee's travel. Proximate cause theory focuses on whether the employee's actions were a foreseeable consequence of their employment and sufficiently connected to their job duties to hold the employer liable.

[55] Kacisau, an employee of LTA, was driving a company vehicle to conduct an exam. He was speeding and under the influence of alcohol, resulting in an accident causing injuries to Naicker. "Coming and going rule" typically applies to employees commuting to or from work. However, Kacisau was not merely commuting; he was performing a work-related task (driving to an examination location). Since Kacisau was actively engaged in his job duties, this situation falls outside the usual "coming and going" rule, making LTA liable. Although, employers might not foresee specific illegal conduct like driving under the influence of alcohol, if an employee is performing a work duty, the employer could still be liable if such behavior can be deemed a foreseeable risk of employment. Speeding while driving is a common risk associated with driving tasks, which makes it more foreseeable. Since Kacisau was performing a work-related duty (driving to conduct an exam) when the accident occurred, despite misconduct (intoxication and speeding), his actions were within the scope of his employment duties, similar to the employee in ***Purton*** who was returning from a company-sponsored event. In ***Smith v Stages*** [1989] AC 928, an employee who was required and paid by the employee to travel to perform some urgent work at non-regular premises and who injured the plaintiff during the return journey, was regarded as having committed the tort in the course of employment. Lord Lowry drew a distinction between the duty to turn up for work and the notion of already being on duty while travelling to it.

[56] Generally speaking, alcohol can slow reaction times, making it difficult for the driver to respond to hazards and intoxication can impair judgment, leading to poor decision-making, such as driving at excessive speeds. According to Kacisau, he was speeding not because of intoxication but because he wanted to be at Lautoka at or around 9.00 am to conduct the examination. However, alcohol can affect motor skills, making precise

[25] See for e.g. ***QBE Insurance (International) Ltd v Julaiha Bee Bee*** [1991] 2 SLR (R) 724

driving more difficult. In this case, Kacisau admitted to having a high blood alcohol concentration, which may have impaired his driving abilities. Therefore, arguably intoxication could be seen as a proximate cause if it had contributed to his impaired driving ability. Speeding also increases the risk of accidents and the severity of injuries. Higher speeds make it harder to control the vehicle and react to unexpected events and speeding reduces the time and distance available to stop safely. The force of a collision increases with speed, leading to more severe outcomes. Kacisau admitted to driving at 90 km/h in an 80 km/h zone. Speeding would reduce his ability to stop or maneuver the vehicle in time to avoid hitting Naicker, arguably making it also a proximate cause of the accident. Thus, in general intoxication and speeding together significantly may increase the likelihood of an accident due to impaired reaction time and reduced vehicle control. Intoxication can lead to poor decisions like speeding, while speeding can exacerbate the effects of intoxication on driving performance. In this case, it is likely that both intoxication and speeding worked in tandem to cause the accident, making both factors causes of the accident.

[57] However, to what degree intoxication and speeding contribute to an accident may well depend on the individual driver and the surrounding circumstances. In fact, considering the totality of Kacisau's record of interview, it appears that it was over speeding more than intoxication that had made it difficult for him to avoid the accident in the middle of the road although he had attempted to do so by turning his vehicle to the left of the road. Considering that the point of impact of the accident on the rough sketch is further right to the double line, and his admission that he was speeding and crossing the double line as he was rushing to Lautoka to conduct the examination, him having alcohol beyond the legal limit in his blood may not have decisively or significantly contributed to the accident leave aside being ***the*** proximate cause for the accident, for it is very likely that even if Kacisau was not after alcohol, the accident would still have happened due to over speeding and driving on the middle of the road by crossing the double lane at a bend. Kacisau had seen some passengers getting down from a bus ahead of him at a distance of about 20 meters and it seems that Niacker was one of them who was trying to cross the road to get to the other side of the road. Kacisau had seen him crossing the road but he could not avoid the collision as 'it happened so fast and so quickly'. LTA's position that Naicker was also negligent and Kacisau had not seen Naicker until he was close for

Kacisau to avoid the collision on time because his views were obstructed by the road bend, lends credence to the possibility that several other factors had contributed to the accident and the least of them appears to have been his intoxication. Therefore, it is not correct to argue that intoxication was ***the*** proximate cause of the accident.

[58] However, as already stated, Kacisau was performing a task related to his employment when the accident occurred. Driving involves foreseeable risks, including the potential for accidents due to speeding or impairment. While LTA can argue that Kacisau's intoxication in particular and speeding in general were outside the scope of his employment, the stronger legal precedents and principles of vicarious liability suggest that LTA would still be held liable. The connection between Kacisau's job duties and the accident, combined with the foreseeability of risks associated with driving, supports the conclusion that LTA is vicariously liable for his actions. It is also pertinent to reiterate that the LTA had ascribed the cause of the accident to contributory or sole negligence on the part of Naicker. Thus, at no stage had the LTA blamed Kacisau's intoxication and speeding (though pleaded) as the sole or even the proximate causes for the accident. Applying the coming and going rule and proximate cause theory from ***Purton*** to the facts involving Kacisau and LTA, does not change the conclusion that LTA is vicariously liable for Kacisau's actions and under both the coming and going rule exception and the proximate cause theory, LTA would still be held vicariously liable for the actions of Kacisau.

02nd ground of appeal

[59] The LTA seems to take exception to what the learned High Court judge has said at paragraph 34 of the impugned ruling which is as follows:

> *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.*

[60] To me, what the judge has meant to say is that merely because Kacisau had pleaded guilty to the charges under the LTA Act and punished, it does not absolve the LTA from vicarious liability as his employer. What his guilty plea does is to put beyond any controversy the fact that Kacisau had alcohol in excess of the legal limit and he was driving at a speed above the legal limit at the time of the accident. Kacisau had never attempted to hide both even in his record of interview. Either or both of them do not take away the fact that Kacisau was still LTA's employee and the question is whether he was acting in the course of the employment as to make LTA liable vicariously for the tort committed by him. Too much need not be read into the statement '*irrespective of the fact that the alleged act was endorsed or not by the 1st defendant employer'. As Professor Winfield observes "No sane or law abiding Master ever hires a man to tell lies, give blows or act carelessly. But that is not what course of employment means. A wrong falls within the scope of employment if it is expressly or impliedly authorised by the Master or is an unauthorised manner of doing something which is authorised, or is necessarily incidental to which the servant is employed to do." (See: Winfield on Torts, p.638 and see also Denning L.J's comments in* ***Navarro -v- Moregrand Ltd.*** *[1951] 2 TLR 674 at pp.680-681).*

[61] Considering the totality of the ruling, it is abundantly clear that the judge was very clear in his mind that what he had to determine was whether Kacisau was acting in the course of his employment with the LTA (see for example paragraph 12 & 15). However, I tend to agree with the LTA that the judge seems to have had 'Salmond test' in his mind and applied it to determine that question because he had ruled out the 'close connection test' as not required in the circumstances of the case. The trial judge also seems not to have distinguished between primary vicarious liability based on attribution of authorised acts of one person to another in the sense of an agency or joint enterprise relationship (agent's vicarious *acts* - as opposed to vicarious liability - are attributable to the principle) and secondary/true/proper vicarious liability of an employer based on the employee's wrongful acts (whether or not those acts were authorised by the former) *i.e.* the employee's *liability* is vicariously attributed to the employer if the employee's wrongful acts are sufficiently or closely connected to his duties or powers of employment so that they could be said to have been performed in the course of his employment. The third category of vicarious liability through non-delegable duty did not feature in the trial

judge's ruling which was not anyway relevant to this instance. These distinctions were drawn in ***CCIG Investments***. Nevertheless, the analysis of the facts and circumstances admirably undertaken by the trial judge shows that even on the application of the 'close connection test', he would have come to the same finding.

[62] Given the extensive analysis I have attempted earlier under the first ground of appeal and the conclusion I arrived at, I do not think that any further discussion is needed on the second ground of appeal.

03rd ground of appeal

[63] I have already dealt with the 03rd ground of appeal to a great extent earlier but would focus on some specific maters raised therein. The LTA complains of the trial judge's exclusion of the 'close connection test' in paragraph 41 of the impugned ruling. Paragraph 41 reads as follows:

> *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.*

[64] I agree that the trial judge has erred in saying that Kacisau was not engaged in any unauthorized or illegal activity. However, the judge had qualified it by adding *'other than driving his official vehicle ……under the influence of liquor and at 90 km/h speed'.* Although at first blush, the first statement looks ill-founded, it appears that what the trial judge was trying to emphasis is that Kacisau was not engaged in any extraneous legal or illegal act or had not deviated from his given task of driving to Lautoka to conduct the examination. This is clear from paragraph 42 where the judge had given examples of *'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'* to describe such possible illegal or unlawful activities. According to the judge, driving the official vehicle under the influence of liquor and at 90 km/h speed were only unauthorized ways of doing an

authorized act of driving but not extraneous to the authorised journey. Thus, the judge had clearly guided himself according to 'Salmond test' and ruled out the 'close connection test'.

[65] While driving at an excessive speed may be categorized as an unauthorized way of carrying out the authorized act of driving, I doubt whether one could reasonably say that driving under the influence of liquor was merely an unauthorized way of driving the vehicle. While speed is an integral part of driving, the driver getting intoxicated is not. Over speeding occurred while Kacisau was in the act of driving whereas he was already under intoxication even before he started the journey. Therefore, in my view 'Salmond test' alone was not sufficient to deal with the vicarious liability of the LTA. 'Close connection test' was necessary and the trial judge should have adopted it.

[66] However, I have delved into the question of vicarious liability on the part of the LTA using, for most part, the 'close connection test' supplemented by other tests, where relevant and required, and concluded that the LTA was indeed vicariously liable for Kacisau's tort.

04th ground of appeal

[67] The LTA submits that it had no notice of the fact that Kacisau was going to give evidence at the trial to determine the limited question of vicarious liability depriving the LTA to rebut his evidence.

[68] It is clear that initially the LTA was to file its evidence on the issue of vicarious liability (which it indeed did by way of an affidavit and documents). Both the LTA and Niacker had tended written submissions as well. However, the court subsequently decided to set a hearing date for taking of evidence on the matter as the matter could not be decided on documentary evidence alone. Accordingly, on 31 August 2022, the LTA's counsel indicated to court that it will rely on affidavit evidence and submissions and not call any witnesses. Niacker's counsel said that he was going to call Kacisau. LTA's counsel had not objected but said that *'…now this would be a cut throat thing…'*

[69] Accordingly, Kacisau's evidence had been concluded after examination-in-chief, cross-examined by LTA's counsel and re-examination. There was no application by the LTA for an adjournment of the hearing on the basis that it was not ready or taken by surprise. Even after Kacisau's examination-in-chief, there was no application for an adjournment for cross-examination by the LTA's counsel. The counsel for the LTA decided to cross-examine Kacisau after expressing that he was taken off guard but said *'I will try my best'*. Nor was there any request for adjournment of the hearing for the LTA to call any rebuttal evidence.

[70] I have already dealt with in detail as to how all the documents produced by Kacisau were already with the LTA for years. The LTA need not have been taken by surprise as Kacisau's oral testimony was in line with his record of interview with more elaboration into details of his employment relationship with LTA and journey to Lautoka. There was no deprivation of the right to a fair trial as enshrined in the 2013 Fijian Constitution. This ground of appeal has no merits.

Morgan, JA

[71] I have read and concur with the reasoning and conclusions of the judgment of Hon. Prematilaka, RJA.

Heath, JA

[72] I have had the advantage of reading the judgment prepared by Prematilaka RJA. I pay tribute to His Lordship's comprehensive and insightful discussion of legal principles in the notoriously difficult area of vicarious liability. Despite considerable misgivings about the outcome in this case, I join in the Resident Justice of Appeal's proposal that the appeal be dismissed. As my concerns involve both matters of principle and evidence, I shall outline why I have been more troubled than my colleagues in resolving this appeal.

[73] It seems to be common ground, throughout the common law world, that the fixing of boundaries within which an employer will be held liable for the unauthorized acts of its employees is achieved by balancing public policy factors in particular cases, as opposed

to a measured development of a coherent body of law. I agree with the list of policy factors in favour of imposing vicarious liability that Prematilaka RJA has helpfully set out in his judgment.[26] However, I consider that the policy question should be asked from the perspective of the employer, rather than any person who might suffer injury or loss as a result of the acts or omissions of the employee. In each case, the question is: Why is it just, in the circumstances of a particular case, to attribute liability to the employer for the wrongful acts of the employee?

[74] This point was highlighted in ***CCIG Investments Pty Ltd v Schokman***,[27] a decision of the High Court of Australia. In the principal judgment, discussing the importance of any tortious act of an employee occurring within the scope of his or her employment, Kiefel CJ, Gageler, Gordon and Jagot JJ put the point in this way:[28]

> *12. … The principle upon which the rule is based is that it is just to make the employer, whose business the employee is carrying out, responsible for injury caused to another by the employee in the course of so acting, rather than to require that the other, innocent, party bear their loss or have only the remedy of suing the individual employee.*
>
> (Footnotes omitted)

[75] In the same case, Edelman and Steward JJ discussed, in some detail, the various ways in which vicarious liability might arise. They did so to distinguish among three types of situations, all of which have been given a label of "vicarious liability", but which must be considered discretely. There is no doubt that the present case falls within the second area identified by those Judges. Edelman and Steward JJ said:[29]

> *"[The second area involves attributing] to an employer the liability of an employee, based on the wrongful acts of the employee, whether or not those acts were authorized … But the employee's wrongful acts had to be sufficiently or closely connected to the employee's duties or powers of employment so that they could be said to have performed in the "course of their employment" …"*

[26] See para 22 above.
[27] ***CCIG Investments Pty Ltd v Schokman*** [2023] HCA 21.
[28] Ibid, at para 12.
[29] Ibid, at para 51.

[76] The distinction is between cases in which an employer is liable for the acts of its employee as a matter of agency law and those in which liability is attributed to it for the wrongful acts of its employee that are closely connected to that person's employment obligations.

[77] The evidence on which findings of fact have been made in the present case to support a finding of vicarious liability is sparse, to say the least. There was little, if anything, said in the Amended Statement of Claim or in Mr. Naicker's affidavits about Mr. Kacisau's role as an employee. That is understandable, to the extent that Mr. Naicker, as the victim of the motor vehicle accident, would not have any direct knowledge of Mr. Kacisau's employment position. In the absence of any evidence in support, the Land Transport Authority (the Authority), as employer, did not respond with evidence. Some evidence was given orally by Mr. Kacisau in the High Court, when he was called as a witness by Mr. Naicker, much to the surprise of the Authority. Nevertheless, as Prematilaka, RJA has said, no application to adjourn was made so we must proceed on the basis of the evidence before us. The fact that the Authority did not call evidence that was in its own possession or control about the scope of Mr. Kacisau's employment when travelling to Lautoka and returning to Lami is the basis on which I have accepted evidence on that topic that is favourable to Mr. Naicker.

[78] For the purpose of determining whether vicarious liability exists, the following facts have, in my view, been proved:

(a) Mr. Kacisau was employed by the Authority as a "Technical Officer". His employment contract started on 1 January 2009, and was to run for three years. In the absence of evidence to the contrary, it can be safely inferred that the contract was continuing on existing terms at the time that the accident occurred.

(b) Mr. Kacisau was a salaried employee, though there were various provisions, in the employment contract and accompanying "Partnership Agreement" which made provision for leave entitlements and performance bonuses. Despite hours of employment being set out in the employment contract, it is clear that they were flexible and could be altered with the consent of the parties.

(c) Mr. Kacisau lived in Lami, near Suva. He was authorized to travel to Lautoka in a car owned by the Authority, on Friday 26 July 2013. The precise purpose of the travel is not entirely clear; during the course of Mr. Kacisau's evidence, there were references to him conducting a driving school examination or simply taking the examination papers to Lautoka. The examination was due to start at the Authority's premises in Lautoka around 9.00am on Saturday 27 July 2013.

(d) Mr. Kacisau drove from Lami to Nadi, breaking his journey overnight at a hotel there. The Authority paid for his overnight accommodation. In his caution interview to the Police on the day of the accident, Mr. Kacisau admitted to consuming about 10 rum and cokes, finishing at about 2.00am on the Saturday morning.

(e) On the Saturday morning, Mr. Kacisau left the hotel at Nadi and drove towards Lautoka. At about 8.50am on 27 July 2013, his vehicle struck Mr. Naicker, a pedestrian, on Queen's Road, Waimalika. The evidence suggests that Mr. Naicker suffered serious injuries.

(f) Mr. Kacisau was charged with one count of driving a motor vehicle with an excess blood alcohol concentration and one of dangerous driving occasioning grievous bodily harm. He pleaded guilty to both offences and was sentenced by Resident Magistrate Wickaramasekara, in the Magistrate's Court at Nadi on 13 March 2014.[30]

(g) In his sentencing remarks, the Resident Magistrate recorded that Mr. Kacisau had 52 micrograms of alcohol per 100 millilitres of breath, the equivalent of 114.4 milligrams of alcohol per 100 millilitres of blood.[31] That blood/alcohol level is telling in respect of a person who admitted to having stopped drinking at 2.00am this morning. I have no doubt that the accident was caused by a combination of excessive speed and driving under the influence of alcohol. I infer that the

[30] ***State v Kacisau*** Resident Magistrates Court Nadi, Traffic Case 5763 of 2013, 13 March 2014.
[31] Ibid, at para 4.

continuing presence of alcohol in Mr. Kacisau's blood stream was an (but not the sole) operating cause of the accident.

[79] For present purposes, I am prepared to infer that the Authority instructed Mr. Kacisau to drive from Lami to Lautoka for a purpose connected to the examinations that were to take place at the Authority's offices on Saturday 27 July 2013. The issue is what "act" caused the pedestrian's injury and whether that "act" was being undertaken within the scope of his employment. As Gleeson J said in a separate judgment in ***CCIG Investments***, in "the absence of an employer's authorization of the employee's wrongful act, the principles justifying vicarious liability remain contentious".[32]

[80] So, what is the "wrongful act"? On the view that has found favour with both the High Court Judge and Prematilaka RJA, the "act" was the accident which occurred while Mr. Kacisau was driving a vehicle within the scope of his employment. Another view might be that the "act" was the unauthorized consumption of alcohol outside of the scope of his employment. If it were, when he made the decision to drive in an intoxicated state, did he resume acting within the scope of his employment?

[81] Unfortunately, given the paucity of evidence about the tasks that Mr. Kacisau was to undertake, the absence of any evidence as to what was to happen on the return journey after the examination had been completed, and the lack of full argument on those nuanced issues, this is not an appropriate case to explore the point further. Nor would this be an appropriate case to remit for further fact-finding; it has already taken over 11 years to reach this point.

[82] For consideration in future cases, I would like to offer two variations on the fact situation which might have resulted in a different analysis.

[83] The first is if Mr. Kacisau had been in Suva and was returning to his home in Nadi before continuing, on the next day, to Lautoka. If he had consumed the same amount of alcohol and then driven to Lautoka, would that have been within the scope of his employment, or in his personal time? That point is, at least, arguable on the basis of what was said in

[32] ***CCIG Investments Pty Ltd v Schokman*** [2023] HCA 21, at para 93.

Smith v Stages.[33] In that case, one of the issues was whether an employee who was paid wages by his employer to travel from his ordinary residence to a place other than his usual workplace to carry out a job (and was also paid for the return journey) was acting within the scope of his employment while travelling. In that sense, the case is similar to ***Purton v Marriot International*** *Inc,*[34] the Californian case discussing the (so called) "coming and going" principle, to which Prematilaka, RJA has referred.[35]

[84] Acknowledging that "it is comparatively easy to state the principle; but it is more difficult to apply it to the facts of individual cases", Lord Goff of Chieveley took the view that, on the facts of that case, the employee was acting in the course of his employment.[36] In the same case, Lord Lowry set out some *prima facie* propositions that he said "may be stated with reasonable confidence".[37] The first two propositions contrasted an employee travelling from his ordinary residence to a regular place of work, by whatever means of transport (who was not acting in the course of his employment) with one involving travel in the employer's time between workplaces or in the course of a peripatetic occupation (who was acting in the course of his employment). The remaining members of the House of Lords, Lord Keith of Kinkel, Lord Brandon of Oakbrook and Lord Griffiths agreed with the speeches given by both Lord Goff and Lord Lowry.

[85] The second involves the possibility that, having consumed alcohol in the hotel, Mr. Kacisau struck a patron with a blunt object causing grievous bodily harm. Even though Mr. Kacisau was staying in a hotel for which his employer had paid, would his employer be vicariously liable for injury suffered in that situation? On one view, the only difference is that the victim was struck with a blunt instrument rather than a car. Asking the policy question: would it be just to attribute the employee's wrongful act to the employer in that situation?

---

[33] ***Smith v Stages*** [1989] 1 AC 928 (HL).
[34] ***Purton v Marriot International*** *Inc* [2023] 218 Cal. App. 4th 499, a decision of the Court of Appeal, 4th Appellate District for the State of California.
[35] See paras 53–55 above.
[36] ***Smith v Stages*** [1989] 1 AC 928 (HL) at 936.
[37] Ibid, at 955–956.

[86] I do not think it would be helpful to speculate as to how such situations may be determined. The purpose of this concurring judgment is to highlight the need for greater specificity in the evidence to enable the court to assess whether an employee was or was not acting within the scope of his or her employment at a time something is done or omitted that causes loss or injury to a third party. One need only compare the comprehensive nature of the evidence adduced in ***Smith v Staples*** with what occurred in the present case to realise how stark the difference was.

Orders of the Court:

1. Appeal is dismissed.
2. Considering the maters of law involved, parties to bear their own cost of the appeal.

.....
Hon. Justice C. Prematilaka
RESIDENT JUSTICE OF APPEAL

COURT OF APPEAL FIJI

.....
Hon. Justice W. Morgan
JUSTICE OF APPEAL

.....
Hon. Justice P. Heath
JUSTICE OF APPEAL

Solicitors:

Legal Aid Commission for the Appellant
Chaudhary & Associates for the 1st Respondent
2nd Respondent is absent and unrepresented