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

CIVIL APPEAL NO.ABU 107 OF 2020
[Labasa High Court Civil Case No. HBC 27 of 2018]

BETWEEN : **USEBIA CIBA**

Appellant

AND : 1. **BALE FRANCIS**
2. **GORDON LEEWAI**
3. **THEN INDIA SANMARGA IKYA SANGAM**

Respondents

Coram : Jitoko, P
Qetaki, JA
Clark, JA

Counsel : Mr. S. Prasad and Mr. R .Dayal for the Appellant
Mr. Sushil Sharma for the first and second Respondents
Mr. S. Krishna for the third Respondent

Date of Hearing : 02 September 2024

Date of Judgment : 27 September 2024

JUDGMENT

Jitoko, P

1. Totally agree with the judgment.

Qetaki, JA

2. I have read in the draft judgment of Honorable Clark, JA and I agree with it the reasons and orders.

Clark, JA

Introduction

3. On 16 June 2015 the three appellants, student nurses at the time, were passengers in an eight-seater Toyota van being driven by the first respondent who I will refer to as "the driver". The driver was speeding. He lost control of the vehicle. It overturned and ended up in what was described as a "drain" but from the sketch map tendered in evidence in the Magistrates Court is better understood as an 8.7 metre-wide open culvert. The appellants were seriously injured. Unrestrained as they all were, two were thrown through the front windscreen on impact and the third was flung from the back row into the front passenger's seat.

4. The driver, Bale Francis Lee, was charged with dangerous driving causing grievous bodily harm. The Magistrate determined he drove at a dangerous speed, was inattentive, had gone to sleep at the wheel and as a result had "caused grievous injuries" to the students.[1] Mr Lee was convicted, sentenced to five months' imprisonment and served his term not having appealed either his conviction or sentence.

5. The appellants sued the driver. They also sued Gordon Leewai who was the registered owner of the vehicle and the Sangam College of Nursing where the

---

1 *State v Bale Francis Lee* Criminal Case No 1297/15, Resident Magistrates Court at Labasa, 23 October 2017.

5. The appellants sued the driver. They also sued Gordon Leewai who was the registered owner of the vehicle and the Sangam College of Nursing where the appellants were students.[2] For reasons particularised in their pleadings the appellants claimed each of the three defendants was negligent.

6. In the High Court, the driver and the owner were ordered to pay general damages totalling $285,000.00 across the three appellants, special damages totalling $6,369.00 and $9,000.00 in costs. The appellants' action against the College was dismissed.[3]

7. Regrettably, the appellants have been denied the fruits of the judgment in their favour. The driver is impecunious and apparently the owner, Gordon Leewai, is declared bankrupt.

8. The appellants have appealed the High Court judgment. Before turning to their arguments on appeal it is necessary to mention the position the defendants adopted in the High Court and to set out key findings made by the learned High Court Judge.

High Court proceeding

Plaintiffs' case

9. The plaintiffs' pleaded case was advanced in negligence:

   9.1 against the first defendant driver, Mr Lee, on the basis of his dangerous driving.

   9.2 against the second defendant, Douglas Leewai, as the owner of the Toyota van register no EM369, for permitting it to be driven for the commercial conveyance of passengers when it was not licensed for that purpose and lacked seat belts; and for failing to instruct the driver to drive safely and take rests if sleepy.

---

[2] For convenience, in this judgment I refer to the third respondent as "**Sangam**" or "the **College**". Mr Kumar, who gave evidence for the third respondent in the High Court, confirmed the correct name to be Sangam College of Nursing in Health Care Education and referred to it as "the College".

[3] *Ciba v Lee* [2020] FJHC 620; HBC27.2018 (7 August 2020) [the **High Court decision**].

9.3 against the third defendant College for multiple pleaded failures including failure to ensure the hired vehicle was suitable for conveying the College's students.

10. The appellants also pleaded the College was vicariously liable for the negligence of the first two defendants.

First and second defendants' admissions of liability

11. At the commencement of day one of the trial Mr Sharma, counsel for the first and second defendants, advised the Court that he had written instructions from the second defendant to admit liability. Mr Sharma said that would "make things simple" for the plaintiff and the third defendant. The issue of quantum would be decided by the Court and "any amount for quantum will be accepted by the 2nd defendant".[4] Mr Sharma went on to confirm the admission of liability was by both the first and second defendants.

12. Mr Prasad, counsel for the plaintiffs, protested mildly on the basis it was a personal injury matter, the plaintiffs were seriously injured and the owner of the vehicle was a bankrupt. However, Mr Sharma advised he would take no further part in the proceedings and, his clients having admitted liability and having confirmed they intended to accept whatever decisions the Court reached on quantum, sought to be excused.

13. Accordingly, the trial proceeded as between the plaintiffs and third defendant only. Mr Prasad did not seek an adjournment and it does not seem that any application was made to cross-examine the first two defendants.

Sangam's pleaded admission of agency relationship

14. In its statement of defence the College denied it had been negligent in any respect or that it was responsible for the first or second defendants' negligence. In fact, the College sought declarations that the first two defendants had complete management and custody of vehicle EM369 at the time of the accident and that

---

4 Notes of evidence, pp 6-7.

the first defendant was not an employee or servant and agent of the College but was an employee of the second defendant.

15. An issue arose quite early in the hearing concerning an admission in the third defendant's statement of defence.

16. In their statement of claim the plaintiffs pleaded an agency relationship between Sangam and Mr Lee, the minivan driver:

> 1. *The Plaintiffs were at all material times final year Student Nurses and were studying nursing under the care and supervision of the Third Defendant and were based at the Coqeloa Nursing Station. ...*
>
> 2. *The **First Defendant was at all material times** the driver of the motor vehicle registered No. EM369 and was **driving the said vehicle for the** Second and **Third Defendants as their servant and/or agent**.*
>
> *[Emphasis added]*
>
> 3. *The Second Defendant was at all material times the owner of motor vehicle registered No. EM 369 (hereafter the "said Vehicle") which was hired by the Third Defendant for conveyance of Student Nurses.*

17. In its statement of defence the College admitted Mr Lee was driving as Sangam's servant and/or agent:

> 2 *THAT the 3rd Defendant admits paragraphs 2 and 3 of the Statement of Claim.*

18. In the normal course of events, Sangam's admission of an agency relationship with the driver would have removed it as an issue for trial. But at the pre-trial conference on 19 November 2019 the parties agreed a number of issues for trial, including the following:

> 3 *WAS the 1st Defendant driving the said motor vehicle registration no EM369 for the 3rd Defendant as their agent and/or servant with any authority or permission or instructions from the 3rd Defendant?*

19. The learned High Court Judge, Lyone Seneviratne J, addressed the "discrepancy" between Sangam's admission of an agency relationship with the driver and the fact the agency relationship was agreed to be an issue for trial. Seneviratne J determined that the Court could not "make a finding on the admissions found in

the pleadings which are contrary to the minutes of the pre-trial conference".[5] Accordingly, His Honour proceeded to determine whether or not the driver was an employee or agent of the College.

High Court Judgment

20. The Judge set out the following agreed facts:

> 1. *The plaintiffs were at all material times students of Sangam Institute of Technology.*
>
> 2. *The 1st defendant was at all material times the owner of the motor vehicle registered No. EM 369 and was driving the said vehicle for the 2nd defendants as their servant and/or agent.*
>
> 3. *The 2nd defendant was the owner of motor vehicle registration No. EM 369 and the 3rd defendant was the hirer of motor vehicle registration No. EM369 for conveyance of student nurses from one destination to another.*
>
> 4. *On the 16th day of June 2015, the plaintiffs were involved in an accident while travelling in motor vehicle registration No. EM 369 and were injured. (Extent of which is an issue).*
>
> 5. *The 1st defendant was charged for the offence of dangerous driving causing grievous harm and was found guilty and had been convicted and sentenced to five (5) months imprisonment and disqualified from driving for a period of four (4) months to be served after the 1st defendant completed his term in prison.*

21. At the outset the learned Judge concluded the driver's conviction for dangerous driving established that his "carelessness and dangerous driving" caused the accident.[6] His Honour then proceeded to consider whether the College was vicariously liable for the first defendant's negligence.[7]

22. It was an agreed fact that at all material times the driver drove EM369 for the owner and as the owner's agent. The plaintiffs had adduced no evidence to show the driver was employed by the College or was otherwise an agent of the College. The plaintiffs relied on the College's pleaded admission of agency in its statement of defence. The Judge's treatment of this issue has already been discussed above at paragraphs 14 to 19. Ultimately, his Honour determined that the driver was not

---

5 High Court decision above, n3 at [15].

6 At [9].

7 At [11].

employed by the College but was an independent contractor. Therefore, the College could not be held vicariously liable for the driver's negligence.[8]

23. Nor was the College negligent in providing a private vehicle for the transportation of the student nurses. Driving a vehicle to transport passengers without a licence, in breach of the Land Transport Act 1971 *"cannot be an act of negligence it is only a violation of statutory provision which is punishable by law"*.[9] As to the fact the vehicle had no seat belts, the Judge said that was the responsibility of the owner, not the College and the students could have refused to travel in the vehicle.[10]

24. There was a dispute at trial concerning the provision of supervisors to accompany students when they were being transported from one destination to another. The appellants contended that they were accompanied by a supervisor whenever they travelled in the hired vehicle. Ms Ciba's evidence was that an accompanying supervisor was responsible for the nurses while they travelled because most of the nurses were female and the supervisor would observe the conduct of the driver towards the students and whether the vehicle was being driven safely. She testified to the return trip on 16 June 2015 being the first occasion in her three years when there "[was] no supervisor with us".[11]

25. Ms Tunabuna gave evidence that the students were told at the orientation that their enrolment package fee included the transport which the school was to provide from one destination to another and that during school hours supervisors would be with them.[12]

26. Krishan Kumar gave evidence for the College. Mr Kumar was a registered nurse who was with the College from 2014 to 2018. As the "Head of School" his responsibilities included implementing the undergraduate programme, supervision of the students and other administrative duties. Mr Kumar said "we would not travel with the students all the time"; there were so many trips that

---

8 At [24].
9 At [27].
10 At [29].
11 Notes of evidence at p 553.
12 Notes of evidence at p 660.

making a tutor available each time would not be do-able; "this is the whole purpose of outsourcing". Mr Kumar confirmed that if the students were being transported for a competency assessment they would be accompanied by a tutor but as to "supervis[ing] the driver I am not sure".[13]

27. The learned Judge made no specific finding about this conflict in the evidence. His Honour noted the plaintiffs adduced in evidence a College Handbook titled "The Companion" but there was nothing in the handbook to suggest a supervisor would accompany the students to supervise the driver. Seneviratne J referred to Mr Kumar's evidence but he did not expressly reject any party's evidence or prefer the evidence of one party over another.[14]

28. In light of the evidence he had heard and the parties' submissions it appeared to his Honour that there was no negligence on the part of the College which contributed to the plaintiffs' injuries and he proceeded to consider the medical evidence and the extent of the injuries suffered by each of the plaintiffs.[15]

29. The medical report for Uesbia Ciba, who was thrown through the windscreen, recorded the following injuries as a result of the accident:

> 1. *Open pubic symphysis diastasis.*
> 2. *Bladder rupture (anterior wall) secondary to avulsion and direct force from pubic symphysis diastasis.*
> 3. *Large anterior vaginal wall tear communicating with loss foetus vitals.*
> 4. *Left antero-medical thigh laceration.*

30. Ms Ciba was in hospital for 53 days. She had initial emergency surgery as her injuries were life-threatening. Ms Ciba was five months pregnant and lost her baby. It became apparent the baby was not breathing and a complex caesarean section was performed. Ms Ciba also had surgery to repair her ruptured bladder, an injury from which she had not fully recovered at the date of the High Court trial. The first and second defendants were ordered to pay Ms Ciba $150,000.00 as general damages and $2,400.00 as special damages.

---

[13] Notes of evidence at pp 800-803.

[14] High Court Judgment at [28].

[15] At [30]

31. Anaseiki Diroko was 35 weeks pregnant when she was thrown from the van. She was initially assessed on arrival at the hospital for trauma and a cardiotocography was done to assess the wellbeing of the foetus. A repeat CTG was done some hours later when Ms Diroko had detected no foetal movement. Indications of foetal distress were apparent and it was decided to perform an emergency caesarean section. Ms Diroko was not discharged for approximately one month as the baby had neonatal problems and could not be discharged. The first and second defendants were ordered to pay Ms Diroko $60,000.00 as general damages and $1,920.00 as special damages.

32. Rosa Tunabuna suffered musculoskeletal injuries when she was thrown from the rear of the van into the front passenger's seat. Her thigh bone was fractured and her left shoulder dislocated. The medical report noted Ms Tunabuna was "destined for challenges physically that will impair her from her duties" as a nurse and was likely to "continue to have impairments that would gravely impair her quality of life, employability and functional/emotional independence". At some point Ms Tunabuna's father took her from the hospital, against medical advice, in favour of traditional healing. The first and second defendants were ordered to pay Ms Tunabuna $75,000.00 as general damages and $2,049.00 as special damages.

33. The three appellants were each awarded $3,000 in costs.

The Appeal

34. The appellants' notice of appeal contains 11 grounds of appeal but before this Court they elected not to pursue several of those grounds. They advanced as their principal position Sangam's breach of its duty of care to the appellants as well as its vicarious liability for the negligence of the driver and vehicle owner.

35. The first and second defendants' admissions of liability and their consequent non-participation in the trial resulted in a paucity of evidence. That is reflected in the High Court judgment itself which contains few findings of fact.

36. It is incumbent on this Court to undertake a careful examination of the relevant evidence in order to be able to assess whether the High Court erred in determining that the College bore no liability for the injuries the appellants sustained when

travelling in pursuance of their studies. An appellate court must be mindful of the advantage a trial judge has in hearing and assessing witnesses and evidence. But where the question on appeal is one of law, such as the legal nature of the relationship between the parties, –[16]

> *... the appellate court can, and indeed must reach its own view whether or not, on the findings of fact made by the lower court the true legal analysis is that there was [a particular legal relationship].*

37. I turn now to the first of the two primary heads of argument advanced by the appellants namely, that the College owed a non-delegable duty of care to the appellants and breached that duty.

Non-delegable duty of care

38. In *Gounder v Murr* the Supreme Court determined an application for leave to appeal by a landlord who had been held liable in the courts below for causing property damage due to his breach of contract with his tenant.[17] Although it was not necessary to do so the Supreme Court thought it might be useful to clarify the law on the "nebulous concept of non-delegable duty of care" as counsel for both parties had made extensive submission on this area of negligence.

39. The Supreme Court explained the duty in the following way:

> *The non-delegable duty of care envisages tort liability not only to take care but ensure that care is taken. The concept seeks to in effect fix liability for negligent acts to a particular person, even if that person had delegated responsibility for performance of those acts to a third party, for example the electrical contractor in this case, who acted quite independently from the person who engaged his services. The concept is significant in that it constitutes an exception to the normal rule that a person will not be liable for the acts of independent contractors. Where a duty is held to be non-delegable, it will be deemed to be personal to the defendant who is not permitted by the law to delegate the responsibility to a third person even where in actual fact some work had been entrusted to such third person.*

40. The Court noted the English and Australian cases which had extended the concept of a non-delegable duty but they were not analogous to the case before it where a

---

16 *O'Kelly v Trusthouse Forte plc* [1983] 3 All ER 456, 466.

17 *Gounder v Murr* [2011] FJSC 12; CBV009.2010 (12 August 2011).

tenant had suffered injury to property as a result of the landlord's breach of contract.[18]

41. Subsequent to the Supreme Court's decision in *Gounder v Murr*, the UK Supreme Court delivered its decision in *Woodland v Essex County Council* providing guidance on the circumstances where a non-delegable duty of care might arise.[19] The appellant was a pupil of a school for which the respondent local authority was responsible. During a school swimming lesson she suffered serious brain injury. She issued proceedings claiming the authority owed her a non-delegable duty of care. The authority successfully applied to strike out the allegation and the Court of Appeal upheld the decision to strike out. On appeal to the Supreme Court, the appeal was allowed and the Judge's order striking out the allegation of a non-delegable duty was set aside.

42. Lord Sumption delivered the primary judgment with which Lady Hale DP agreed while adding in a separate judgment a "few thoughts". Clarke, Wilson and Toulson LJJ agreed with both judgments.

43. Lord Sumption began by noting the appeal had nothing to do with vicarious liability. Indeed, it was only because the local authority was not vicariously liable for the negligence of the independent contractors that the question arose as to the scope of the authority's duty to pupils in its care.

44. His Lordship identified two broad categories of case in which English law recognised the existence of non-delegable duties, without having a single theory to explain when or why non-delegable duties arose. The first category "was a large, varied and anomalous class of cases" in which defendants employed contractors to perform a function that was inherently hazardous or liable to become so in the course of the contractor's work.[20] The second category of non-delegable duties comprised cases where the common law imposed on the defendant a duty having three critical characteristics:[21]

---

18 At [32].
19 *Woodland v Essex County Council* [2013] UKSC 66; [2014] AC 537; [2013] All ER 482.
20 At [6].
21 At [7].

First, it arises not from the negligent character of the act itself but because of an antecedent relationship between the defendant and the claimant. Second, the duty is a positive or affirmative duty to protect a particular class of persons against a particular class of risks, and not simply a duty to refrain from acting in a way that foreseeably causes injury. Third, the duty is by virtue of that relationship personal to the defendant. The work required to perform such a duty may well be delegable and usually is. But the duty itself remains the defendant's.

45. Lord Sumption reviewed the origins of non-delegable duties and the contexts in which they had been said to arise. His Lordship canvassed the so-called "employment cases" and "hospital cases" before turning to four important decisions of the High Court of Australia which considered the underlying rationale for non-delegable duties. The first to be considered was *Commonwealth of Australia v Introvigne* in which the High Court of Australia discussed Professor Glanville Williams' criticisms of the notion of non-delegable duty of care.[22] I note that *Introvigne* was one of the authorities cited by the Fiji Supreme Court in *Gounder v Murr*.[23] Lord Sumption considered the Australian cases were "broadly correct in their analysis of the factors" that gave rise to non-delegable duties of care (although he did not necessarily subscribe to every dictum in the Australian cases).[24]

46. Next, Lord Sumption turned to the circumstances in which a non-delegable duty arises. Noting that "non-delegable duties of care are inconsistent with the fault-based principles on which the law of negligence is based" his Lordship observed that the difference must be more than a question of degree and could not depend simply on the degree of risk involved in the relevant activity.[25] His Lordship identified the following "defining features" that characterised the cases where non-delegable duties were held to exist.[26]

(1) The claimant is a patient or a child, or for some other reason is especially vulnerable or dependent on the protection of the defendant against the risk of injury. Other examples are likely to be prisoners and residents in care homes. (2) There is an antecedent relationship between the claimant and the defendant, independent of the negligent act or omission itself,

22 *Commonwealth of Australia v Introvigne* (1982) 150 CLR 258.
23 *Gounder v Murr* above n 17 at [30].
24 *Woodland v Essex County Council* above, n19 at [22].
25 At [23].
26 At [23].

(i) which places the claimant in the actual custody, charge or care of the defendant, and (ii) from which it is possible to impute to the defendant the assumption of a positive duty to protect the claimant from harm, and not just a duty to refrain from conduct which will foreseeably damage the claimant. It is characteristic of such relationships that they involve an element of control over the claimant, which varies in intensity from one situation to another, but is clearly very substantial in the case of schoolchildren. (3) The claimant has no control over how the defendant chooses to perform those obligations, ie whether personally or through employees or through third parties. (4) The defendant has delegated to a third party some function which is an integral part of the positive duty which he has assumed towards the claimant; and the third party is exercising, for the purpose of the function thus delegated to him, the defendant's custody or care of the claimant and the element of control that goes with it. (5) The third party has been negligent not in some collateral respect but in the performance of the very function assumed by the defendant and delegated by the defendant to him.

47. Addressing the lead judgment of Lord Phillips MR in a 2004 decision where it was suggested "a non-delegable duty had only been found in a situation where the claimant suffers an injury while in an environment over which the defendant is in control", Lord Sumption disagreed.[27]

> *The defendant is not usually in control of the environment in which injury is caused by an independent contractor. That is why as a general rule he is not liable for the contractor's negligence. Where a non-delegable duty arises,* ***the defendant is liable not because he has control but in spite of the fact he may have none. The essential element*** *in my view* ***is*** *not control over the environment but* ***control over the claimant*** *for the purpose of performing a function for which the defendant has assumed responsibility.*
> [Emphasis added]

Applying the principles

48. I have no doubt that the College assumed a duty to its students to ensure that when they were required to be transported in the course of their training, they were transported safely.

49. The students were entrusted to the College for the essential purposes of training and supervision. Transportation of the students to the many places they were required to be may not have been confined to college grounds but transportation by vehicle was the required means via which the students attended placements,

27 At [24].

training and shift work all of which were compulsory components of the nursing qualification conferred by the College.

50. The College outsourced, as Mr Kumar put it, the College's essential transportation function. In other words, the College delegated this function and this control of its students to an independent contractor. Transporting the appellants was the very function the College assumed an obligation to perform and it delegated the function.

51. At the time of the accident the appellants were on rural attachment and were being driven to the Coqeloa nursing station for the purpose. Thus, the negligence of the driver and vehicle owner occurred in the course of transporting the appellants in the course of the College's programme. As both the first and second respondents were negligent in performing the College's transportation function, the College breached its non-delegable duty of care to the appellants.

52. In the discussion that follows I encapsulate the evidence that leads to this inevitable conclusion.

Discussion

53. Mr Kumar agreed that the College's fee-paying students were under the care and supervision of the College and that the College owed them a duty of care. He further agreed the College was *"duty bound to see their safety and security was not compromised at any time while they were students of the school"*.[28] But Mr Kumar took the view the College could not dictate to the independent contractors to whom the transport function was outsourced. The view is misconceived as it suggests an understanding that the College could outsource its vital transportation function and with that outsourcing, shift for its responsibility for and duty of care to its students.

54. The College published and provided to students a 150-page student handbook titled *The Companion* which was in evidence at trial. The Handbook emphasised the expectation of attendance *"at 100% of all nursing practice learning*

[28] Notes of evidence, p 808.

experiences (nursing laboratory sessions, residential college and clinical placements) ... During the clinical attachments you will be allocated to do shift work, 8 to 4 shift, am shift, pm shift and night shift."

55. The College's senior executive officer, Ms Premi, gave evidence. She said the College arranged transport to pick students up and drop them off for evening shifts, night shifts, clinical duties, community attachments and the like. Ms Premi's evidence was that the College owed a duty of care to its students and the safety of the students was the College's "paramount mission".[29]

56. In regard to the hire of vehicles Ms Premi described the College's responsibility as being to ensure the vehicles were in running condition, were Land Transport Act compliant and that the drivers were suitable. The College was aware it was illegal to use a private vehicle for hire and Ms Premi said if the College had known EM369 was not licensed to carry passengers commercially they would not have used the vehicle. The College had simply assumed EM369 was appropriately licensed and was not aware it had no seat belts. The College apparently "trusted" that the requirements were met. Ms Premi said the College had been using the vehicle since 2005 so had no reason to check.[30]

57. Ms Premi also testified to her understanding that if passengers were being transported in a private vehicle used for commercial purposes the third party insurance policy did not cover the passengers.[31]

58. The evidence demonstrates the appellants' dependence on the College for safe transportation and to protect them against the risk of injury. The College, and not the students, assumed the sole responsibility for all aspects of the transportation arrangements and the students were bound to use the transport provided. When asked if the plaintiffs used the transport Mr Premi replied "the school used the transport".[32]

---

29 Notes of evidence, p 783.
30 Notes of evidence, p 786
31 Notes of evidence, p 776.
32 Notes of evidence, p 765.

59. In a sense, the students were rendered passive by the structure. They were bound to attend the places to which transport was arranged by the College and they were bound to use the vehicle provided. It was put to Ms Ciba that it would have been reasonable to not enter the vehicle when she saw it had no seat belts. She replied:[33]

> *Sir, that vehicle was – the school transport so when the school provides that vehicle we would have gotten into the vehicle if we did not use that vehicle we wouldn't complete our rural attachment.*

60. It seems the College used Mr Lee in 2020 to transport at least Ms Ciba to the Court for the trial. In cross-examination, it was put to Ms Ciba that she was prepared to travel with the same driver because she felt safe with his driving. Ms Ciba replied:[34]

> *We have to get on to the vehicle because it was school transport. If we don't get in to the vehicle the school will take disciplinary action to us as students ...*

61. The evidence establishes the existence of the necessary antecedent relationship between the appellants and the College – independent of the negligent acts themselves. The relationship placed the appellants in the charge of the College. It is not necessary to impute a duty from this facet of the relationship because both Ms Premi and Mr Kumar accepted the College owed a duty of care to the students to protect them.

62. The evidence also establishes the complete lack of control, or even influence, the students were able to exercise over how the College managed its responsibility for transporting the students.

63. The fourth factor giving rise to a no-delegable duty is the delegation by the College of a function which is an integral part of the positive duty it had assumed to the appellants. Sangam unquestionably delegated its responsibility for safely transporting its students, but to whom? Ms Premi said the College used Leewai Tours as its sole contractor but there is some doubt about the identity of the actual contractor. First, although there was said to be a contract with Leewai Tours the

---

33 Notes of evidence, p 598.
34 Notes of evidence, p 596.

contract was not in evidence. Ms Premi said she had never sighted the contract and both she and Mr Kumar confirmed it was missing probably as a result of the College shifting premises. So there was no evidence of the so-called contractual arrangement between the College and any third party.

64. The second basis for doubt about the legal identity of the contractor arises from the invoices. Although the contract was missing the College was able to tender a bundle of some 150 pages of invoices and payment vouchers evidencing payment for the hire of transport for the College's students between May 2006 and June 2015. The detailed invoices show the sheer extent of the transportation undertaking and the many tens of thousands of dollars that were paid over this period for transporting the student nurses. Most of the invoices between 2006 and 2012 were "From: Mr G Leewai" or "G Leewai". Thereafter, they were from Leewai Tours. But regardless of whether the College's arrangement was with Gordon Leewai or an entity named Leewai Tours, there is no dispute the College delegated its responsibility for its transportation function to one or the other. As Gordon Leewai never sought to substitute Leewai Tours as the second defendant, and Gordon Leewai is the named second respondent to this appeal, I shall continue to refer to Gordon Leewai as the third party to whom the College delegated its function.

65. As the owner of EM369, Gordon Leewai was responsible for ensuring it was compliant with the statutory and regulatory requirements for his operations. The complete absence of seat belts was not only unlawful but a significant contributor to the serious injuries the appellants suffered when, unrestrained, two were flung through the windscreen and the third from the back of the van to the front.

66. In any event Gordon Leewai admitted liability. Even without that admission, it was an agreed fact that his vehicle was driven by Mr Lee as Gordon Leewai's agent.

67. Finally, it was proved that the negligence (in this case, the dangerous driving) arose not in some collateral way but in the performance of the very function for which the College assumed responsibility and which function it delegated to Gordon Leewai.

Conclusion

68. For the foregoing reasons the third respondent owed a non-delegable duty of care to the appellants. *Woodland v Essex County Council* is not of course binding on this Court but relevant opinions of the Privy Council, House of Lords, the UK Supreme Court and senior appellate courts in other common law jurisdictions have tended to influence the development of the common law including in Fiji. The duty imposed on the College is on all fours with the critical characteristics and features of the duty discussed in *Woodland.*

69. At the material time the appellants were in the third respondent's charge. The third respondent assumed a duty to ensure the appellants were transported and transported safely, in the course of their studies. The training and transportation for that purpose, were integral parts of the College's teaching function. The third respondent assumed and exercised control over the appellants in the discharge of that integral function. The appellants were reliant on the third respondent; they had no control over how the third respondent chose to perform its responsibility for transportation whether personally or through a third party. The third respondent chose to outsource its vital and integral transportation function but without ensuring any proper risk assessments were undertaken. As Lord Sumption observed at [25]:

> *When the school's own control is delegated to someone else for the purpose of performing part of the school's own educational function, it is wholly reasonable that the school should be answerable for the careful exercise of its control by the delegate.*

70. The negligence occurred in the course of the very functions which the College assumed an obligation to perform and delegated to a third party. As the appellants' injuries resulted from the negligence of the third party in performing that function (the first respondent in driving dangerously and the second respondent in failing to provide a legally compliant vehicle) the College was in breach of its duty.

71. Accordingly, the appeal is allowed.

72. Having determined the appeal on the basis the College is liable for breach of its non-delegable duty it is not necessary to address the remaining grounds of appeal.

73. Not having pursued their appeal against the High Court's assessment of damages, the quantum of damages and costs awarded in the High Court stand. However, as the third respondent was in breach of its non-delegable duty, the quantum of damages and the costs set out in the High Court judgment are to be paid by the third respondent to each of the appellants in the amounts set out in the orders that follow.

Orders:

(i) *The appeal is allowed.*

(ii) *The judgment of the High Court is set aside.*

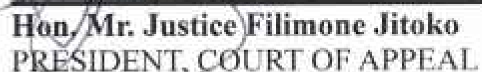
(iii) *The third respondent is ordered to pay Usebia Ciba $150,000.00 as general damages and $2400.00 as special damages.*

(iv) *The third respondent is ordered to pay Anaseini Diroko $60,000.00 as general damages and $1920.00 as special damages.*

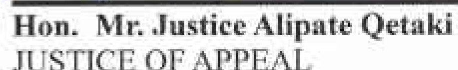
(v) *The third respondent is ordered to pay Rosa Tunabuna $75,000.00 as general damages and $2049.00 as special damages..*

(vi) *The third respondent is ordered to pay $7000.00 to each of the appellants ($21,000.00 in total) being costs in the High Court and on appeal.*

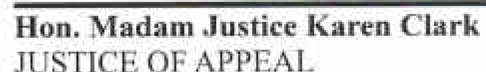
(vii) *The third respondent is ordered to pay interest on each of the three awards of general damages at the rate of 5% per annum from 7 August 2020 until 27 September 2024.*



Hon. Mr. Justice Filimone Jitoko
PRESIDENT, COURT OF APPEAL



Hon. Mr. Justice Alipate Qetaki
JUSTICE OF APPEAL



Hon. Madam Justice Karen Clark
JUSTICE OF APPEAL