THE HIGH COURT OF FIJI AT SUVA
CIVIL JURISDICTION

CIVIL ACTION NO. 295/2013

BETWEEN:

Losavati Dirasise

Plaintiff

AND

Carpenters Fiji Limited

Defendant

COUNSEL:	Mr W. Tabuya for the plaintiff
	Mr E. Narayan with Mr K.Naidu for the defendant
Date of hearing:	18th and 19th November, 2015
Date of Judgment:	14th September,2016

Judgment

1. The plaintiff states that on 14th September,2013,she entered the premises of Morris Hedstrom City Center,(MHCC) and used the ladies restroom at Level 1.MHCC is located in a building owned by the defendant. Whilst she was seated in the privacy of the toilet, an employee of the defendant had taken pictures of her with his phone. The plaintiff claims that her constitutional right of privacy under the Constitution of the Republic of Fiji was breached by the employee. She alleges that the defendant was negligent and breached its duty of care to ensure that she was not unduly harassed, while she was in its premises. She states that she was humiliated, shocked and in grave fear, as a result of the actions of the defendant. Her right to quiet enjoyment was disrupted to the degree of nuisance. The plaintiff claims that she suffered damages, as a consequence of the actions of the employee committed in the course of his employment. The defendant states that it in no way caused, contributed, or was responsible for any liability in relation to the alleged invasion of privacy. The actions of the employee were beyond his scope of employment.

2. ***The hearing***

A. *PW1 (the plaintiff)*

PW1, in her evidence said that she commenced work at Pacific Building Solutions, as a Receptionist on 29th January,2013. She said that she rose to become an Executive Assistant to the Directors in 2014, an Account Officer in mid-2014, and a HR Officer in early 2015.

On Saturday, the 14th September,2013, after work, she went to MHCC at 3 pm. She went to the cafeteria and then to the first stall of the public conveniences at level 1. She sat down to relieve herself. When she was standing and trying to pull her pants up, she heard snap shots from the back. When she looked back, one of the two knobs used to flush, was missing. She noticed a Blackberry phone, but did not see "*his face*".

She felt exposed. The first thing that came to her mind was the Internet. She shouted "*what are you doing and then he tried to put the knob back*". She quickly pulled her pants up and ran outside to the lady to whom charges are paid. She asked her if she saw somebody going in to do service or maintenance work. She called security. The security went into the service and maintenance room from the men's washroom. They said nobody was there. She met with the HR Officer. On Monday, she called and spoke to Mr Parma of the HR office. He told that they have sent the man home.

PW1 said that she had never experienced such a happening before nor has it happened to any of her female friends.

The pictures have not been deleted in front of her. She still feels angry and has fear of a lot of things, of internet exposure, her family and because at that time, she was a receptionist, the face of a company. On Tuesday, she told a colleague Swaran Lata, about the incident, when she asked her.

In cross-examination, it was put to her that she appears to be a very smart person, since she had four promotions. She was unaware that there was a passage behind the ladies toilet. She assumed it was a man. There was a possibility that he had not taken a photo of her face. She did not see the photos on the internet.

She agreed that the facilities provided by the defendant were all working, fit and proper to use and the door had a lock to ensure safety. In answer to the question posed by Mr Narayan, counsel for the defendant whether the defendant provided her with a safe environment, her answer was in the negative.

In re-examination, she said that despite her experience she pursued her employment with hard work.

B. *PW2 (Nicholas Fuata, Psychologist)*

PW2 produced his "*Psychological Assessment Report–for Losavati Dirasise*". He said that he made his findings according to the "*Trauma Response Scale*". He read extracts of his Report which provides that she experienced "*intense fear, helplessness or horror Sleep difficulties..Irritability/ angry outburst, Concentration difficulties..Hypervigilance,.Exaggerated startle. Avoidance of thoughts/feelings..Avoidance of activities/situation..inability to recall incident, diminished interest happiness and Estrangement/detachment..Unwanted thoughts of the incident Heightened experienced of dreams and nightmares Reoccurring feelings of incident Emotionally attached to incident Heightened feelings of guilt.. Heightened feelings of helplessness/hopelessness..Feelings of sadness related to the incident..Feeling that nothing will be good again. Acceleration experience with fear*".

The Report continued to state that following the incident at MHCC, she has suffered a marked psychological reaction. She has not qualified for diagnosis of Post-Traumatic Stress Disorder, but "*slight significance symptoms of traumatization..*(the) *incident appeared to shatter her belief that she could feel safe in a public rest room and left her with a marked sense of vulnerability which underlines her anxiety in relation to personal safety and reputation. Psychosomatic symptoms such as nose bleeds, back aches, tiredness associated with accelerated eating disorder and insomnia are now part of her daily life. The extent of her anxiety has had a marked impact upon that quality of her life, as at times she has shown signs of distress at work and her social life and interests have been restricted. Despite concerted effort from work colleagues, there has been no improvement in the intensity of her psychological reaction over time. Her symptoms of anxiety are directly related to the incident at MHCC.*

(She) *has suffered a Specific Phobia to public safety and personal reputation of moderate intensity, which has persisted without improvement over the past two months since the incident...Her symptoms of anxiety is directly related, and can be entirely attributed to the incident.*(She)*currently requires cognitive behavioral therapy with a therapist..Some eight sessions should suffice*".

Mr Tabuya, counsel for the plaintiff pointed out to the witness that PW1 had not lost her job and got promotions at work. PW2 said that the Report contains the effects on her, at the time of his assessment. She could have got help from her family or friends to assist her.

In cross-examination, PW2 said that he was not a "*medical Doctor*". It transpired that he made the assessments that she has nose bleeds, back aches, tiredness, eating disorder and insomnia from what PW1 had told him. He cannot ascertain whether she still has trauma, unless he does another assessment. His assessment showed that she had actual psychological damage, at the time of his Report.

In re-examination, PW2 said that promotions are not a measure of depicting recovery from trauma. Promotions spells out that she had a good social support group at work. She is "*still damaged based on the Report* ".

C. *PW3,(Ms Swaran Lata)*

PW3 said that she has known PW1 for three years, as a colleague at Pacific Building Solutions. On the morning of Monday,16th September,2013, she observed that PW1 had come late and was not serving refreshments to the staff, as was part of her duties. She was hardly answering any calls. She did not come for lunch nor tea break and was refusing to take her breaks. She was mostly inside the kitchen and hardly saying anything at all. She was in her own world. PW3 knew that something was wrong definitely. On the next day, PW3 asked her if something was wrong. She then told her about the incident.

She was not concentrating on her work. She was not punctual. She could not perform well, when she promoted as a Personal Assistant to the Directors.She was coming late and not communicating. She was transferred to the Accounts Department, where she did clerical work.

PW3 said that she was always frightened and worried about the pictures taken. She was not aware, if PW1 had obtained any professional help.

In cross-examination, PW3 said that she did not report the matter to HR. It was put to the witness that her evidence that PW1 could not perform was inconsistent with the promotions she got. It emerged that PW3 did not have any evidence in the form of a Performance Appraisal to show that she was not performing well.

D. *DW1(P.Sharma, Head of Group Human Resources for the Carpenter Group of Companies)*

DW1 said that the incident that occurred on 14th September, 2013, was reported to his office as a disciplinary matter. The employee had done a wrong against the company, which he should not have done. The defendant maintained the building, including the washrooms.

He said that when the incident report was received in the first instance, the employee was suspended. An investigation was carried out. The employee's services were terminated. After the termination, the defendant wrote to PW1 that she could report the matter to the Police, as the act was criminal in nature.

DW1 said that the employee, Ednan Hussain, was employed as a Refrigeration and Air Conditioning Technician. His role was to look after the air conditioning cooling towers. He had gone into a confined space not within his jurisdiction and against his job description. He acted on his own will.

In cross-examination, the witness denied that Ednan Hussain committed the act in the course of his employment. He said that there are three different levels in the building. Eighty people are currently employed in the building. No one can be supervised every minute of the day. He denied that his company was negligent .

It was put to him that the defendant owed a duty of care or a right of enjoyment under common law guaranteed by the defendant and a constitutional right to privacy under the Constitution of Fiji. DW1's response was that the company did not approve the employee's act nor condone his behavior. It was a frolic of his own.

The determination

3. The plaintiff's case is that the defendant was negligent and breached its duty of care to ensure that she was not unduly harassed, while she was in its premises. She claims that her right of privacy and right to quiet enjoyment were breached and disrupted to the degree of private nuisance, as a consequence of the actions of an employee of the defendant committed in the course of his employment.

4. The defendant's case is that the actions of its employee, Ednan Hussein were plainly beyond the scope of his employment duties. It was a frolic of his own. The management investigated the incident and terminated his services.

5. The facts are not in dispute. Ednan Hussein, an employee of the defendant had taken snaps of the plaintiff at the ladies toilet at level 1 of MHCC, from the passage at the back of the toilet.

6. Both counsel described the location of the passage with photographs. The passage was in-between the ladies and men's toilet and contained the piping system. It was locked and only accessible by the maintenance staff. Ednan Hussain had entered the passage, removed one of the two flush knobs in the ladies toilet and took photographs of the plaintiff.

7. The closing submissions of the plaintiff contends that the defendant was negligent and breached its duty of care to the plaintiff, as its management failed to monitor their employee Ednan Hussain and prevent him from causing a foreseeable risk of injury to the plaintiff.

8. The defendant's closing submissions cite several cases on the principles of duty of care and reasonable foreseeability, including the following.

9. In ***Bourhill v. Young,***1943 A.C. 93 Lord Macmillan at page 104 said:

> *The duty to take care is a duty to avoid doing or omitting to do anything the doing or omitting to do which may have as its reasonable and probable consequence injury to others, and the duty is owed to those to whom injury may reasonably and probably be anticipated if the duty is not observed.*
> *There is no absolute standard of what is reasonable and probable. It must depend on circumstances and must always be a question of degree.*

10. Mason J in ***The Council of the Shire of Wyong v. Shirt,*** [1979] 146 CLR 40 at pp 47-48 declared:

> *In deciding whether there has been a breach of duty of care the tribunal of fact must first asked itself whether a reasonable man in the defendant's position would have foreseen that his conduct involved a risk of injury to the plaintiff or to a class of person including the plaintiff. If the answer be in the affirmative, it is then for the tribunal of fact to determine what a reasonable man would do by way of response to the risk. The perception of the reasonable man's response calls for a consideration of the magnitude of the risk and the degree of the probability of its occurrence, along with the expense, difficulty and inconvenience of taking alleviating action and any other conflicting responsibilities which the defendant may have. It is only when these matters are balanced out that the tribunal of fact can confidently assert what is the standard of response as to be ascribed to the reasonable man placed in the defendant's position.*
> *The considerations to which I have referred indicate that a risk of injury which is remote in the sense that is extremely unlikely to occur may nevertheless constitute a foreseeable risk. A risk which is not farfetched or fanciful is real and therefore foreseeable. But, as we have seen, the existence of a foreseeable risk of injury does not itself dispose of the question of breach of duty. The magnitude of the risk and its degree of probability remain to be considered with the other relevant factors.*

11. The principles that govern liability in negligence are well settled. In order to succeed, a plaintiff must establish firstly that the defendant had a duty of care and secondly, it did an act or omitted to do an act which was reasonably foreseeable would cause damage to the plaintiff.

12. In the instant case, there was a duty of care owed by the defendant to the plaintiff, as a customer, to ensure that the toilet door could be locked. PW1 in cross-examination stated that the toilet door had a proper lock.

13. The next question is whether a reasonably prudent owner of a building in charge of its maintenance could have foreseen that an employee would go to a locked passage next to a ladies toilet, remove a flush button and take photographs of a customer. In my view, the answer is clearly no. Such an incident was completely unknown and unforeseeable. It was the evidence of the plaintiff herself that neither she nor any of her female friends had ever experienced such an incident.

14. In the words of Lord Dunedin in ***Morton v. William Dixon, Ltd***, (1909 S.C. 807), as re-stated by Lord Normand in ***Paris v. Stepney Borough Council,***[1951]1 All E.R. at p. 49):

> *Where the negligence of the employer consists of what I may call a fault of omission, I think it is absolutely necessary that the proof of that fault of omission should be one of two kinds, either-to show that the thing which he did not do was a thing which was commonly done by other persons in like circumstances, or-to show that it was a thing which was so obviously wanted that it would be folly in anyone to neglect to provide it.*

15. I would conclude this part of my judgment with a passage from Lord Reid's speech in ***The "Wagon Mound"***(No 2), [1967] A.C. 617 at pg 642:

> *.the general principle*(is)*that a person must be regarded as negligent if he does not take steps to eliminate a risk which he knows or ought to know is a real risk and not a mere possibility which would never influence the mind of a reasonable man.*

16. That takes me to the paramount question whether the defendant can be vicariously liable for the actions of its employee, Ednan Hussein.

17. It is trite law that a wrong doer must be made a party in an action founded on vicarious liability. The defendant, in its statement of defence has quite correctly pointed out that in the absence of the joinder of the employee, the statement of claim discloses no cause of action against the defendant.

18. The case of ***Warren v Henlys Ltd,***[1948] 2 All ER 935 as cited by Mr Tabuya, in his closing submissions provides a useful exposition of the principles of vicarious liability in the context of an employer and employee relationship.

19. In that case, a petrol pump attendant had abused and physically assaulted a customer of the defendants' garage, after the pump attendant mistakenly assumed that the customer had not paid for the petrol. It was held that the defendant was not liable for the wrongful act of their employee, since that act was one of personal vengeance on the employee's part and was not done in the course of his employment, it not being an act of a class which the employee was authorized to do or a mode of doing within that class. Hilbery,J at pp.937-938 cited the following passages from the judgment of ***Poland v. John Parr & Sons,***[1927] 1 KB 236 at pgs 240 and 243:

> *The rule of law is concisely stated in Salmond on Torts,*(6th Ed.,1924, p 100:"*A master is not responsible for a wrongful act done by his servant unless it is done in the course of his employment. It is deemed to be so done if it is either (a) a wrongful act authorized by the master, or (b)a wrongful and unauthorised mode of doing some act authorised by the master.*"
>
> ***To make an employer liable for the act of a person alleged to be his servant the act must be one of a class of acts which the person was authorized or employed to do. If the act is one of that class the employer is liable, though the act is done negligently or,in some cases, even if it is done with excessive violence.*** *But the excess may be so great as to take the act out of the class of acts which the person is authorized or employed to do.*(emphasis added)

20. Hilbery, J at page 938 also cited *Salmond on Torts,*(10th Ed.,p.89) as follows:

> ***..if the unauthorized and wrongful act.. is not so connected with the authorized act as to be a mode of doing it, but is an independent act, the master is not responsible: for in such a case the servant is not acting in the course of his employment, but has gone outside of it.*** (emphasis added)

21. Lord Millett in ***Dubai Aluminium Co Ltd v Salaam,***[2003] 2 AC 366 at page 400 said that in determining liability of an employer, regard must be had "*to the closeness of the connection between the employee's wrongdoing and the class of acts which he was employed to perform*".

22. In ***Makanjuola vs Commissioner of Police for the Metropolis,*** 1990 2 Admin L. R. 214, CA, as referred to in ***Clerk & Lindsell on Torts,***(19th Ed, 2006) pg 337,foot note 27 a police officer had demanded sexual favours in return for not reporting the claimant to the immigration authorities. The Commissioner was not vicariously liable, as there was no ostensible authority. The defendant's strategy was held to be clearly an adventure of his own.

23. Returning to the present case, in my view, the wrongful act of the employee Ednan Hussein clearly does not fall within the class of acts he was authorized to do nor "*so connected with that class of acts as to be a mode of doing some act within that class*" to quote Hilbery J in ***Warren v Henlys Ltd,***(*supra).*

24. In my judgment, the act of Ednan Hussein was a frolic of his own, for which the defendant cannot be held liable.

25. The plaintiff's claim of invasion of her right of privacy and nuisance do not arise for consideration as the wrongdoer has not been made a party to this case. In any event, Article 24(1)(c) of the Constitution does not apply to this case and there is "*no general tort of invasion of privacy*" in private law: ***Clerk & Lindsell on Torts,***(*op.cit.*at pg 19).

26. The plaintiff's action is declined. In the circumstances of this case, I make no order as to costs.

27. ***Orders***

i) The plaintiff's action is declined.

ii) No order as to costs.

A.L.B. Brito Mutunayagam
JUDGE
14th September,2016