IN THE HIGH COURT OF FIJI AT SUVA
CIVIL JURISDICTION.

Civil Action No. HBC 338 of 2012

BETWEEN

ZELDA ROSLYN KISSUN of Lot 5 Kinoya Road, Nasinu, Fiji, Self Employed.

PLAINTIFF

AND

SAMUELA NAITAU of Lot 50, Divula Road, Nadera, Nasinu, Fiji.

FIRST DEFENDANT

AND

BW HOLDINGS LTD a company duly incorporated in Fiji having its registered office at Vishnu Deo Road, Nakasi, Nasinu.

SECOND DEFENDANT

AND

ROCK TEC LIMITED a company duly incorporated in Fiji having its registered office at 50 Kaunitoni Street, Vatuwaqa, Suva, Fiji.

THIRD DEFENDAND

AND

RAVENDRA KUMAR c/c BW Holdings Ltd, Vishnu Deo Road, nakasi, Nasinu.

FOURTH DEFENDANT

Counsel	:	Mr Naidu R. for the Plaintiff 1st Defendant absent and unrepresented Mr Valenitabua S. for the 3rd defendant
Date of Hearing	:	06th December 2019
Date of Judgment	:	13th February 2020

JUDGMENT

[1] The plaintiff instituted these proceedings claiming damages for the injuries caused to her against the 1st, 2nd and 3rd defendants and the 4th defendant was subsequently joined as a party to the proceedings.

[2] The plaintiff on the day of the accident that is 27th February 2012 was a fare paying passenger in the minibus bearing registration No. LM 192 driven by the 1st defendant. The minibus driven by the 1st defendant collided with the truck-trailer bearing registration Nos. EV 247 / FP 176, which was left in a stationary position on the Queens Road in Lami.

[3] The Registry entered default judgment against the 1st, 2nd and 3rd defendant since they failed to file the notice to defend the action. However, this court later set aside the default judgment entered against the 3rd defendant. The plaintiff subsequently entered into a

settlement with the 2nd and 4th defendants and the action against then was withdrawn and discontinued.

[4] At the pre-trial conference between the plaintiff and the 3rd defendant following facts have been admitted:

1. The plaintiff was born on the 26th day of January 1984.
2. The 1st defendant at all material times the driver of motor vehicle registration number LM 192, a Nissan minibus (hereinafter referred to as the "minibus").
3. According to the Land transport Authority records the third defendant was the registered owner of the minibus at the time of the accident.
4. On the 27th day of February 2012 the plaintiff was a front seat fare paying passenger in the minibus which the 1st defendant was driving along Lami when the first defendant caused the same to collide with a truck-trailer registration No. EV 247 / FP 176 which was left in a stationary position on the Queens Road, Lami.
5. The plaintiff suffered injuries as a result of the accident.
6. The first defendant was prosecuted and convicted on 16 April 2014 at the Magistrate's Court in Suva for the offence of dangerous driving occasioning grievous bodily harm arising out of the said collision in Traffic case No. 167 of 2012. The said conviction is relevant to the issue of negligence against the 1st defendant and the plaintiff intends to rely thereon as evidence in this action.

[5] Since there is a default judgment entered against the 1st defendant no necessity arises for the court to reconsider the issue of negligence driving. There are two issues the court is required to determine. Firstly, whether the 3rd defendant is vicariously liable for the negligence of the 1st defendant and secondly, if so, the quantum of damages that should be awarded to the plaintiff.

[6] The plaintiff in her testimony stated that the 2nd and 4th defendants paid her $12,000.00 as damages.

[7] The plaintiff tendered in evidence the Registration Certificate of the vehicle involved in the accident (LM 192) according to which the registered owner of the vehicle at the time of the accident was the 3rd defendant. The witness from the Land Transport Authority testified that the ownership has been changed on 21st March 2012 and on that day the 1st

defendant became the owner of the vehicle. She also said that at the time of the accident the vehicle was not a public service vehicle and its number was FR 483.

[8] Section 19(3) of the Land Transport (Public Service Vehicles) Regulations 2000 provides:

> No person may advertise or offer a service which is of a regular or repetitive nature between 2 terminating points or places unless—
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> (a) the person is a holder of a road permit or mini-bus permit which includes that service; or
> (b) the person has a contract or other arrangement with another holder of a road permit or mini-bus permit which includes that service.

[9] It appears from the evidence of the officer from the Land Transport Authority the 1st defendant carried passengers including the plaintiff, in the vehicle which was not at the time of the accident, a public service vehicle, in breach of section 19(3)(b) of the Land Transport (Public Service Vehicles) Regulations 2000. The question then arises for determination is whether this illegality deprives the plaintiff of her right to claim damages from the 3rd Defendant.

[10] In this regard the 3rd defendant submits that the plaintiff has failed to prove that the 1st defendant at the time of the accident drove the vehicle as a servant or agent of the 3rd defendant. It is the 3rd defendant's submission that the burden of proving that the 1st defendant drove the vehicle with its authority lies on the plaintiff.

[11] The Court of Appeal in **Chandra v Narain** [1997] FJCA 42, Abu0051u.96s (14 November 1997) held;

> The law on fixing vicarious liability for a driver's negligence on the owner of a motor vehicle has been frequently considered by the Courts. The decision of the New Zealand Court of Appeal in Manawatu County, v. Rowe, [1956] NZLR 78, approved by the Privy Council Rambarran v. Gurrucharran, [1970] 1 WLR 556, 560, establishes the following propositions:
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> 1. The onus of proving agency rests on the party alleging it.
> 2. The fact of ownership of a vehicle gives rise to an inference that the driver was the agent of the owner; in other words, that fact alone in the absence of anything else, provides some evidence to go to a jury;

3. This inference can be drawn in the absence of other evidence bearing on the issue or where such other evidence as there is, fails to counterbalance it.
4. For the plaintiff to make the owner liable, the plaintiff must establish that the driver was driving the car as a servant or agent of the owner and not for the drivers own benefit and for his own concerns.

[12] In **New World Ltd v Vusonitokalau** [2018] FJCA 20; ABU0073.2012 (8 March 2018) the Court of Appeal said, although registration is prima facie proof of ownership, it is not registered ownership alone that can be the foundation of vicarious liability. Registration does not create vicarious liability in the registered owner in respect of every driver of the vehicle.

[13] The facts in New World v Vusonitokalau (supra) are different from the matter before this court. In that case it had been agreed that at the time of the accident the driver (the 2nd respondent) had driven the vehicle for her own purpose.

[14] In this case as I have mentioned above it has been established that at the time of the accident the registered owner of the vehicle was the 3rd defendant. There is no doubt that burden of proving a particular fact is not the party who asserts that fact. However, in the decisions relied on by the Court of Appeal in Chandra v Narain (supra) the court is entitled to draw an inference in the absence of any other evidence that the driver was driving the vehicle as an agent of the owner. In this case the 1st and 3rd defendants did not testify at the trial nor did they call any witnesses. Therefore, in the absence of any evidence to counterbalance the inference the court has to hold that the 1st defendant, at the time of the accident, was driving the vehicle as the agent of the 3rd defendant.

[15] The plaintiff relies on some English decisions and the decision of the then Supreme Court of Fiji in the case of **Fiji Electricity Authority v Balram & Others** (1972), 18 FLR 20. In Fiji Electricity Authority v Balram & Others (supra) the court said;

> Plaintiff's Counsel admitted that there was no direct evidence that the bus was driven by a servant or agent of the United Transport Company at the material time. He submitted, however, that since no evidence had been called to suggest that any unauthorised person was driving the vehicle, and since it had been suggested in the cross-examination that the collision occurred at a "turning point" used by buses, it was reasonable to presume that the bus was on a normal journey and

being driven by a servant or an agent of the United Transport Company. In my view, this is a reasonable conclusion. I would, however, prefer to rely on an appellate decision of the King's Bench Division in Bernard v Sully (1931) 47 TLR at page 557, in which it was decided that proof of ownership of the vehicle is prima facie evidence that the vehicle at the material time was being driven by the owner or his servant or agent. In the present case, no evidence was called to rebut this.

[16] The decision in Fiji Electricity authority v Balram (supra) is a decision of the then Supreme Court in the exercise of its original civil jurisdiction.

[17] I will now discuss briefly whether the principle "*ex turpi cuasa non oritur actio*" which means no cause of action may be founded upon an immoral or illegal act", can be applied to the facts of this matter.

[18] In this case there was nothing on record to suggest that the plaintiff committed any act of illegality. It is the 1st defendant who carried passengers without a valid licence. The learned counsel for the 3rd defendant asked the plaintiff whether she looked at the number plate of the before entering the vehicle and the plaintiff answered in the negative. One cannot expect every passenger to ask the driver whether he has a permit to carry passengers or to look at the number plate of the vehicle to ascertain whether it is a proper vehicle for them the travel.

[19] It is the 1st defendant who offered to carry passengers knowing very well he did not have licence to carry passengers. It is the 1st defendant who breached 19(3)(b) of the Land Transport (Public Service Vehicles) Regulations 2000. He or his employer or with whose authority drove the vehicle cannot plead his own illegal act as a defence to avoid payment of compensation.

[20] Due the accident the plaintiff who was at the time 29 years of age suffered fractures in both legs and doctors were able to save right leg and he left leg was amputated above the knee. She had realignment of the fracture and bone grafting. She had been in hospital for one month and she needs continuous medical care.

[21] The doctor's evidence is that the percentage of permanent impairment is 38%. However, it is a fact well established that the plaintiff has to live the rest of her life with one leg and she is permanently disabled. It is also evident that the plaintiff will have to be looked after by someone for the rest of her life. The evidence of the plaintiff's sister is that she is looking after the plaintiff.

[22] Taking in to account all these factors the court is of the view that it is reasonable to award $200,000.00 as damages for pain and suffering and loss of amenities of life. Since the 2nd and 4th defendant have already paid the plaintiff $12,000.00 that amount should be deducted from the damages awarded.

[23] In the amended statement of claim the plaintiff claims damages for future loss of income. However, she has failed to describe the nature of her claim and there is no evidence that she was employed at the time of the accident and she lost employment because of the injuries she suffered.

[24] The plaintiff also claims $150.00 as special damages. There is no necessity for the plaintiff to prove that she in fact incurred this amount as pleaded in the amended statement of claim by documentary evidence but she must at least say in evidence that she incurred this amount but there is no mention about special damages in her evidence.

[25] For the above reasons the court makes the following orders.

ORDERS

1. The 1st and 3rd defendants are ordered to pay the plaintiff $188.000.00 as damages.
2. The 1st defendant is also ordered to pay the plaintiff $7,500.00 as costs (summarily assessed).

Lyone Seneviratne

JUDGE

13th February, 2020