IN THE HIGH COURT OF FIJI
WESTERN DIVISION AT LAUTOKA
CIVIL JURISDICTION

CIVIL ACTION NO. HBC 213 OF 2018

BETWEEN : **RAVINESH DASS** of Tavakubu, Lautoka, Unemployed.

PLAINTIFF

A N D : **ANJUM ALI** trading as Nadro Motor Parts of Vumasalu, Sigatoka, Businessman.

FIRST DEFENDANT

A N D : **ARUN KUMAR RAWAT** of Kulukulu, Sigatoka , Driver.

SECOND DEFENDANT

Appearances : Mr R. P. Chaudhary for the plaintiff
Mr Mr J. Reddy for the first defendant
Mr R. R. Gordon with Ms N. Kasturi for the second defendant

Date of Trial : 12 & 13 February 2020

Date of Submission : 05 March 2020 (1st and 2nd defendants), 06 March 2020 (plaintiff)

Date of Judgment : 29 April 2020

JUDGMENT

Introduction

[01] The plaintiff initiated these proceedings against the defendants claiming special damages in the sum $2,586.00 and general damages for pain and suffering, loss of amenities of life and loss of earning capacity. The claim arises out of a motor vehicle accident. The plaintiff alleges that the accident was caused by the second defendant's negligent driving.

[02] The claim against the first defendant is based on vicarious liability. The first defendant denied that second defendant was his employee or agent at the time of the accident.

[03] At the commencement of the trial, the second defendant admitted liability. His counsel, Mr Gordon confirmed it.

The facts

[04] It is alleged in the statement of claim that:

4.1 The first defendant, Anjum Ali was the owner of a taxi registration number LT 3299.

4.2 The second defendant, Arun Kumar Rawat was driving the said taxi as the servant and/or agent of the first defendant.

4.3 The plaintiff, Ravinesh Dass was a fare paying passenger in the said taxi.

4.4 On or about 13 March 2016, the second defendant drove the said taxi so negligently, carelessly, recklessly and unskillfully on Queens Road, Olosara, Sigatoka that it went off the road and hit a tree.

Particulars of Negligence

I. *Failing to keep any or any proper lookout;*
II. *Driving at an excessive speed having regard to all the circumstances;*
III. *Failing to stop, to slow down, to swerve or in any other way so to manage or control the said motor vehicle as to avoid the said accident;*
IV. *Driving below the standard of a careful and prudent driver.*
V. *Driving in a reckless and dangerous manner.*
VI. *Driving off the road.*

4.5 On 21 December 2016, the second defendant pleaded guilty and was convicted of the following offences by the Sigatoka Magistrate's Court:-

a) Driving motor vehicle whilst there is present in blood a concentration of alcohol in excess of the zero prescribed limit,

contrary to section 105 (1) (a) and 114 of the Land Transport Authority Act No. 35 of 1998.

b) Dangerous driving occasioning harm: contrary to section 97 (4) (c) (8) and 114 of the Land Transport Act No. 35 of 1998.

The second defendant was fined $800.00 for the first count and disqualified from driving or obtaining a Driving Licence on any group for a period of twelve (12) months. He was fined $600.00 for the second count.

4.6 The aforesaid convictions are relevant to the issue of negligence in the within matter and the plaintiff intends to rely thereon as evidence of the same.

4.7 As a result of the said accident the plaintiff suffered several personal injuries.

Admitted facts

[05] At the Pre Trial Conference the following facts were admitted between the parties:

B. Facts admitted by both defendants

i) That at all material times (i.e., on 13 March 2016) the first defendant was the owner of a Taxi registered number LT 3299.

ii) That on 21 February 2016[sic], there was an accident involving the said Taxi on Queens Road, Olosara, Sigatoka.

iii) That on 21 December 2016, the second defendant pleaded guilty and was convicted of the following offences by the Sigatoka Magistrate's Court.

a) Driving motor vehicle whilst there is present in blood a concentration of alcohol in excess of the zero prescribed limit, contrary to section 105 (1) (a) and 114 of the Land Transport Authority Act No. 35 of 1998.

b) Dangerous driving occasioning harm: contrary to section 97 (4) (c) (8) and 114 of the Land Transport Act No. 35 of 1998.

C. Facts admitted by second defendant only

i) That at all material time the second defendant was driving the said Taxi as the servant and/or agent of the first defendant.

ii) That at all material time the plaintiff was a fare paying passenger in the said Taxi.

The issue

[06] Since the second defendant had admitted liability, the only issue that remains to be determined by the court is whether or not the first defendant is vicariously liable for the action of the second defendant and the quantum of damages payable to the plaintiff.

The law on vicarious liability

[07] Lord Denning in *Rose v Plenty* 1975 1WLR 141 stated:

> *"In considering whether a prohibited act was within the course of employment, it depends very much on the purpose for which it is done. If it is done for his employer's business, it is usually done in the course of his employment, even though it is a prohibited act."*

[08] In the same case of *Rose v Plenty,* Lord Justice Scarman went further and said:

> *"But basically, as I understand it, the employer is made vicariously liable for the tort of his employee not because the plaintiff is an invitee, nor because of the authority possessed by the servant, but because it is a case in which the employer, having put matters into motion, should be liable if the motion that he has originated leads to damage to another."*

[09] The Fiji Court of Appeal in *Shell Fiji Ltd v Chand* [2011] FJCA 6; ABU0038.2008 (8 February 2011) considered and relied on the decision in *Rose v Plenty* as being applicable in Fiji as well.

[10] In *Rambarran v Gurrucharran* (1970) 1 All ER 749 it was held that:

> *"Although ownership of a motor vehicle (which at the time of an accident is being driven by another for his own purposes and without the knowledge of the owner) is prima facie evidence that the driver was the agent or servant of the owner and that the owner is therefore liable for the negligence of the driver, that inference may be displaced by evidence that the driver had the general permission of the owner to use the vehicle for his own purposes, the question of service or agency on the part of the driver being ultimately a question of fact.*
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> *In the same case Lord Donovan stated at page 751 as follows:*
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> *Where no more is known of the facts, therefore, than that at the time of an accident the car was owned but not driven by A it can be said that A's ownership affords some evidence that it was being driven by his servant or agent. But when the facts bearing on the question of the service or agency are known or sufficiently known, then clearly the problem must be decided on the totality of the evidence."*

[11] In *Ormrod v Crossville Motor Services Ltd* (1953) 2 All E.R. 753 Lord Denning stated [at pp 754 – 755]:

> *"It has often been supposed that the owner of a vehicle is only liable for the negligence of the driver if that driver is his servant acting in the course of employment. That is not correct. The owner is also liable if the driver is his agent, that is to say, if the driver is, with the owner's consent, driving the car on the owner's business or for the owner's purposes... if it is being used wholly or partly on the owner's business or for the owner's purposes, the owner is liable for any negligence on the part of the driver. The owner only escapes liability when he lends it or hires it to a third person to be used for purposes in which the owner has no interest or concern: see Hewitt v Bonvin."*

[12] The Fiji Court of Appeal in *Chandra v Narain* [1997] FJCA 42; Abu0051u.96s (14 November 1997) set out the law on fixing vicarious liability for a driver's negligence on the owner of a motor vehicle as follows:

> *"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:

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 counter- balance 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 driver's own benefit and for his own concerns.*

In Rowe's case, Mrs Rowe, while driving her husband's motor car with his consent, collided with the appellant's vehicle. The Court of Appeal held that she was not driving the car as a servant or agent of her husband. In Rambarran's case, the Privy Council held that the father of a son driving the father's car with the father's general permission was not vicariously liable for the son's negligent driving. In allowing the appeal from Guyana Court of Appeal, the Privy Council noted that the occasion when the accident happened was not one of those specified by the appellant as one when the son would drive on his behalf; the appellant was unaware that the son had taken the car on that day nor did he hear of the accident until a fortnight after it had happened. These facts, destroyed any presumption of agency and raised the strong inference that the son was not driving as the appellant's servant or agent.

In the most recent leading authority, Launchbury v. Morgans [1973] AC 127, Lord Salmon at 151 referred with approval to the two cases just cited. In that case, a wife owner was held not to be vicariously liable for the negligent driving of a friend of her husband who was driving the husband home after a drinking session. The vehicle was owned by the wife but used by the husband and the wife for various purposes, it was regarded as their car. The husband had telephoned the wife warning her that he was going out drinking with his friends and might arrange to be chauffeured home. The House of Lords held that to fix vicarious liability on the owner of the car, even when there was express or implied permission from the owner for the driver to drive it, it had to be shown, that the driver was using the vehicle for the owner's purposes under delegation of a task or duty. The owner's interest or concern for the safety of the car or its occupants was not sufficient. On the facts, it was impossible to hold that the driver had been the wife's agent when driving the husband home after the husband had become unfit to drive. Mere permission to drive is not enough to extend the principle of vicarious liability even in the special case of the motor vehicles. Any further

extension of the principle of vicarious liability in relation to car owners requires legislation. This had not occurred in England at the time of the Launchbury case and it has not occurred in Fiji.

Another formulation of the test was made by du Parcq, L J in Hewitt v. Bonvin [1940] 1 K.B. 188, 194-5, approved by Lord Salmon in Launchbury at 149. "The driver of a car may not be the owner's servant and the owner will be nevertheless liable for his negligent driving if it be proved that at the material time he had authority express or implied to drive on the owner's behalf. Such liability depends not on ownership, but on the delegation of a task or duty.""

[13] In *Lautoka General Transport Company Ltd v Vosa* [2008] FJCA 75; ABU0102.2006S; ABU0104.2006S (6 November 2008), the Fiji Court of Appeal approved the decision of the High Court and said:

"[9] The bus company appealed on the ground that the trial judge erred in finding it vicariously liable for the negligence of Mr Ramatora. The submission was that Mr Ramatora was not driving the bus in the course of his employment, he had been told by the bus company's general manager that only Mr Buto was to drive and the trial judge misapplied the decisions that he referred to ***Ilkiw v Samuels & Ors*** *[1963] 2 All E.R. 879 and in* ***New South Wales v Lepore*** *[2003] HCA 4; [2003] 212 CLR 511*

[10] This submission seems unanswerable. The general principle as stated in ***Salmond on Tort*** *1963 edition is:*

"A master is not responsible for the wrongful act done by his servant unless it is done in the course of his employment. It is deemed to be done so if it is either (i) a wrongful act authorised by the master, or (ii) a wrongful and unauthorised mode of doing some act authorised by the master."

[11] In ***Ilkiw*** *the authorised lorry driver Waines had instructions from his employer British Sugar not to allow the lorry to be driven by anyone else. In breach of those instructions he allowed a workman Samuels, who was not an employee of British Sugar and who had never driven a lorry before, to drive the lorry and the plaintiff was injured.*

[12] Willmer LJ held that British Sugar could not be made vicariously liable for the negligence of Samuels who was not their servant. However the trial judge had found that Waines was negligent in allowing Samuels to drive and that British Sugar was vicariously liable for Waines' negligence, and the Court of Appeal agreed holding that an employer could only escape liability:

"if, but only if, at the time of the negligent act, the vehicle was being used by the driver for the purpose of what has been called a "frolic" of his own. That is not this case."

*[13] Of course in the present case the driver Mr Ramatora, unlike the driver in **Ilkiw** was a co-employee of the authorised driver. However that is not a relevant distinction. The bus company authorised the use of the bus at the funeral provided it was driven by Mr Buto, and the bus company could no more be liable for negligent use of the bus that day than if another passenger or even a thief had taken the wheel.*

*[14] There is nothing in **Lepore** that would lead to any different conclusion. Gleeson CJ at 535ff deals discusses the development of **vicarious liability** law. He refers to **Salmond Law of Torts** 1907 & 1936 editions where it was held that an employer is not responsible if the unauthorised act is no so connected with the authorised act as to be a mode of doing it, but is an independent act, and observes that all subsequent Australian authority turn upon application of the **Salmond** test. Then, noting that the test has its limitations particularly in sexual abuse cases, Gleeso. CJ referred to more recent Canadian and English cases including Lister v Hesley Hall Ltd [2002] AC 215 where the court held that employers of a school warden who sexually abused some of the pupil are vicariously liable for his assault."*

The evidence

Plaintiff's evidence

[14] The plaintiff, Ravinesh Dass (PW1) gave evidence on his behalf and called Dr Akhtar Ali (PW2) who tendered and explained the medical report prepared by Dr Rounak Lal dated 16 June 2016 concerning the plaintiff's injuries.

[15] The evidence of the plaintiff was that:

a) He is 26 years old his date of birth is 2 November 1993.
b) He got involved in an accident on Sunday 13 March 2016. He was together with Master Sharma, Rahul and Sharma. They all went to Olosara beach, Sigatoka to relax by taxi around 10 o'clock. They spent 3 hours at the beach, where they had drinks. There were 3 bottles of beer left, after some time Master Sharma called a taxi.
c) Arun Kumar Rawat,the second defendant was the taxi driver, who was also drunk. The second defendant drove through gravel road and then

came to the highway. He was speeding on the highway, where he lost control and the taxi went off the road. The taxi tumbled, hit a tree, which broke the windscreen and the tree hit his (PW1's) head.

d) He removed himself from the car and went to the highway. He felt pain in his head and was bleeding.

e) A passing vehicle stopped and took him to Sigatoka Hospital. He was injured severely, and his clothes were soaked in blood. He was transferred to Lautoka Hospital due to his serious condition. At Lautoka Hospital he was cleaned and kept in ICU. He gained conscious next day, where he was unable to eat and drink. He had scar on his face and body, he was transferred to Suva Hospital and stayed there for 2 weeks. Upon discharge he returned to Lautoka and came back and forth.

f) He made 5 trips from Lautoka to CWM hospital. He felt ashamed in public due to the injuries. He has got scars on his neck, jaw and forehead.

g) He had 3 trips for 21 days from Samabula to CWM, - $12 per trip. The accommodation cost was $300.00. He had difficulty in seeing from his left eye. He could work or walk in sunny weather.

h) He could not play soccer anymore and is no more employed by Pacific Green. He cannot find a permanent job. He stays with his father in Lautoka and is not married.

[16] Under Cross examination (by first defendant), he states:

a) He works part time for Krishneel and for Diman's as a boy, not a plumber. He currently works for Krishneel but previously for Diman's. He was paid $3 per hour and had to work for 20 – 24 hours.

b) He said he was not informed by anyone that he cannot work in the hot weather. He admitted that he can work in the sunshine conditions, but he has headache.

[17] Under cross examination (by the second defendant) he states:

a) He did not pursue further education after Form 6, instead he started working in 2016. In between, PW1 did not obtain any other qualification.

b) On 13 March 16, he was at Olosara beach with 4 people namely: Master Sharma, Rahul, Shivneel Sharma and Arun Kumar, the driver for the taxis.

c) He did not pay the fare, though he shared the taxi with his friends. On 13/3/2016, all the fare was supposed to be paid by Master Sharma.
d) He said only 4 bottles of beer was left not 6 bottles. He stated that he consumed less than half bottle of beer.
e) Before the accident, he worked at Pacific Green and earned $3.15 an hour. He said he cannot play soccer again.

[18] In re-examination, he said:Mr Sharma hired the taxi but he does not know whether he paid and Master Sharma told the driver to drive slowly. He works 20 – 25 hours per week, that also not every week.

[19] Dr Akhtar Ali (PW2), a general practitioner, surgeon and consultant, with 17 years of experience and consultant in 2016 explained the folder of Ravinesh Dass was referred to Dr Rounak Lal dated 16 June 2016. On prognosis, he said fractures heal by natural mechanism, if rightly arranged.

[20] Under cross examination, Dr Ali stated that the report is made after some 3 months of the accident and it does not cover the expert opinion.

First defendant's evidence

[21] The first defendant, Anjum Ali (1DW1) gave evidence for himself and called a Mr Mohammed Shameem (1DW2).

[22] The first defendant's evidence was that: he was the owner and he sold the permit, but the car was still there. He sold his taxi permit due to his house debts. The driver, Arun Kumar Rawat had signed the contract and it was signed before the accident and he did not sign and return the contract. The driver was not my servant or friend, he was my contractor.

[23] Under cross examination (by the second defendant), he (1DW1) states:

a) On 13 March 2016, he was the owner of LT 3299 and agreed that on the same day, he had given the authority to the second defendant, driver to drive.
b) The driver of the taxi was also driving his gas taxi prior to this. He employed the driver to drive his taxi, before driving my taxi, Rawat was not his employee.

c) He had asked Rawat to follow the Rules of LTA-not to drink and drive. The driver is liable for any accident.
d) There was oral agreement regarding the taxi at Rawat's house, which was later put into writing.
e) He denied that the written agreement (2DW1) was drawn after the accident.
f) Rawat did not sign and return it.
g) He said 'no' to the suggestion that Rawat was not on contract but was in fact your servant.

[24] In re-examination the first defendant said he gave the taxi on contract basis for $150.00 a week. The taxi was given for 2 weeks. He (Rawat) made only one payment-$150.00 through Master Shameem.

[25] 1DW2, Mohammed Shameem, a school teacher also gave evidence for the first defendant. He in his evidence states:

a) He drafted the agreement in respect of the taxi.
b) The agreement was done one and half weeks before the accident. Traffic fines, base and alcohol are underlined.
c) He said collected $150.00 from Rawat but no receipt was issued to him.
d) The agreement was not signed by Arun Kumar Rawat.

[26] Under cross examination (by the second defendant) 1DW2 states:

a) He made the agreement one and half week before the accident.
b) The first agreement was oral at Rawat's place and later signed the agreement. The agreement was made before the accident.
c) He (Rawat) was the contracted driver, where he was supposed to give $150.00 to Anjum Ali and keep the rest for himself.
d) He had known Anjum Ali as they mostly meet at functions.

Second Defendant's evidence

[27] The second defendant gave evidence on his own behalf. He in evidence states:

a) He had known Anjum Ali for more than 5 – 6 years.
b) He was working at his spare parts shop when he started driving his gas taxi in October/November 2015.

c) While working in his shop day time and night time was driving his cab. He would give him $150.00 per week.
d) There was no agreement in writing. He received $150.00 a week from Anjum.
e) He used to drive his (Anjum's) taxi in the evening and at weekends. He would hand over all the income to Anjum and he used to pay to him according to the income.
f) He said Master Shameem and Anjum came to drink grog at his mum's place. That is the time he told him: *'oh, my car is ready now you can hop on to the new one.'* No payment was discussed. Only thing he (Anjum) said to follow the same one as the old. There was no discussion about the terms and conditions. Shameem did not have any pen or pencil or paper with him.
g) Anjum gave the written agreement (2DEX1) after we received the summons (writ of summons). He showed this paper and me to sign so that the claim could be sorted out. When he read it, everything was against him. So he took it to his lawyer without signing it.
h) Master Sharma called him if he could come to Olosara beach and pick them up. He went to Olosara beach. When he reached there, he saw Sharma, Shivneel, Ravinesh, Rahul and Sanjesh were there. Master Sharma asked him to join them for drink.

[28] Under cross examination (by the first defendant), 2DW states: He denied that the taxi was given to him on contract basis for him to earn money out of it, give Anjum $150.00 and keep the rest. He said he was supposed to give weekly income to Anjun Ali and from there he used to decide either he (2DW) gets $100.00 or $150.00.

Discussion

[29] I need to determine the issue whether or not the first defendant being the owner of the taxi (LT3299) which was involved in the accident is vicariously liable for the negligent act of the driver, the second defendant. This issue appears to have arisen between the first and the second defendant.

[30] As I said, the second defendant has admitted liability which means that the accident was caused due to his negligence.

[31] It is common ground that the first defendant was the owner of the taxi and the second defendant was driving it at the time of the accident.

[32] The first defendant's position was that the second defendant was not acting as his servant or agent at the time of the accident he (the second defendant) was an independent contractor, he took the taxi on contract basis.

[33] In order to demonstrate that the second defendant was driving the taxi on contract basis, the first defendant had attempted to have a written agreement in that nature. The purported written agreement was prepared by Master Shameem. This agreement was marked a 2DEX1 during examination in chief of the second defendant.

[34] It was second defendant's evidence that the first defendant brought the undated handwritten papers containing some terms and conditions concerning the use of the taxi and wanted to have the second defendant's signature on it. Having read it, the second defendant found that everything was against him. So he took it to his lawyer without signing it.

[35] The document prepared by the first defendant (2DEX1) includes the following terms and conditions.

"...

That Anjum Ali is giving his taxi (3299LT) to Arun Kumar Rawat to drive on a contract basis of weekly income of $150.00.

Further agreeable condition[s] between the two are as follows:

1. *All fines-traffic fines [are] to be paid by the driver if at fault.*
2. *Driver to take full care and responsibility of the passengers and the vehicle.*
3. *Driver to operate from taxi base only.*
4. *Driver to behave in good manner at all times as PSV driver code of conduct remains.*
5. *Vehicle maintenance to be done by the owner.*
6. *Front two tyres to be replaced by the driver if non-conformed.*
7. *Drinking (Alcohol) and driving is strictly prohibited by the owner.*
8. *Failure to obey clause 7 would result in all fines and damages paid by the driver if found guilty. Owner doesn't take charge or claim for any negligence by the driver in not obeying this contract.*

9. *Payment of $150.00 should be done on every Monday of the week.*
10. *Private use- driver to seek advance approval from owner to use vehicle for personal family use."*

..."

[36] On 21 December 2016 the second defendant pleaded guilty to the charge of drunk and dangerous driving occasioning harm at the Sigatoka Magistrate's Court. This was admitted by both the defendants.

[37] The document (2DEX1) reflects drunk driving for which the second was charged and found guilty upon pleading guilty to the charge and paid the fine. The second defendant said the first defendant brought the paper after he received the writ of summons. It is undated and not signed by the second defendant. If it was drawn before the accident it should have been signed by the second defendant and dated. The document is drafted in favour of the first defendant. It says that the owner (first defendant) does not take charge or claim for any negligence by the driver in not obeying this contract. These facts suggest that it was made after the writ was issued against the defendants. Since it was not signed by the second defendant, he is not bound by that document.

[38] At the PTC, the second defendant had admitted that at all material time he was driving the taxi as the servant and/or agent of the first defendant and that the plaintiff was a fare paying passenger in the taxi. Confirming it, he said in evidence that at first he drove the first defendant's gas taxi and was paid $150.00 per week; he worked in the part shop during the day and drove the taxi in the evening and weekends; this was the arrangement for taxi registration number LT3299 and there was "no" contract as alleged by the first defendant.

[39] Under cross examination, the second defendant maintained that he did not drive the taxi on a "contract basis", but he drove the taxi on the same condition as the previous gas taxi. The first defendant paid $100.00 to $150.00 depending on how much he gave the first defendant. He said he drove the taxi LT 3299 for approximately 3 weeks. In the first week he gave the first defendant $280.00. The first defendant gave him $100.00. In the second week he gave $150.00 to Shameem. He (second defendant) denied that he was given the taxi on condition that he gives $150.00 to the first defendant and keeps the rest.

[40] The second defendant was not shaken by the cross examination. He was firm in his position that he drove the taxi for the first defendant and was receiving payment for that from the first defendant. He was a straightforward witness. I would accept his evidence.

[41] The first defendant gave $150.00 to the second defendant upon return of the earning every week. This payment, in my opinion, amounts to wages paid to the second defendant for driving the taxi and earning income. This clearly demonstrates that the first defendant had given the second defendant his taxi or drive for generating income for the first defendant. The income earned from driving the taxi was wholly given to the first defendant from such income he would deduct $150.00 and give to the second defendant on a weekly basis as his wages. Thus, the first defendant had an economic interest in the job the second defendant was carrying out.

[42] The second defendant drove the taxi with the permission and consent of its owner, the first defendant. The ownership of the vehicle is prima facie evidence that the driver was the agent or servant of the owner and that the owner is therefore liable for the negligence of the driver (see: *Rambarran,above).* The first defendant's ownership of the taxi, in the absence of evidence that second defendant had the general permission of the first defendant to use the taxi for his own purposes, leads to inference that the second defendant was the agent or servant of the first defendant.

[43] On the evidence and admission, I find that at the time of the accident the second defendant was driving the taxi as a servant/agent of the first defendant who was the owner of the taxi.

[44] I now turn to the issue whether or not the accident occurred in the course of the employment.

[45] The defendant was driving the taxi. That is the reason Maser Sharma called him to pick the plaintiff and his friends from the beach. The second defendant

admitted that the plaintiff was a fare paying passenger at the time of the accident. The evidence presented in court points out that the second defendant was hired or on a job to pick the plaintiff and his friends from the breach. The accident happened when the second defendant was driving taxi with his passengers, the plaintiff and his friends.

[46] The second defendant had used the taxi for transporting the passengers, the purpose which he was authorized by the owner.

[47] Before taking the passengers to their destination, the second defendant voluntarily consumed liquor with the passengers.

[48] The question then arises whether the owner of a motor vehicle is vicariously liable for the negligent act of the driver who drunk and drove the vehicle and caused damages claimed.

[49] In *Colonial Mutual Life Assurance v Attorney-General* [1974] 20 FLR 102, where the driver of a government vehicle was instructed to convey a visiting delegation to various functions, and, then, at the end of the day take his superior, a liason officer, home before returning home himself with the car. On one evening, both the driver and the liason officer went to a party given by another visiting delegation where both consumed liquor. On the journey to the liason officer's house, the driver was involved in a collision with another vehicle. It was contended that the driver and the liason officer had been on a frolic of their own and, therefore, the driver was not acting within the scope of his employment at the time of the accident, the Fiji Court of Appeal held:

> *"The facts showed that the driver was under a duty to obey the liason officer, who was his superior, and to drive him home. The liason officer had told the driver to wait and take him home. There was no dereliction of duty on the part of the driver except that, during the period of waiting, he had consumed alcohol. This was no more than improper conduct during employment. The result was that the Crown was vicariously liable for its driver's negligence."*

[50] *Colonial Mutual Life Assurance* case can be easily differentiated from the case at hand. In that case, both the driver and the liaison officer went to a party and both consumed liquor and on the journey to the liaison officer's house, the driver was involved in a collision with another vehicle. The Court of Appeal held that government was vicariously liable for its driver's negligence. In the case at hand, nothing of that sort happened, the driver voluntarily consumed liquor with the passengers and on the way to the passengers' destination he was involved in an accident.

[51] In *Colonial,* the Court of Appeal referred to the following English cases:

> *"The general law was concisely summarised by Diplock J. in Hilton v Thomas Burton Ltd. [1961] 1 All ER 74, 76 where the learned Judge said:*
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> *"I think that the true test can best be expressed in these words: Was the second defendant doing something that he was employed to do? If so, however improper the manner in which he was doing it, whether negligent as in Century Insurance Company Limited v Northern Ireland Road Transport Board [1942] AC 509 or, even fraudulent, as in Lloyd v Grace, Smith and Co. [1942] AC 591, or contrary to express orders, as in Canadian Pacific Railway Company v Lockhart [1942] 2 All ER 464, the master is liable.* ***If, however, the servant is not doing what he is employed to do, the master does not become liable merely because that act of the servant is done at the master's knowledge, acquiescence or permission.*** *To say, as is sometimes said, that vicarious liability attaches to the master whether the act is an act, or falls within a class of act, which the servant is authorised to do, may be misleading". [Emphasis provided]*
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> *In Canadian Pacific Railway Co. v Lockhart [1942] AC 591 Lord Thankerton in delivering the judgment of the Privy Council quoted with approval the following passage from Salmond on Torts, 9th Ed. p.95 . . . " a master . . . is*
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> *liable even for acts which lie has not authorised, provided they are so connected with acts which he has authorised that they may rightly be regarded as modes—although improper modes—of doing them. In other words, a master is responsible not merely for what he authorises his servant to do, but also for the way in which he does it . . .* ***On the other hand, if the unauthorised 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 case the servant is not acting in the course of his employment, but has gone outside it".*** [Emphasis provided]
>
> *His Lordship later said that the inquiry is: What was the servant employed to do?*

The question whether an employee is at a particular point of time acting in the course of his employment may be regarded as a pure question of fact, or as the determination of a question of law or of mixed law and fact. The first may be set aside (as a matter of law) if it appears that the trial Judge acted without any evidence or upon a view of the facts which could not reasonably be entertained: per Viscount Simonds Edwards (Inspector of Taxes) v Bairstow [1955] 3 All ER 48, 53. Lord Radcliffe in the same case when dealing with appeals on questions of law said:-

"When the case comes before the court it is its duty to examine the determination having regard to its knowledge of the relevant law. If the case contains anything ex facie which is bad law and which bears upon the determination, it is, obviously, erroneous in point of law. But, without any such misconception appearing ex facie, it may be that the facts found are such that no person acting judicially and properly instructed as to the relevant law could have come to the determination under appeal. In those circumstances, too, the courts must. intervene. It has no option but to assume that there has been some misconception of the law and that this has been responsible for the determination. So there, too, there has been error in point of law. I do not think that it much matters whether this state of affairs is described as one in which there is no evidence to support the determination or as one in which the evidence is inconsistent with and contradictory of the determination, or as one in which the true and only reasonable conclusion contradicts the determination. Rightly understood, each phrase propounds the same test. For my part, I prefer the last of the three, since I think that it is rather misleading to speak of there being no evidence to support a conclusion when in cases such as these many of the facts are likely to be neutral in themselves, and only to take their colour from the combination of circumstances in which they are found to occur". (ibid: p.5).

[52] In the case at hand, the second defendant was driving a taxi. Therefore, he may be classified as public service vehicles (PSV) driver.

[53] The second defendant had driven the taxi with the passengers after consuming liquor contrary to section 105 (1) (a) and 114 of Land Transport Authority Act, which prohibits driving motor vehicle whilst there is present in blood a concentration of alcohol in excess of the zero prescribed limit.

[54] No owner would ever authorize a drive to drive the vehicle after consuming liquor. The evidence presented in court clearly demonstrates that the second defendant volunteered to drink with the passengers and drove the taxi with them. By doing so, the second defendant had violated zero prescribed limit set by the LTA Act.

[55] Apparently, the second defendant driver was authorized to use the taxi for passenger transport. However, he voluntarily consumed liquor with the passengers and drove the taxi with them and was involved in an accident on the journey. By consuming liquor and driving the taxi, the second defendant had committed an unauthorised and wrongful act which is not so connected with the authorised act as to be a mode of doing his duty, but is an independent act.

[56] The second defendant had consumed liquor with the passengers for his frolic.

[57] In *Canadian Pacific Railway Co. v Lockhart* (above) it was said that: *"on the other hand, if the unauthorised 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 case the servant is not acting in the course of his employment, but has gone outside it"*

[58] The second defendant's drunk and driving was the unauthorised and wrongful act not so connected with the authorised act as to be a mode of doing the job of a taxi driver, but was an independent act. On the evidence, I find that the second defendant was not acting in the course of his employment, but has gone outside it. This translates that first defendant owner is not responsible for the negligent act of his driver, the second defendant.

Quantum

[59] I now proceed to determine the quantum of damages.

General damages for pain and suffering and loss of amenities.

[60] The plaintiff was born on 2 November 1993 and was 23 years old at the time of accident on 13 March 2016.

[61] His evidence was that he was progressing in soccer career and was supposed to go to New Zealand to join a club and his career was spoilt by the accident. However, he did not present any invitation to join a club in New Zealand.

[62] The defendant did not exercise their option of examining the plaintiff by a doctor appointed by them.

[63] The plaintiff led the evidence of Dr Aktar Ali. He was taken through the plaintiff's medical report prepared by Dr Rounak Lal who at that time worked at the Lautoka hospital. He is no more working there.

[64] Dr Ali explained the nature of the injuries suffered by the plaintiff as recorded in the medical report prepared by Dr Lal. The injuries recorded in the medical report as suffered by the plaintiff include:

> Open depressed fracture of left frontal nasal and ethmoid bones
> Left zygomatic, orbital and maxillary fractures.
> Per orbital hematoma
> Traumatic mydriasis (left)

[65] In *Fiji Forest Industries Ltd v Naidu* [2017] FJCA 106; ABU0019.2014 (14 September 2017), stated the guiding principles in measuring the quantum of compensation for pain and suffering and loss of amenities [at paragraph 51]:

> *"[51] The guidelines to be followed in determining compensation for pain and suffering and loss of amenities in cases of personal injuries, were recently laid down by the Supreme Court in **The Permanent Secretary for Health and Another v. Kumar** [2012] FJSC 28 where at p. 37 of its judgment, the Supreme Court held as follows:*
>
> > *"[37] There are three guiding principles in measuring the quantum of compensation for pain and suffering and loss of amenities. First and foremost, the amount of compensation awarded must be fair and should compensate the victim of the injury in the fullest possible manner, bearing in mind that damages for any cause of action are awarded once and for all, and cannot be varied due to subsequent eventualities, some of which could not even be anticipated at the stage a court makes an award. Hence, an award of damages should not only be fair, but also assessed with moderation, even though scientific accuracy is impossible. The second principle is that the sum awarded must to a considerable extent be conventional and consistent. Thirdly, regard must be had to awards made in comparable cases, in the jurisdiction in which the award is made. However, it is also open for a court to take into consideration a comparable award made in a foreign jurisdiction, particularly in cases where the type of injury is not very common, provided that the court takes into consideration differences in socio-economic and other relevant conditions that might exist between the two jurisdictions."*

[66] The plaintiff said he has no or minimal vision, his left eye was distorted and misty vision and left with only good eye. He said his left eye has become a source of embarrassment and he wears a sunglass to cover the unsightly feature. He avoids public gathering as he feels humiliated in public. He did not relate any instance of such humiliation in public.

[67] I am mindful that the amount of compensation awarded for pain and suffering and loss of amenities must be fair and should compensate the victim of the injury in the fullest possible manner, at the same time it should be moderate considering the conventional and consistent approach.

[68] The plaintiff is asking $60,000.00 for pain and suffering and loss of amenities.

[69] The plaintiff had multiple fractures as in the medical report, he was hospitalised and surgery was performed. His left eye vision had diminished and distorted. I, taking all into my account, assess damages for pain and suffering and loss of amenities at $45,000.00, which, in my view, is fair and reasonable in the circumstances of the case.

Loss of earning capacity

[70] According to him, at the time he was working at the Pacific Green and was earning $126.00 a week. At the trial, he attempted to present a pay slip to court, but it was vehemently objected to by the defendants on the ground that it was not disclosed to them before the trial. The court then disallowed to present it at the trial.

[71] Currently, the plaintiff works for one Ashnil for 20-24 hours per week at $3.00 an hour.

[72] He said he cannot work in hot sunshine or in a cool environment, has headache in sunshine and his left eye sight affecting his earning capacity. It will be noted that the plaintiff did not provide expert evidence to support these symptoms.

[73] I am mindful of the fact that the defendants did not have the plaintiff examined by a doctor chosen by them.

[74] It was elicited during cross examination by the second defendant that the plaintiff left the school after Form 6.

[75] The plaintiff seeks a sum of $48,048.00 ($126.00-$60.00=$66.00 per week using a multiplier of 14-the future loss of earnings comes to $66.00 x 52 x 14 =$48.048.00). In arriving at this figure, the plaintiff had taken $126.00 a week as he was earning prior to the accident and $60.00 per week (20 hours per week x3=$60.00).

[76] In fact, it is doubtful whether the plaintiff was earning $126.00 per week by working at the Pacific Green. He did not present any pay slip to substantiate it. Therefore, he is not entitled to calculate using $126.00 as he was earning before the accident.

[77] Since the plaintiff has failed to prove his income to be $126.00 at the time of the accident, he is not entitled to recover full $48.048.00 (as he calculated) for loss of earning capacity. Further, there is no expert evidence on the earning capacity of the plaintiff. Taking all these into my consideration, I am prepared to award a sum of $15,000.00, which is a portion of $48.048.00.

Special damages

[78] The plaintiff is asking the total sum of $2,586.00 as special damages. The special damage is pleaded in paragraph 8 of the statement of claim, which includes:

1) 5 trips from Tavakubu, Lautoka to CWM Hospital and return at $250.00 per trip (by taxi)	$1250.00
2) 5 trips from Tavakubu, Lautoka to CWM Hospital and return at $50.00 per trip (in bus)	$ 250.00
3) 3 trips from Tavakubu, Lautoka to Lautoka Hospital and return at $10 per trip	$30.00
4) 21 day (3 trips per day) from Samabula, Suva To CWM Hospital and return at $12 per trip	$756.00
5) Accommodation	$300.00
TOTAL	$2,586.00

[79] At the trial, the plaintiff did not provide any receipt to support his claim for special damages.

[80] In *Kumar v Drawe* 36 FLR 90 (July 1990), Judge Palmer, dealing with a similar situation stated:

> *"I now turn to the claim for special damages. There is a claim for damage to clothing in the sum of $40 and a claim for the franchise paid in respect of repairs to his car in the sum of $200 both of which are conceded and I accordingly propose to allow those sums. There is further a claim for medical expenses. The Plaintiff gave evidence that he paid Dr. Sharma $225 for his report and $25 for his first check up and $5 to the hospital for its report. Notwithstanding that not a single receipt has been produced in evidence I am satisfied from the Plaintiff's evidence that he paid those amounts and I propose to allow the sum of $255 accordingly. The Plaintiff claims to have made a large number of visits to the hospital for medication but he says that at the hospital and the Civil Service Clinic he did not have to pay, at times the medication was not available and he had to buy it outside. However, he has no receipts and gave no figure whatsoever on which any award could be based. Any allowance for medication purchased would be sheer guess work. He has also claimed for travel to the hospital and clinic for those purposes, but again no evidence has been led as to any expense this has involved and in view of the fact that he was receiving mileage for the use of his car and the total absence of any other evidence as to this I do not propose to allow anything under that head either."*

[81] The plaintiff had to receive treatment at Lautoka Hospital and CWM Hospital, Suva. He would have travelled to both hospitals either by taxi or in bus. He would have incurred considerable expenses in this regard. In the absence of any receipts, I allow only $850.00 as special damages.

Costs

[82] The plaintiff as a winning party is entitled to costs of this proceeding. I consider all and summarily assess the costs at $1,000.00.

[83] Accordingly, I award damages as follows:

General damages for pain and suffering		
and loss of amenities	:	$45,000.00

Damages for loss of earning capacity	:	$15,000.00
Special damages	:	$850.00
Costs	:	$1,000.00
TOTAL	:	**$61,850.00**

[84] COVID-19 PROTOCOL: This judgment was handed down remotely by circulation to the parties' solicitors by email. The date for hand-down is deemed to be Thursday 30 April 2020.

The result

1. The second defendant shall pay a sum of $61,850.00 to the plaintiff.
2. The first defendant shall not be liable for the negligent act of the second defendant.

29/4/20

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M.H. Mohamed Ajmeer

JUDGE

HIGH COURT OF FIJI LAUTOKA

At Lautoka

29 April 2020

Solicitors:

Chaudhary & Associates, Solicitors for the plaintiff
Jiten Reddy Lawyers, Barristers & Solicitors for the first defendant
Gordon & Co, Barristers & Solicitors for the second defendant