IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. HBA 13 of 2022

Magistrates Court Civil Action No. 113 of 2012

BETWEEN: **SALEND K LAL** of 24 Shiri Raman Place, Namadi Heights, Suva.

APPELLANT/DEFENDANT

AND: **LUCIA KAFOA** of 63 Lady Narain Drive, Tamavua, Suva.

1ST RESPONDENT/1ST PLAINTIFF

AND: **QBE INSURANCE (FIJI) LIMITED** a limited liability company having its registered office at Suva.

2ND RESPONDENT/2ND PLAINTIFF

BEFORE: **Hon. Mr Justice Vishwa Datt Sharma**

COUNSEL: **Mr. Kumar P.** for the Appellant/Defendant
Mr. Bale Loa M. for the Respondents/Plaintiffs

Date of Judgment: **Thursday 24th April, 2025 @ 9.30am**

JUDGMENT

[Appellants Appeal from Magistrates Court Decision]

Introduction

1. The Appellants notice of Appeal dated 17th February 2022 seeks the following relief:

   (1) The Ruling of the Learned Resident Magistrate, Mr. Jeremaia N. L. Savou delivered on 10th February 2022 to be set aside,

   (2) All further proceedings be stayed until the hearing and/or determination of this Appeal.

2. There are altogether **Nine (9) grounds of Appeal** filed by the Appellant as enumerated hereunder:

   Ground 1

   (a) By giving judgment in a matter that was presided over by a brother magistrate.

   Ground 2

   (b) By giving judgment in a matter whereby the credibility of the witnesses was not assessed by the magistrate who gave judgment.

   Ground 3

   (c) By finding the Defendant vicariously liable is contrary to law based on the evidence before the court.

   Ground 4

   (d) By finding the Defendant vicariously liable which is contrary to law based on the fact that the actual tortfeasor was never made a 2nd Defendant.

   Ground 5

   (e) By finding the Defendant vicariously liable which is contrary to law based on the fact the relationship between the Defendant and the tortfeasor was not established to be one of employer and employee.

   Ground 6

   (f) By finding the Defendant vicariously liable even though no evidence was adduced in court to give evidence of negligence of either party apart from the Original 1st Plaintiff's account of negligence.

   Ground 7

   (g) By accepting a police complaint as sufficient evidence to place negligence on the Defendant.

   Ground 8

   (h) By accepting a copy of photos for damage to Motor Vehicle Registration No. FH 334 as sufficient evidence to place negligence on the Defendant.

   Ground 9

   (i) By accepting a copy of assessment of damages to Motor Vehicle Registration No. FH 334 as sufficient evidence to place negligence on the Defendant.

3. Both parties to the proceedings have furnished Court with their written submissions and argued the Grounds of Appeal accordingly.

Determination

4. Some of the Grounds of Appeal raises the issue of the credibility of witnesses, erred in finding of vicarious liability and attacks the reliability of the documentary evidence by the Respondents at the trial. Therefore, those grounds can be consolidated and determined accordingly rather than independently.

- **Ground 1 and 2**

5. These grounds argues that since the matter was part-heard by Magistrate Boseiwaqa, the credibility of the witnesses would only have been best assessed by Magistrate Boseiwaqa and not by the current presiding Magistrate Mr. Savou.

6. It is noted herein that the Appellant is appealing the final civil Judgment of the Resident Magistrate of 10th February 2022 and not appealing the Ruling of 27th January 2022 that purely dealt with the issue of trial-de-novo.

7. I have perused Magistrate Savou's Ruling on trial-de-novo issue and sets out his reasons hereunder for not making an order that the matter be heard de-novo. However, it shall complete the process began by his predecessor in title pursuant to *section 47 of the Magistrate Court Act 1944:*

- No prejudice Exists.
- Notes of predecessor in title are unblemished.
- with the exception of not privy to demeanor of the witnesses whilst giving evidence
- Documentary evidences tendered supporting the pleadings and inference can be drawn.
- No prejudice suffered by either party if this court were to complete the process begun by its predecessor in title

8. Reference is made to the case of **ANZ Banking Group Ltd v Vikash** [2020] FJHC 3; HBC 208.2004L (18 January 2010) wherein Justice Inoke (as he then was), refused a trial de-novo after the matter was part heard by a different Judge and where closing submissions were filed: at paragraph 8 to 10 of its Ruling:

> '[8]This claim was filed on **16 July 2004**. It eventually went to trial 4 years later on **18 August 2008**. If I were to order a trial de novo, it will be another year at least before the matter is reheard. It is a claim for a very small amount $11,074.23. By the time the matter is reheard legal costs may have well exceeded the claim, if not already. Further, the witnesses' memories of events that took place over 6 years ago must have been dimmed and any advantage that may have been gained in respect of the credibility of witnesses in a trial held over a year ago as opposed to a new trial to be held at least a year hence may have been nullified and now nonexistent.

> [9] The trial Judges notes are, as usual, comprehensive and appear to be verbatim. All submissions have now been filed. I note from the record that Mr. Khan appeared for the Defendant at the trial. Mr. Babu Singh was not Counsel for the Plaintiff at the trial. So if I were to order a re-trial, Mr. Khan would be at a distinct advantage over Mr. Babu Singh.
>
> [10] In the circumstances, exercising this Court's discretion as a matter of jurisdiction and as a matter of case management, I think, in the interests of justice and fairness to both parties and in the interests of the Court's limited resources being available to others, this matter should not be heard de novo. However, I will allow the parties Counsels to make oral submissions and I will set a date convenient to both of them and the Court, subject to what follows.'

9. The Magistrates Court Civil Action No. 113 of 2012 was filed in 2012 where the motor vehicle accident occurred sometime in 2011, after 8 years, the matter proceeded to trial and parties given opportunity to furnish their closing submissions, the Resident Magistrate herein delivered a Decision on the materials that were already before this Court and refused de-novo.

10. The Appellant the Respondents were given the opportunity to present its case before the presiding Resident Magistrates Mr. Boseiwaqa. They also filed their closing submissions and concluded each party's case at the Magistrate Court.

11. It was only when Resident Magistrate Mr. Boseiwaqa briefly left the Judiciary that the matter was allocated to Resident Magistrate Mr. Savou who wrote and delivered his well-reasoned out Judgment based on Resident Magistrate Boseiwaqa's file notes as well as the closing submissions filed therein for the Magistrate's consideration and determination.

12. For the above reason, I find that there is no merit in Appellant's Grounds of Appeal 1 and 2 and accordingly both grounds 1 and 2 fails.

- **Grounds 3, 4, 5 and 6**

13. These ground of the Appellant argues that the Learned Resident Magistrate erred in making findings of vicarious liability. The Appellants rational is that the actual wrong doer was not made a party to the current proceedings and that it was contrary to law to find the Appellant vicarious liable for the actions of the wrongdoer since there was no link between the wrongdoer and himself.

14. The question that arises herein is if above actual wrongdoer was not made a party to the proceedings and it was contrary to law of finding, Appellant vicarious liable then did the Plaintiff file any Interlocutory application for striking out the Plaintiff's action. The answer is in negative and therefore the Appellate Court will not entertain anything which was not raised and considered at the Magistrate's Court below.

15. Refer to case of **Hicks v Bank of South Pacific** [2018] FJHC 597; HBC 291.2013 (12 July 2018) the Court said the following in respect of a **striking out application** for **no cause of action:**

> [28] 'on the other hand, the first defendant must establish that the Plaintiff does not have a cause of action in this case against him.'

16. The Appellant in his pleadings admitted that he was the owner of LT 1345 at the time of the Accident. Therefore, there was a cause of action against him.

17. The Respondent, in his Amended Statement of Claim of 25 September 2017 pleaded that:

> 'On 14 August 2011, at about 11am, the Appellants agent and/or employee drove LT 1345 negligently by driving a U-turn in front of FH334 that was driven by the first Respondent, causing a collision.

18. [a] The Resident Magistrate in his Judgment of 10 February 2022 at paragraphs 31 stated that:

> "The first Plaintiff has established on the balance of probabilities via evidence that the employee of the Defendant was negligent in the manner of his driving, leading to the accident.

19. He quoted the case of **Ram Pal v Ise Lun trading as Wing Fat Bakery** [1971] 17 FLR 8 Hammett CJ (as he was then) held at page 13 that:

> ***"The authorities are clear that in order to impute to the owner of a car the negligence of his driver, it must be proved that the driver was the servant or agent of the owner***.'

20. He said that the pleadings of the Defendant suggested that his driver was driving on 14 August 2021 and in cross examination confirmed that he had a driver.

21. This confirms that there was a servant or agent relationship and therefore proves that since it is established that the defendant's driver was negligent, 'the defendant is vicariously liable as a result."

22. Reference is made to the case of **Naicker v Land Transport Authority** [2023] FJHC 330; HBC 18.2014 (28 April 2023, where the Court said the following on vicarious liability:

> ***11. The doctrine of vicarious liability represents not a tort, but a rule of responsibility which renders one person liable for the torts committed by another. Most common application of vicarious liability is in employer and employee relationship. The employers are held liable for what their employees did for their (employers') purposes and benefits.***

23. The Driver of LT 1345 in the current case at the time of accident – Neil K Goundar was an authorized driver of the Appellant. Hence, making the Appellant liable. As discussed hereinabove in the case of **Naicker v Land Transport Authority (supra)**, **the Doctrine of vicarious liability represents** not a TORT, but a **rule of responsibility which renders one person liable for the torts committed by another.**

24. Thus, I hold that the Learned Resident Magistrate has correctly found that the Appellant was vicarious liable for the Tort committed by the driver – Neil K Goundar of LT 1345 who was an authorized driver of the Appellant.

- **Grounds 7, 8 and 9**

25. The Appellant argues that the Court below erred in accepting the Police Complaint, copy of photos for damage to motor vehicle Registration No. FH 334, as sufficient evidence to place negligence of the part of the defendant.

26. The perusal of the Court record and trial evidence at the Court below does not confirm that objections were raised by the Appellant at the trial proper when these documents were tendered into evidence as Exhibits. Further, this Court notes that the Appellant did not file and/or furnish court with their written submissions to discuss the evidence at trial or attack the Respondent's documentary evidence.

27. The evidence tendered before the Magistrates Court was that the first respondents vehicle sustained substantial damages from the Accident of 14 August 2011 as a result of the Careless driving of the driver of LT 1345, owned by the Appellant.

28. Did the Appellant call any witnesses at trial or the authorized driver at the time of the accident to dispute and/or disprove the first Respondent's evidence?

29. The answer is in the negative.

30. The Judgment delivered by the presiding Resident Magistrate on 10 February 2022, clearly sets out that:

- 'The Plaintiff exhibits highlight that the matter was reported to the Police and there were damages to the 1st named Plaintiff's motor vehicle;
- The Court accepts first named Plaintiff's version of events is *prima facie* evidence of the Defendant's employee being a negligent driver.
- It was open to the Defendant to rebut the version of the 1st named Plaintiff.
- His driver was not called to give evidence which means that there is no evidence to support the claim of negligent driving by the Defendant against the 1st named Plaintiff or that his motor vehicle registration LT1345 suffered damages; and
- As a result, the Defendant has not been able to establish a prima facie case.'

31. The Resident Magistrate in his Judgment at paragraph 14 considered the enumerated proven facts as follows:

ii. 'There was a motor vehicle accident which occurred on 14th August 2011 between motor vehicle registration FH-334 and LT1345; which are owned by the 1st Plaintiff and the Defendant herein;
iii. The 1st Plaintiff and the Defendant's employee were driving the motor vehicles at the time of the accident;
iv. There were pictures to confirm the damage to FH-334;
v. There were invoices and reports to highlight the extent of the damage and repair costs to FH-334;
vi. Repairs were paid for by the 2nd Plaintiff as a result of a claim (comprehensive motor vehicle Insurance) from the 1st Plaintiff.'

32. Taking into consideration all above, Appeal Grounds Nos. 7, 8 and 9 fails accordingly.

33. The Resident Magistrate further stated that the first Plaintiff has established on the balance of probabilities via evidence that **the employee of the Defendant was negligent in the manner of his driving, leading to the accident and that the Defendant has not established on a balance of probabilities that the first Named Plaintiff was negligent in the manner of her driving.**

34. I am of the view that the presiding Resident magistrate took into consideration the evidence and exhibits tendered into Court and eventually determined his finding that a proper case was formally made out against the Appellant/Defendant and quite correctly determined and held that the second named Plaintiff was entitled to the sum claimed to recover their costs requiring the first named Plaintiff's motor vehicle and entered the judgment with costs against the Defendant accordingly

35. For these reasons, the Appellants/Defendants Appeal in its entirety is accordingly dismissed with summarily assessed costs of $2,500 against the Appellant/Defendant to be paid to the Plaintiff/Respondent within 14 days timeframe hereof.

Orders

(i) The Appellant/Defendants Appeal on the nine (9) Grounds is Dismissed in its entirety.

(ii) The Appellant/Defendant to pay the Plaintiff/Respondent(s) a sum of $2,500 as summarily assessed costs within 14 days timeframe.

Dated at **Suva** this **24th** day of **April ,2025.**

HIGH COURT OF FIJI SUVA

VISHWA DATT SHARMA
PUISNE JUDGE

Cc: Haniff Tuitoga, Suva
Patrick Kumar Lawyers, Nasinu