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IN THE SUPREME COURT OF TONGA

APPEALLATE JURISDICTION **AM 14 of 2015**

NUKU'ALOFA REGISTRY **[MC, CV 13 of 2013]** 04/11/15

BETWEEN: **DOBYN MANU KAUMAVAE**

- **First Appellant**

LISIATE MANU KAUMAVAE

- **Second Appellant**

AND : **LITANI LAVEMAAU**

- **Respondent**

BEFORE LORD CHIEF JUSTICE PAULSEN

Counsel : **Mr. 'O. Pouono for the appellants.**

Mrs. M. Palelei for the respondent.

Hearing : **25 September 2015**

Ruling : **6 October 2015.**

Recd 12/10/15

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RULING

[1] This is a civil appeal from a decision of Magistrate Soakimi delivered on 12 February 2015 in which he awarded the respondent damages against both appellants as a result of a traffic accident. A number of grounds of appeal are advanced which I set out below after dealing with the facts.

The facts

[2] Mr. Lavemaau is the owner of a van which on 24 September 2013 was parked at the petrol station at Lapaha. At the same time the first appellant, Mr. Dobyn Kaumavae, was the driver of a bus in a northerly direction on Taufa'ahau Road in the vicinity of the petrol station. He did a U-turn. In the course of the U-turn another vehicle being driven behind the bus by Mr. 'Iki Ulutaufonua collided with the bus and then, while out of control, ran into Mr. Lavemaau's van causing damage to the van and rendering Mr. Lavemaau

unconscious. Mr. Lavemaau was taken to hospital. The evidence was that was unconscious for a period of four hours. There was no evidence that he suffered any other injuries. As a result of the accident Mr. Dobyn Kaumavae was convicted of reckless driving and fined.

[3] Mr. Lavemaau filed a claim against Mr. Dobyn Kaumavae and Mr. Lisiate Kaumavae in the Magistrate's Court alleging that Mr. Dobyn Kaumavae had been negligent when doing the U-turn causing Mr. Ulutaufonua to hit Mr. Lavemaau's van. It was alleged that Mr. Lisiate Kaumavae was vicariously liable "because he gave [*Dobyn Kaumavae*] the bus driven". Mr. Lavemaau sought damages of $6,500 to repair his van and $2,000 for general damages and costs. In his decision Magistrate Soakimi held that Mr. Dobyn Kaumavae had been reckless and caused the accident and was liable for Mr. Lavemaau's losses made up as to $6,500 for damage to his van, $1,500 "to compensate to the injuries made to the plaintiff" and costs. The Magistrate also held that Mr. Lisiate Kaumavae was vicariously liable for the

actions of Mr. Dobyn Kaumavae and awarded judgment against him for the same amounts.

Causation

[4] The first ground of appeal is that Magistrate Soakimi was wrong to find that Mr. Dobyn Kaumavae had caused the accident when it was Mr. Ulutaufonua's vehicle that ran into Mr. Lavemaau's van and the evidence was that Mr. Ulutaufonua did not hold a drivers license at the time of the accident. The evidence of Mr. Ulutaufonua was that he had once held a drivers license but it had expired and that since the accident he had obtained his license again.

[6] This ground of appeal is misconceived for two principal reasons. First, the Magistrate had before him the claim by Mr. Lavemaau against the appellants. There was no claim against Mr. Ulutaufonua, either by Mr. Lavemaau or the appellants. If the Magistrate was satisfied that the evidence established that the negligent conduct of Mr. Dobyn

Kaumavae was an operative cause of the accident then he would be fully liable for the losses of Mr. Lavemaau (subject to questions of remoteness) regardless of whether Mr. Ulutaufonua also contributed to the accident. Secondly, there was no evidence that the fact that Mr. Ulutaufonua did not hold a drivers license in any way caused or contributed to the accident.

[7] In determining whether an act is a cause of loss various formulae have been suggested by the Courts but the assessment is ultimately one that can only be resolved by the application of common sense and experience. *March v E and MH Stramare Pty Ltd* (1991) 171 CLR 506, 509. There was ample evidence for the Magistrate to conclude that a lack of care by Mr. Dobyn Kaumavae, in doing a U turn in front of the on-coming vehicle driven by Mr. Ulutaufonua, was an operative cause of the accident and Mr. Lavemaau's losses. The first ground for the appeal fails.

General damages

[8] The second ground of appeal is that the Magistrate was wrong to award general damages in the sum of $1,500 when there was insufficient evidence to support that award. General damages relate to such things as pain and suffering, humiliation, distress and loss of enjoyment to life to which no exact dollar value can be ascribed. In accessing general damages the Court must make a fair assessment based on the circumstances and nature of the case and from the awards in other cases (where available). There was some limited evidence from which the Magistrate could determine that it was proper to make an award of general damages. Mr. Lavemaau was rendered unconscious and spent time in hospital. No doubt he experienced some shock, distress and inconvenience as a result. This seems to have been accepted by the appellants in the Magistrate's Court as their challenge to this head of claim focused on quantum, which it was said was excessive.

[9] The general rule is that in relation to the assessment of damages the Court should not interfere with a decision under appeal unless convinced that the judge below acted upon some wrong principle of law or that the amount is so extremely high or so extremely low as to make it a highly erroneous estimate of the damages. *Taulanga Kaufusi v Sisi Lasa and Others* [1990] TLR L.R. 139, 140 (CA). Unfortunately the Magistrate's approach to this aspect of the claim was so unsatisfactory I cannot make any assessment of whether he proceeded on wrong principle. He made a substantial award against the appellants but gave no reasons for doing so. He simply said "Both defendants should compensate to the injuries made to the plaintiff $1,500". It is not clear either what the Magistrate meant by 'injuries' and what factors he took into account in assessing the award. I must therefore make my own assessment and I find that the award of $1,500 for general damages is so high that it cannot stand. I substitute an award of $500 which reflects the fact that whilst Mr. Lavemaau did suffer some shock, distress and inconvenience this was transient in

nature and there was no evidence that he suffered further injuries of any sort.

[10] Accordingly this ground of appeal succeeds to the extent that the award made by the Magistrate is set aside and replaced with an award of $500.

Bias

[11] The third ground of appeal is the Magistrate failed to consider the first appellant's evidence and was biased. The basis for this submission is an exchange that occurred between the Magistrate and Mr. Dobyn Kaumavae. During the course of his evidence-in-chief Mr. Dobyn Kaumavae had said that he had appealed his conviction for reckless driving. That was not correct. At the conclusion of his evidence this exchanged occurred –

Court: Did you submit an appeal?

Defendant: No, an appeal is to be submitted sir.

Court: It seems you are going to lie. You told us before that there has been an appeal but you are questioned if you have and you replied no?

Defendant: I apologised your worship I misunderstood.

[12] The Court will not lightly infer bias on the part of a judicial officer. There must be evidence that the bias is real. That is not the case here. The comment made by the Magistrate was, perhaps, immoderate and failed to take account of possibilities other than that Mr. Dobyn Lavemaau was lying, but the fact that a Magistrate makes and expresses an assessment that a particular witness may be lying does not of itself demonstrate bias. As Mrs. Palelei submitted, the possibility that Mr. Dobyn Kaumavae had lied was one possible inference open to the Magistrate. In any event, Mr. Pouono has not taken me to any parts of Mr. Dobyn Kaumavae's evidence that the Magistrate failed to consider. This ground of appeal fails.

Vicarious liability

[13] The final ground of appeal is that Mr. Lisiate Kaumavae was vicariously liable for the conduct and losses caused by Mr. Dobyn Kaumavae. The Magistrate held that Mr. Lisiate Kaumavae was so liable because "the first defendant is an employee. He is daily paid." This finding cannot stand.

[14] An employer may in some circumstances be liable for the actions of their employee. It is often said that the employer will be liable for the tortious conduct within the scope of the employee's authority or later ratified by the employer. *To'a v Latu* [2010] Tonga LR 44. For my part I would hold that an employer will be liable for the acts of their employee when the act complained of is actually authorised by him or sufficiently related to conduct authorised by him to justify the imposition of vicarious liability, i.e. is there a sufficiently close connection between the wrongdoing and the wrongdoer's employment, so that it will be fair and just to

hold the employer vicariously liable. *Canadian Pacific Railway Co v Lockhart* [1942] AC 591 and *The Children's Foundation v Bazley* (1999) 174 DLR 45.

[15] The evidence that had a bearing on this issue was scant. Mr. Lisiate Kaumavae did not give evidence. Mr. Dobyn Kaumavae said in his evidence that the bus he was driving had been purchased by his sister. He also said that he got paid $30 a day and $150 a week and that the bus had been repaired by Mr. Lisiate Kaumavae at a cost of $3,500. Mr. Dobyn Kaumavae was cross-examined but no questions were asked that related to this issue. No challenge was taken to the transcript of proceedings in the Magistrate's Court provided to me for the purposes of the appeal.

[16] There was insufficient evidence from which the Magistrate could find that Mr. Lisiate Kaumavae was the owner of the bus or the employer of Mr. Dobyn Kaumavae. There was also insufficient evidence that Mr. Dobyn Kaumavae was driving the bus at the direction of, or in the course of his

employment with, Mr. Lisiate Kaumavae. The Magistrate was therefore quite wrong to conclude that Mr. Lisiate Kaumavae was vicariously liable for the losses caused by Mr. Dobyn Kaumavae.

[17] In written submission for the respondent the only submission about this aspect of the case was this:

> The first Appellant admitted in his evidence that the second Appellant is vicariously liable for his wrongful actions.

[18] I can see no such admission in the evidence and should the first appellant have made such a concession it cannot possibly bind the second appellant.

[19] Accordingly this ground of appeal, which is advanced on behalf of Mr. Lisiate Kaumavae only, succeeds.

Result

[20] The result of my findings are as follows:

[20.1] The appeal of the first appellant is dismissed except to the extent that the award made by the Magistrate of $1,500 general damages is reduced to $500. All other awards against the first appellant are upheld.

[20.2] The appeal of the second appellant is allowed and the judgment entered against him is quashed in its entirety.

[21] It appears to me that all parties should bear their own costs but I have heard no submissions. For that reason any party who does not agree that costs should lie where they fall and wishes to claim costs must file a memorandum within 14 days.

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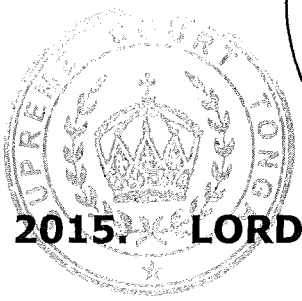

O.G. Paulsen

NUKU'ALOFA: 6 October 2015. LORD CHIEF JUSTICE