

Solicitor General.

29/05/17

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**IN THE SUPREME COURT OF TONGA
APPELLATE JURISDICTION
NUKU'ALOFA REGISTRY**

**AM 2 of 2017
(MC CV 64 of 2016)**

BETWEEN: KAVAMOLI NAU

Appellant

AND : YU JU MING

Respondent

BEFORE LORD CHIEF JUSTICE PAULSEN

**Counsel: Mr S. Fili for the appellant
Mrs S Taione for the respondent**

**Hearing: 19 May 2017
Date of Ruling: 22 May 2017**

RULING

Background to the appeal

[1] On 29 May 2016 the appellant was the driver of vehicle (Mitsubishi Delica Registration J6704) in the vicinity of 'Alipate and Hihifo Roads when she was involved in an accident with a vehicle being driven by the respondent.

*Received 26/05/17
Fili*

- [2] The respondent was at fault for the accident and he was subsequently convicted of reckless driving in the Magistrates' Court.
- [3] The vehicle driven by the appellant was damaged. She brought a claim in the Magistrates' Court to recover its full pre-accident value of \$9,500 alleging it was a total loss.
- [4] In a decision of 14 November 2016 Magistrate Tuita dismissed the claim. It appears that the Magistrate was not satisfied that the appellant had established either any right to sue for damage to the vehicle or that the vehicle was in fact a total loss. He expressed valid concerns about the valuation evidence and found that a vehicle of the same make and registration number was still being driven by the appellant's husband. On the state of the evidence the Magistrate's conclusion appears entirely justified.
- [5] The appellant appeals on four grounds from the Magistrate's decision but the appeal falters at the first hurdle and it is necessary for me to consider only the first ground of appeal which concerns the appellant's right to sue for damage to the vehicle.

The right to sue

- [6] The summons alleged that the vehicle was 'a vehicle of the plaintiff and her husband'. The evidence at trial was that the vehicle was gifted to the appellant's husband, Samiuela Nau, by the Chairman of the Whole House Committee, Hon Semisi Sika, in March 2016 as a reward for his hard work.

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- [7] Following the accident the appellant commenced her action in the Magistrates' Court on 24 August 2016. The vehicle was not yet registered in her husband's name. It was not registered in his name until 27 October 2016.
- [8] The trial commenced the next day on 28 October 2016. After hearing two witnesses the case was adjourned until 9 November 2016, apparently in the hope that the parties might reach a settlement. It was during the period of this adjournment that on 2 November 2016 the vehicle was registered in the name of the appellant.
- [9] Mr. Fili, quite correctly given the state of the evidence, accepted that at all material times prior to 2 November 2016 the vehicle was owned by the appellant's husband and not by the appellant. He submitted that she became the owner of it on 2 November 2016 when it was registered in her name. I understand him to have also acknowledged that the transfer of registration was a response to the respondent's challenge to her right to sue.
- [10] When I asked Mr. Fili to explain on what basis the appellant could sue to recover for damage caused to her husband's vehicle he submitted that Mr. Nau had authorised the appellant to bring the action as he was busy. I understand it was thought inconvenient for Mr. Nau to bring the action in his own name. Mr. Fili submitted that in the Kingdom actions are often commenced in Court 'on behalf' of the proper claimant but he could not provide me with any authority that would allow for that in a case such as this.
- [11] The appellant's cause of action is in negligence and it is trite that the three elements that together constitute the cause of action are, first

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that there is a duty on behalf of the defendant towards the person injured, secondly that the defendant negligently performed or omitted to perform his duty and thirdly, and most importantly in the present context, that such negligence was the effective cause of injury to the plaintiff.

[12] The appellant sought to recover for damage caused to the vehicle and nothing more. But she did not own the vehicle at the time of the accident or at any time until after the trial was underway. She did not personally suffer any loss which was the subject of the action.

[13] It does not assist the appellant that ownership of the vehicle was transferred to her on 2 November 2016. By that time the loss had already been suffered, not by her but by her husband and only he had the right to sue to recover it.

[14] I do not accept Mr. Fili's submission that the appellant had the right to sue 'on behalf' of her husband. In the absence of special circumstances, such as might arise if the proper claimant is a minor or incapacitated, she had no such right.

[15] I therefore find that the Magistrate was correct to dismiss the action on the basis that the appellant could not sue for loss suffered by another. This is sufficient to dispose of the appeal. It is not necessary for me to consider the other grounds advanced in challenge to the Magistrate's ruling.

[16] I should note that as far as the respondent is concerned this may not be an end of the matter. It is open to Mr. Nau to seek recovery of his

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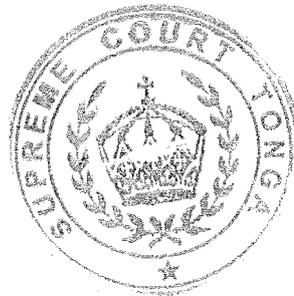
losses (should be able to prove them) in his own action against the respondent.

Result

[17] The appeal is dismissed.

[18] The respondent is entitled to costs to be fixed by the Registrar if not agreed.

NUKU'ALOFA: 22 May 2017.



A handwritten signature in black ink, appearing to read "O.G. Paulsen", is written over a large, empty oval shape.

**O.G. Paulsen
LORD CHIEF JUSTICE**