IN THE SUPREME COURT OF WESTERN SAMOA

HELD AT APIA

CP. 351/92

BETWEEN : TUNOA TANOAI of Vailoa, Taxi Proprietor

Plaintiff

A N D : TAGALOA MIKA AH KAM of Saleufi, Businessman

First Defendant

A N D : TAUINAOLA AH KAMof Saleufi, Driver

Second Defendant

Counsel : R. Drake for Plaintiff
P.A. Fepulea'i for Defendants

Hearing : 29 June 1993

Judgment : 5 July 1993

JUDGMENT OF SAPOLU, C.J.

This is an action in negligence against the second defendant and for vicarious liability against the first defendant.

The plaintiff operates a taxi radio telephone service and a fleet of taxis which he owns. On Wednesday morning, 26 August 1992, the plaintiff's wife dropped off their children at school in taxi registered number 2264 owned by the plaintiff. On her return after dropping off her children at school, she picked up a call on the radio telephone of her taxi for a passenger to be picked up from the Feiloaimauso Hall at Matafele. She then went to the Feiloaimauso Hall and picked up the passenger from there. That passenger was to go to Morris Hedstrom at Savalalo. So the plaintiff's

wife drove her taxi along Convent Street. That was between 7.30am and 8.00am in the morning and that is always a busy time for the traffic within the Apia area. When her taxi came to the intersection at Matafele, the police officer who was directing the traffic at the intersection signalled her taxi to go. At that time the plaintiff's wife saw in the directly opposite direction on Convent Street a queue of 2 taxis and then a bus which were stationary as the Police Officer directing the traffic at the intersection appears from the evidence not to have signalled those vehicles to go. So the taxi driven by the plaintiff's wife crossed the intersection and continued on along Convent Street towards Morris Hedstrom. When she came alongside the bus in the said queue, all of a sudden a pick-up vehicle U-turned across the road from behind the bus onto the side of the road where the plaintiff's wife's taxi was coming from and so a colission occurred. In cross-examination the plaintiff's wife says that she did not see any vehicle behind the bus and she was shocked when the pick-up from nowhere suddenly U-turned across the road from behind the bus. She tried to stop her taxi and swerved it sideways to avoid a collision but it was too late.

Now after the collision, the pick-up vehicle did not stop but took off. The plaintiff's wife tried to catch up with the pick-up but did not succeed. Two or three days later the plaintiff and his wife saw the pick-up parked in front of the first defendant's motel at Saleufi. They went inside and talked to the first defendant about the accident that had occurred and the latter called the second defendant who came and stated that it was him who caused the damage to the plaintiff's taxi. According to the plaintiff's wife the first defendant asked the second defendant as to why he did not stop after the accident but took off and the second defendant replied he was scared. The first defendantd then scolded the second defendant. Both the plaintiff and his wife then say that the first defendant told them that he is a businessman himself and he understands

what has happened. He also told the plaintiff to have their taxi repaired and then give him the bill to pay.

The plaintiff then saw Tony Hill, a well known motor mechanic at Vaitele, for carrying out repairs to his taxi. The left-front indicator of the plaintiff's taxi was broken and the left-front fender was pushed in or dented. The hood also did not close properly but that was not included in the claim for damages. Tony Hill told the plaintiff that he did not have the right paint for the taxi. So the plaintiff and his wife made telephone calls for their relatives in Pago Pago, American Samoa, for a gallon of paint that suits the colour of their taxi. A gallon of paint together with accessories was sent over to the plaintiff as they had requested. The total cost for those items was US$198.94 or $474.43 in Western Samoa currency. The freight was US$10.00. The plaintiff also made telephone toll calls to his relatives in New Zealand for a replacement indicator and an indicator costing NZ$175.20 or $212.96 in Western Samoan currency was sent from New Zealand.

The plaintiff and his wife also say that at the time of the accident their taxi was operating 6 days a week from Monday to Saturday and was earning a minimum of $50.00 clear a day after running expenses and the driver's wages had been paid. From 26 August 1992 to 17 September 1992 the taxi was not in operation as it was embarrassing to operate the taxi as a taxi given its damaged condition. In addition the left front indicator was damaged and the plaintiff says the Police would not allow the taxi to operate on the roads without one of its indicators. That is essentially what the plaintiff and his wife are saying in this case.

The second defendant on the other hand says that on the morning in question, he was instructed by the plaintiff's wife to take the children in the plaintiff's pick-up vehicle to St Mary's Primary School at Savalalo not far from the first defendant's motel. After dropping off the school children the second defendant drove along Convent Street. As he drove along Convent

Street he remembered something at Morris Hedstrom. So he turned his pick-up the side of the road in front of Nelson Motors a few meters from the Matafele intersection and stopped. At that time there was a stationery queue of 2 taxis and then a bus between his pick-up and the Matafele intersection. His pick-up was stopped some short distance behind the bus but on the side of the road and not directly behind the bus and a car which was coming from behind stopped to allow him to make his U-turn. When this pick-up came to the centre of the road he stopped to check if there was on-coming vehicle from the other side of the road. There was none and the road was clear of any traffic. So he continued his U-turn but then the collision occurred. He became scared of what had happened as it had never happened before to him as he did not stop but carried on. However, he saw that the indicator and fender of the other car were damaged. When he arrived home he did not tell his father, the first defendant, what had happened. It was not until 2 or 3 days later when the plaintiff and his wife saw the first defendant at his home that the second defendant told the first defendant what happened.

The second defendant also says that at the time of the accident, he was employed as a panel beater at OSY and Sons Ltd engineering workshop and his father asked the plaintiff and his wife to allow the second defendant to repair their taxi. The second defendant now works at home and sometimes goes to his father's plantations. However, he also says that his father told the plaintiff and his wife to fix their car and to let him (the first defendant) have the bill of costs for repairs to their taxi to pay. In cross-examination, the second defendant also says that he often drove his father's pick-up on family errands and to take the children to school in the mornings.

The first defendant in his evidence admits that he is the owner of the pick-up involved in the accident. However he denies that it is the second defendant who drives his children to school in the mornings. He says he drives his own children to school as he is concerned for their safety. He says the second defendant only drives the vehicle on some family errands and to the plantations and some of those times he accompanies the second defendant in the vehicle. But he never permits the second defendant to drive his children to school. Overall that was the tenor of the first defendant's evidence on this point.

As to the damage to the plaintiff's taxi, the first defendant says that he asked the plaintiff and his wife to let him fix their car. This is because he was a motor mechanic for some 20 years. However, in cross-examination the first defendant admitted that it is now 40 years since he ceased to work as a motor mechanic. He is now a planter and businessman. He also says that the plaintiff told him that the damage comprised of the broken indicator and the damaged fender and in his estimation it would have taken him 3 weeks including working at night to repair the damage. So when after the repairs were done he saw that the bill for repairs shown to him by the plaintiff was $500 he refused to pay as the bill was excessive. He also says in cross-examination, that he had agreed with the plaintiff to pay for the costs of repairs as he thought it would cost $500 but he never asked for the likely costs of repairs. When the Police came and investigated the second defendant he then changed his mind and refused to pay. However, if he had understood that the Police investigation was concerned only with a breach of traffic regulations, he would have done what he had agreed to with the plaintiff.

The issues in this case appear to the Court to be threefold, namely, negligence, vicarious liability and damages, although the third is really included in the first. The Court will deal with those issues in that order.

To succeed in an action in negligence a plaintiff must prove four things. Firstly, that the defendant owed a legal duty to the plaintiff to take care; secondly, that the defendant had breached that duty to take care; thirdly, the plaintiff suffered damage as a consequence of the defendant's breach of his legal duty to take care; and fourthly, that the damage suffered by the plaintiff was not too remote but a sufficiently proximate consequence of the defendant's breach of legal duty. If one of these four elements is absent then an action in negligence must necessarily fail. In the circumstances of this case the Court has no difficulty in finding that the second defendant when making the U-turn in his pick-up vehicle on Convent Street owed a legal duty to take care to the plaintiff whose taxi was driven by his wife from the opposite direction on the same street. As to the second element, the Court finds the evidence of the plaintiff's wife as to how the accident occurred to be credible and rejects the evidence of the second defendant on the same point. If what the second defendant says is true that the road was clear of any traffic and there was no approaching vehicle from the opposite side of the road when his pick-up made its U-turn, then clearly no accident should have happened. The fact that an accident happened clearly suggests that the road was not clear and the plaintiff's taxi was coming from the opposite direction when the accident took place. As the plaintiff's taxi was coming from the opposite direction of the road, the second defendant should have stopped his pick-up until the plaintiff's taxi had gone past before he continued his U-turn across the road to the other side. His

failure to stop means that the second defendant acted in breach of his legal duty to the plaintiff to take care in driving his pick-up. The second defendant's conduct in taking off without stopping after the accident and in not informing his father, the owner of the pick-up for 2 days about what had happened until the plaintiff and his wife came and talked to the owner is also hardly conduct consistent with an innocent driver. The second defendant's failure to protest his innocence when confronted with the accident by the owner of the pick-up and the plaintiff and his wife coupled with his own evidence that he agreed to fix the damage to the plaintiff's taxi is also not conduct consistent with that of an innocent person. For these reasons the Court finds that the second defendant was in breach of his duty to take care. Coming to the third and fourth elements, the Court also finds that on the evidence the plaintiff's taxi suffered damage as a consequence of the second defendant's breach of his duty of care and that the damage suffered by the plaintiff's taxi was a sufficiently proximate consequence of the second defendant's breach of duty and was not too remote. Accordingly, the plaintiff has established his action in negligence against the second defendant.

The next issue is whether the first defendant should be held vicariously liable for the negligence of the second defendant. The plaintiff claims that the second defendant was at all material times the agent of the first defendant and therefore the latter is vicariously liable for the acts of the former. The plaintiff does not claim that the second defendant was acting as a servant of the first defendant. Perhaps there is really no distinction between the responsibility of a master or principal for the acts of a servant or agent, but for the purpose of adducing evidence to establish in a particular case whether a master or principal is vicariously liable for the acts of a servant or agent, it may be important to bear in mind that the

scope of a servant's authority is usually, although not always, wider than that of an agent. In Heaton's Transport (St Helen's) Ltd v Transport and General Workers' Union [1973] AC 15 Lord Wilberforce in delivering the unanimous decision of the House of Lords said : "In each case the test to "be applied is the same : was the servant or agent acting on behalf of, "and within the scope of the authority conferred by, the master or principal? "Hewett v Bonvin [1940] 1K.B. 188 and Launchbury v Morgans [1973] AC 127. "Usually a servant, as compared with an agent, has a wider authority because "his employment is more permanent and he has a larger range of duties as he "may have to exercise discretion in dealing with a series of situations as "they arise. The agent in an ordinary sense is engaged to perform a "particular task on a particular occasion and has authority to do whatever "is required for that purpose but has no general authority."

From the evidence adduced in this case, the second defendant is a son of the first defendant's sister-in-law. He lives with the first defedant and the latter's family. He calls the first defendant his father and the first defendant calls him his son. The second defendant used to work as a panelbeater with OSY & Sons Ltd but he now stays at home doing errands for his family. So it appears that the relationship between the first defendant and the second defendant is one of father and son in a family sense rather than a master-servant relationship. The question of vicarious liability as between the first and the second defendant should not therefore be decided on the basis of a master/servant relationship but on the basis of a principal/agent relationship as asserted by the plaintiff in his statement of claim. I think this is a better way of putting the plaintiff's case as, on the evidence, it would be easier to assert agency than service.

Now the onus of establishing a principal/agent relationship as the basis for vicarious liability is on the party asserting the existence of such a relationship. And the principles which apply in deciding whether a principal/agent relationship exists in this case are contained in the speech of Lord Wilberforce in the leading case of Launchbury v Morgan [1973] AC 127 at p.135 where His Lordship said : "For I regard as clear "that in order to fix vicarious liability upon the owner of a car in such "a case as the present it must be shown that the driver was using it for "the owner's purposes, under delegation of a task or duty. The substi- "tution for this clear conception of a vague test based on 'interest' or "'concern' has nothing in reason or authority to commend it. Every man "who gives permission for the use of his chattel may be said to have an "interest or concern in its being carefully used, and, in most cases if "it is a car, to have an interest or concern in the safety of the driver, "but it has never been held that mere permission is enough to establish "vicarious liability. And the appearance of the words in certain judgments "(Ormrod v Crosville Motor Services Ltd [1953] 1 W.L.R. 409, per Deulin J., "[1953] 1 W.L.R. 1120 per Denning LJ) in a negative context (no interest or "concern , therefore no agency) is no warrant whatever for transferring "them into a positive test. I accept entirely that 'agency' in contexts "such as these is merely a concept, the purpose and meaning of which is to "say 'is vicariously liable,' and that either expression reflects a judgment "of value -- respondeat superior is the law saying that the owner ought to "pay. It is this imperative which the common law has endeavoured to work "out through the cases. The owner ought to pay, it says, because he has "authorised the act, or requested it, or because the actor is carying out "a task or duty delegated, or because he is in control of the actor's "conduct. He ought not to pay (on accepted rules) if he has no control over "the actor, has not authorised or requested the act, or if the actor is

"acting wholly for his own purposes."

Turning back to the evidence, the second defendant says that sometimes he drives the first defendant's children to school and sometimes it is the first defendant. The first defendant denies that the second defendant drives his children to school. He says that he does not allow the second defendant to drive his children to school. It is him, the first defendant, who drives his own children to school. Having rejected the evidence by the second defendant as to how the accident in this case occurred, the Court is rather reluctant to accept his evidence about driving the children to school given its conflicting nature with the evidence of the first defendant on the same point. It should also be remembered that the second defendant used to work as a panel beater with OSY & Sons Ltd and there is no evidence as to when he stopped such work and stayed at home. The Court draws the inference that at the time the second defendant was working as a panelbeater he would not be driving the children to school as it is most likely he would be late to his own work if he were to drive the children to school first and then return home to leave the first defendant's pick-up before he goes to work. In any event, on the morning when this accident occurred, it was the wife of the first defendant who instructed the second defendant to drive the children to school and there is no evidence that the first defendant knew of the instruction given by his wife to the second defendant. Where the accident occurred was also outside of the shortest route back to the first defendant's home, and the evidence does not show whether the defendant was embarking on a 'frolic of his own' or acting for a purpose requested by the first defendant or his wife.

As the Court has already pointed out, the onus of establishing a principal/agent relationship is on the party asserting its existence. And as stated in **Launchbury v Morgan** what has to be established in a case like this was that the driver of the car was using the car for the owner's

purposes under a delegation of a task or duty. The evidence does not show that at the time of the accident the second defendant was driving for the purposes of the first defendant under delegation of a task or duty. There is also no evidence that the first defendant permitted the second defendant to drive the pick-up on the morning in question, or authorised or requested the second defendant to drive the pick-up. And as the first defendant was not present at the time of the accident, it could not be said that he was in control of the actions of the second defendant at the time of the accident. The Court has therefore come to the view that the onus of establishing an agency relationship asserted by the plaintiff as the basis for vicarious liability has not been discharged on the balance of probabilities and the claim against the first defendant is accordingly dismissed.

" I turn now to the question of damages against the second defendant who has been found negligent. Counsel for the defendants during the trial appears to suggest that the plaintiff has a duty to mitigate his loss. This suggestion came out clear from the evidence of both defendants and in questions put to the plaintiff. I think it would be helpful to refer to the principles which apply to the plaintiff's duty to mitigate his loss."

In the decision of the House of Lords in British Westinghouse Electric and Manufacturing Co. Ltd v Underground Electric Rail Co. of London Ltd [1912] A.C. 673 at p.689, Viscount Haldone L.C. in delivering a judgment with which the other Law Lords concurred stated : "this first "principle is qualified by a second, which imposes on a plaintiff the duty "of taking all reasonable steps to mitigate the loss consequent on the "breach, and debars him from claiming any part of the damage which is due "to his neglect to take such steps." This case was a case on contract but the Court is of the view that what is said in the passage quoted also apply

in tort. In Halbury's Laws of England 4th edition, volume 12 paragraph 1194 it is said :

> "Standard of conduct required of the plaintiff. The plaintiff is "only required to act reasonably, and whether he has done so is a "question of fact in the circumstances of each particular case, "and not a question of law. He must act not only in his own "interests but also in the interests of the defendant and keep "down the damages, so far as it is reasonable and proper, by "acting reasonable in the matter. One test of reasonableness "is whether a prudent man would have acted in the same way "if the original wrongful act had arisen through his own default. "In cases of breach of contract the plaintiff is under no "obligation to do anything other than in the ordinary course of "business, and where he has been placed in a position of "embarrassment the measures which he may be driven to adopt in "order to extricate himself ought not be weighed in nice "scales at the instance of the defendant whose breach of contract "has occasioned the difficulty. Similar principles apply in tort."

So the test to be applied when considering the question of mitigation is one of reasonableness and whether a plaintiff has taken reasonable steps to mitigate his loss is a question of fact to be decided by looking at all the circumstances of each case. It must be added that whilst the plaintiff carries the burden of proving both the fact and the amount of the damage, the burden of proving that the plaintiff has failed to take reasonable steps to mitigate his loss is on the defendant and not the plaintiff : see for instance McGregor on Damages 4th edition paras 1516-1517.

Turning now to the first part of the plaintiff's claim for damages, I will allow the claim for $205 for the labour costs of the mechanic who

repaired the plaintiff's taxi. The first defendant says that he offered to do the repairs himself as he was a mechanic and that his son, the second defendant, was also a panelbeater with a mechanical workshop. However, the first defendant also says that it is some 40 years since he ceased to be a mechanic and that if he were allowed to fix the plaintiff's taxi he would have taken about 3 weeks provided he also worked on the repairs during the night. I do not think it would be reasonable for the plaintiff to give his taxi to someone like the first defendant who had ceased to practise his trade for 40 years to do the repairs. Further, if the mechanic who repaired the plaintiff's taxi took about 3 days to do the job which the first defendant says would have taken him 3 weeks including overnight work, then clearly it was not unreasonable for the plaintiff not to accept the offer by the first defendant to repair the plaintiff's taxi. In any event, if the repairs was really a 3 weeks job including night work, then the Court is of the view that $205 is more than a reasonable amount for labour costs of repairs. There is also no evidence as to the second defendant's degree of competence and experience as a panelbeater. So there is really no evidence to persuade the Court that the plaintiff did not take reasonable steps to mitigate his loss by not accepting the offer from the first defendant if in fact an offer was made.

I will also allow the claim for $212.96 being the cost of the replacement indicator. An invoice from the supplier of the indicator in New Zealand was produced to substantiate the amount claimed.

As to the claim of $474.43 for the paint and accessories, it is clear to the Court from the evidence that the whole gallon of paint plus accessories bought by the plaintiff for his taxi could not have been wholly used to repaint the fender that was dented. There was, however, no specific evidence as to how much of the paint was used on the damaged fender. Given the extent of the damage described in evidence to the

Court, I have come to the view that about 1/3 of the paint was used on the damaged fender and therefore 1/3 of the claim for $474.43 is allowed. That means the amount allowed is $158.14. The plaintiff has argued that the defendant should pay for the full amount of the paint plus accessories as the paint could only be bought in certain quantities and not for an exact quantity that fits the damage. I accept that, but it appears from the evidence for the plaintiff that he and his wife just asked for a gallon of paint from Pago without enquiring whether the paint could be bought in a lesser quantity than a gallon. The plaintiff also did not ask the motor mechanic who repaired his taxi for an estimate of the quantity of the paint needed to repaint the damaged fender. The principles regarding mitigation of loss also apply here.

As to the claim for $1,150 on the basis of loss of income of $50 per day, for the 23 days the plaintiff's taxi was out of use as a consequence of the accident, the evidence by both the plaintiff and his wife was that this particular taxi was earning a minimum of $50 per day for 6 days a week after the driver's wages and all running expenses have been deducted. There is no evidence to contradict the plaintiff and his wife's evidence on this point. However, the plaintiff says that this particular taxi of his fleet was not in operation on Sundays. There were 3 Sundays during the period this taxi was out of use. So only 20 working days should have been claimed. An amount of $150 for the 3 Sundays the taxi was not in operation should be deducted from the total amount claimed. A suggestion was made during the course of the evidence that notwithstanding the damage, the plaintiff's taxi could still have been driven around to carry passengers and thereby mitigate any loss to the plaintiff. This suggestion did not appear to have been seriously placed before the Court. I am not prepared to accept it considering the purpose of carrying passengers for which a taxi is put on the roads and the nature of the damage. Not only was the left fender pushed in but there was no left-front indicator. There is also no other factor which appears

to the Court to justify any further discounting of the amount claimed for loss of income and therefore $1,000 is allowed on this claim.

As to the claim for general damages, the Court on the basis of the evidence, is only prepared to allow $100 under this claim.

In all then judgment is given for the plaintiff against the second defendant in the total sum of $1,676.10 plus costs and any disbursements to be fixed by the Registrar.

F.E.M. Sapolu

CHIEF JUSTICE