EXAMINING THE LEGAL 'RELATIONSHIP' BETWEEN THE TAXI OWNER AND THE TAXI DRIVER IN FIJI: A CASE FOR REFORM.

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DECLARATION

Statement by Author

I, Navneel Sharma, declare that this Direct Research Project is my own work and that, to the best of my knowledge, it contains no material previously published, or substantially overlapping with material submitted for the award of any other degree at any institution, except where due acknowledgment is made in the text.

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ABSTRACT

Between the period 2015-2020, Fiji Taxi Drivers have been responsible for 3,297 accidents on Fiji's Roads. This represented close to fifty percent (50%) of all related Public Service Vehicle accidents during that period ahead of buses, minibuses and hire cars. While the Fijian Government is promoting public transportation coupled with an overt protectionist stance towards taxi operations, the industry has unfortunately been blemished with relatively high levels of accidents. Furthermore, accidents resulting in property damage rate higher than those causing injuries and fatalities.

Taxi Drivers ability to effectively pay for property damage caused by them is capricious based on their current economic realities. The concept of attributed liability hinges on loss distribution, encouraging higher levels of duty of care and the deepest pocket theory. The current state of common law in Fiji unfortunately does not effectively allow for the proper application of such doctrinal concepts. Common law jurisprudence currently appears to classify the relationship between a taxi owner and taxi driver to be that of an 'independent contractor'. This is opposed to the alternate being that of an 'employer-employee'. This is simply not a matter of terminology or style but has a serious as well as a practical implication for those who have suffered property damage attributable to a taxi driver. Given that taxi owners and taxi drivers are not necessarily the same person and with the absence of industry specific civil liability legislation, this paper proposes to bring about a fairer balance between the national advancement of the taxi sector against the danger that they pose towards property security and ultimately effective indemnity measures. Three methods will be explored. The paper will do so by firstly exploring the prospect of an enhanced common law application of the 'relationship test' in respect of vicarious liability. Secondly, it will assess the viability of classifying taxi services as a 'non-delegable duty' as it has traditionally been viewed as an alternative to vicarious imposition. The final and third proposal will be through a more interventionist approach via legislative reform given the laxities in the regulatory environment. Comparative synergy will be made with the legislative reform experiences in California and New South Wales.

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1.0 INTRODUCTION

The general notion of 'Vicarious Liability' stands as a form of strict liability that entails a legal person being made jointly liable for the tort committed by another regardless of fault.[1] A court does not inquire into the existence of fault in the employer but attributes the liability of the employee onto the employer. Lord Pearce in the case of *Imperial Chemical Industries Ltd v Shatwell* stated that the practical imposition of vicarious liability is based on 'social convenience and rough justice'.[2] This famously coined term stems from presumptions in law that the Employers having *(presumably for his own benefit)* employed the employee, and being *(presumably)* better able to make good any damage which may occasionally result from the arrangement, is answerable to the world at large for all the torts committed by his employee within the scope of it.[3] Three prominent justifications appear to be at the forefront for such an imposition. There are (1) loss distribution[4], (2) encouraging higher levels of duty of care[5] and (3) the 'deepest pocket theory'.[6]

There are two specific requirements for the successful imposition of vicarious liability. These are the firstly the 'relationship test' and secondly the 'connection test'.[7] The

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[1] *Bernard v A-G of Jamaica* [2004] UKPC 47 at 21.
[2] *Imperial Chemical Industries Ltd v Shatwell* [1965] AC 656 at para 15.
[3] Ibid.
[4] Jones, M.A *Textbook on Torts* (8th ed, 2002) 419.
"The torts of employees committed in the course of employment can be regarded as part of the cost of producing the goods and services supplied by the employer. The employer is in the best position to insure against those costs, and the cost of insurance will be reflected in higher prices. The people who make use of the employer's goods or services i.e., customers, will pay for the risks created by the enterprise rather than the innocent victims who would usually find that an action against the employee alone is worthless. This is more efficient in economic terms, since by treating the 'external' risks created by an enterprise as a cost of production the price of the product reflects its true social cost".
[5] Ibid.
"This is in the sense that vicarious liability encourages accident prevention by giving an employer a financial interest in encouraging his employees to take care for the safety of others. This argument depends upon the validity of the more general claim that torts liability contributes to accident prevention"
[6] Ibid at 419.
"This emphasizes the compensation function of the law of tort. The wealth of a defendant…or the fact that he has access to resources via insurance…".
[7] Savage, A and Broomfield, N 'Vicarious Liability : Whose Liability Is It Anyway ?' (2020) *4newsquare* http://ww.4newsquare.com/wp-content/uploads/2020/04/Whose-Liability-is-it-anyway-vicarious-liability-article-final.pdf (Accessed 23 July 2022).

'relationship test' requires proof of a relationship of employer and employee as between the person to be made liable and the wrongdoer. The 'connection test' is applicable where the commission of the tort falls within the wrongdoer's authority to act; or where a sufficient connection otherwise existed between acts arising pursuant to the relationship and the commission of the torts.[8] Vicarious liability is largely common law based and its pertaining two test have developed via common law. Common law is the body of law created by judges and similar quasi-judicial tribunals by virtue of being stated in written opinions. The defining characteristic of common law is that it arises as precedent. Common law courts look to the past decisions of courts to synthesize the legal principles of past cases. Quite often foreign court judgments from various commonwealth jurisdictions are used locally as a source of persuasive precedent as a matter of practice in smaller commonwealth jurisdictions such as Fiji.

Until only a decade ago, Lord Philips in the seminal British case of *Various Claimants v Catholic Child Welfare Society*[9] described vicarious liability as an area of law that was "on the move".[10] However, a serious point of contention from the emergence of some vicarious related cases had questioned the applicability of the 'relationship test' in favor of a wider policy approach. So much so that both legal tests had to undergo a judicial re-set in the United Kingdom Supreme Court.[11]While the 'relationship test' has now been clarified in the *MW Morrison Supermarkets plc v Various Claimants*[12] and *Barclays Bank plc v Various Claimant*[13] ("Barclays") decisions, its practical application however appears to be problematic in view of the Taxi sector in Fiji.

This was evidentially notable in the *Fowler v Ranadi*[14] decision in which the taxi driver was held responsible and vicarious imputation could not be made towards the taxi owner. In hindsight, taxi drivers appear to be operating with a relative level of impunity on Fiji's

[8] Infra n73 at 623.
[9] *Various Claimants v Catholic Child Welfare Society* [2013] AC 1 para 19.
[10] Ibid at para 19.
[11] Seen in the decisions of *MW Morrison Supermarkets plc v Various Claimants* [2020] UKSC 12 and *Barclays Bank plc v Various Claimant* [2020] UKSC 13.
[12] *MW Morrison Supermarkets plc v Various Claimants* [2020] UKSC 12
[13] *Barclays Bank plc v Various Claimant* [2020] UKSC 13.
[14] Infra n71.

roads given their insolvency. At the crux of the argument, this paper will attempt to show the difficulty for claimants in having the relationship between taxi owner and taxi driver classified as that of an 'independent contractor' given accident trends and economic realities. This paper will argue for a change in *modus operandi* both judicially and legislatively towards the classification of the relationship between taxi owner and driver.

The analysis in the paper will be critical in the sense that it will outline the problematic nature of the current state of local common law jurisprudence and how it disadvantages parties that have suffered property damage. It will do so by examining how Fiji's courts arrive at such a classification through the examination of case law. It will be done with the aim of revealing that such elements are limited and there is room for heightened or further considerations. It will be particularly critical of the *Fowler v Ranadi*[15] decision that relied on *Hassan v Transport Workers Union*[16] Essentially a comparative approach will also be made by comparing cases that have made significant in-roads in respect of the 'relationship test'.

The analysis will be made against two important backdrops. The first is that the public transport industry has been actively promoted based on National as well as International mandates however industry statistics reveals an unsettling reality in respect of taxi operations on Fiji's roads. National focus recently has been largely towards streamlined and efficient compensation for bodily integrity as seen with the recent establishment of the Accident Compensation Commission of Fiji ("ACCF"). Despite the statistical trend of accidents caused by taxi driver, jurisprudence in its current form has unfortunately fallen behind and deserves a common law revision and direct legislative intervention in respect of property loss. Securing property interests has largely been left to the private realm via means of initiating civil action in court or via comprehensive insurance cover. The second backdrop is in respect of national economic realities in that taxi drivers earn less than $7.00 dollars a day and this would seriously question the worthiness of any judgement made solely against them.

[15] Ibid
[16] Infra n117.

Reforms will be proposed in this paper towards holding the taxi owner more accountable. This is done with the ultimate aim of assisting parties who are often put 'out of pocket' as a result of losses suffered and thereby bring to the forefront a truer application of the concept of loss distribution and ultimately encouraging higher levels of duty of care on Fijian roads as a possible secondary effect.

While the paper examines the viability of an enhanced 'relationship test' which forms the crux of the paper, examination of the legal applicability of having taxi operations treated as 'non-delegable' will also be undertaken. The imposition of a non-delegable duty is often seen as a 'alternative route' towards imposing liability for the wrong doing of another and imposing primary responsibility on a person rather than the vicarious form of imputing blame. However, the application of 'non-delegable' duties towards the transport sector has proven problematic as common law precedent on multiple occasions has disallowed its expanded application outside its traditional areas of operation. .

The prospect of direct legislative reform is also a viable alternative and correlations with what has been achieved in New South Wales ("NSW") is deserving of examination noting something unique in their jurisprudence with the creation of statutory vicarious liability provisions given the laxities of the vicarious common law approach Similarly, there will also be discussion on the California Public Utilities Commission ("CPUC") and the California State legislature experience towards the direct regulation of the ride-sharing market that had been undertaken with the aim of protecting the general public from dangers of Transport Network Companies ("TNC's"). These two examples (while not exhaustive) serve as two contemporary and direct examples of the need for direct legislative intervention arising out of a situation that was immediate and threatening given the inability of the vicarious common law approach to effectively address the issue at hand.

The paper will conclude by making an assessment as to the viability of each of the three proposed reform measures.

1.0 Background

1.1. Accident Compensation in Fiji through the ACCF.

The ACCF was established in 2017 through the introduction of the Accident Compensation Act 2017. The Motor Vehicles (Third Party Insurance) Act 1948 and Motor Vehicles (Third Party Insurance) Regulations 1949 were effectively repealed with the introduction of the Accident Compensation Act 2017. The Accident Compensation Act 2017 now mandated Fiji's Land Transport Authority ("LTA") to collect compulsory annual Motor Vehicle Accident ("MVA") Levies on behalf of the ACCF.[17] Taxis currently pay an annual levy of $123.85 to the LTA.[18] The new national controlled scheme through the ACCF prides itself on the fact that victims of accidents do not have to prove fault or negligence in order to secure compensation.[19] Coverage of such a no-fault scheme is broader than previous coverage as it extends beyond third parties[20] meaning that any personal injury or death suffered by any person as a result of an accident in Fiji will be compensated for, subject to meeting the Act's requirements. The ultimate aim of such a legislative re-structure was focused towards providing claimants with a nationally facilitated compensation scheme, with efficient processing of claims whereby claimants would no longer have to pay large sums to lawyers to facilitate long drawn-out compensation struggles with private insurance agencies who were benefiting from the previous third-party payment arrangement.[21] The ACCF however does nothing to assist victims who suffer property loss and the Accident Compensation Act is limited to death and injury only[22] arising out of motor vehicle accidents in Fiji.[23]

[17] r.3 - Accident Compensation (Levies) Regulations 2017 (Fiji).
[18] Ibid at Schedule.
[19] s.19 (1) & (2) - Accident Compensation Act 2017 (Fiji).
[20] S.18 – Accident Compensation Act 2017 (Fiji) - Accident Compensation Regulation 2017 (Fiji).
[21] Infra at n25.
[22] Supra n22.
[23] Accident Compensation Commission on Fiji, 'Establishment of the ACCF' (2021).

1.2. Insurance

Unlike MVA levies, Comprehensive Insurance cover is only an optional product offered by the major insurance agencies in Fiji. Comprehensive insurance offers two-way property cover regardless of fault. Vehicle owners may opt to have such enhanced cover but it is by no means compulsory. Some Insurance Companies such as Swinton in the United Kingdom have gone further by tailor-making insurance packages specifically for taxi drivers due to the increase risk factor as regular car insurance policy do not adequately protect taxi drivers in the United Kingdom. An examination of the enhanced risk factors stemmed from the reality that Taxi drivers usually cover a far higher mileage than a standard car driver, often at unsociable hours, having to drive in stressful situations such as heavy traffic and in built-up areas. They are hence statistically prone of having a higher risk of being involved in accidents as well as causing accidents.[24] Such a private sector initiative as seen in the United Kingdom is commendable reflecting realized dangers associated with the taxi industry specifically protecting both taxi drivers as well as other road user's property. Such an enhanced product is not available in the Fiji's Insurance sector.

1.3 International and National Mandates

1.3.1 Global and National Action Plans - Public Service Vehicle

The United Nations ("UN") General Assembly resolution 64/255 had proclaimed through a plan a Global Decade of Action for Road Safety 2011–2020 and called upon UN Member States to promote the increased use of public transportation.[25] Emanating from resolution 64/255, Fiji implemented its National Action Plan[26] with 7 Strategic Focus Areas aimed at addressing the five pillars of the Global Plan. Fiji's National Action Plan addressed public transport from the viewpoint of making it safer through its Strategic

[24] Swinton Insurance 'The difference between car insurance and taxi insurance' (2021) https://www.swinton.co.uk/taxi-insurance/taxi-guides/differences-taxi-and-car-insurance (Accessed 12 August 2021).
[25] United Nations *Global Plan for the Decade of Action for Road Safety 2011-2020* (2011).
[26] Government of Fiji *Fiji Decade for Action for Road Safety 2011-2020 National Action Plan* (2011).

Focus Area 2 which was termed “Safer Drivers”, by making it compulsory on Public Service Vehicle drivers to successfully complete a Defensive Driving Course.[27] Since the expiry of the Global Plan in the year 2020, the UN General Assembly has now adopted resolution A/RES/74/299 titled "Improving global road safety", proclaiming another Decade of Action for Road Safety 2021-2030. The aim of the resolution is to reduce road traffic deaths and injuries by fifty percent (50%) by the year 2030.[28] To-date however, a revised nation action plan aligning to the UN resolution A/RES/74/299 has not been published in order to synergize international mandates to national actions.

1.3.2 – Fiji’s National Development Plan – Transport Sector

Fiji’s National Development Plan “NDP” was released in 2017 and aims to reflect the aspirations of the Fijian people across all sectors of the economy as well as the Government’s commitment to deliver upon such aspirations and commitments over a period of 5 and 20 years.[29] It largely only serves as a policy document with no legal enforcement and weak monitoring incentives. The NDP’s cross-sectional approach is aimed towards providing strategies designed to empower every Fijian.[30] In respect of the nation’s transport sector, the NDP aims to provide better access to public transportation through an efficient and sustainable transport network.[31] Its strategy is aimed at making public transport generally more attractive by ensuring its safety, efficiency and affordability whilst again employing accident preventative measures such as improving driver education, licensing, testing and enforcement. However, specific property protection initiatives in the NDP only appear in respect of the protection of intellectual

[27] Ibid at 10.
[28] World Health Organisation *Decade of Action for Road Safety* (2021).

[29] Fiji Ministry of Economy, *5-Year and 20-Year National Development Plan: Transforming Fiji* (2017) Forward.
[30] Ibid.
[31] Supra n31 at 75.

property[32] and enabling the use of movable property as collateral for loans. [33] Justice reforms under the NDP also are levied more towards the access of justice.' [34]

1.4 Trends

1.4.1 Protectionist Stance

The growth of the Taxi sector has been due to concessionary duty incentives aimed at promoting the use of taxi's by the general public. The 2017-2018 Fiji National Budget allowed for concessionary duties on taxis (along with buses and vessels) to encourage the growth of public transportation in Fiji. In the 2018-2019 Fiji National Budget, incentives expanded to allow for half the subsisting duty rates on used vehicles less than two years old. Such concessions expired in June 2021.[35] Apart from duty concessions that make the taxi industry more lucrative, public transportation also enjoy protection from the ride-sharing industry. A protectionist stance provides an unfair advantage to a home industry versus international competition.[36] [37] Despite growth in the region, Fiji has adopted a protectionist stance against ride-sharing. This is despite ride-sharing being popular globally as it offers a convenient and cost-effective means of personal mobility. The global ride sharing market is projected to grow at a compound annual growth rate of 16.6% from an estimated 85.8 billion (USD) in 2021 to 185.1 billion (USD) by the year 2026.[38] Developing countries in the Asia Pacific region are said to be pivoted to experience significant growth, primarily in urban transportation due to the high population growth rate in the region and increasing urbanization. The Asia Pacific region also accounts for a

[32] Ibid at 6.
[33] Ibid.
[34] Supra n29 at 61.
[35] Infra n51 at 25.
[36] Tziamalis, A 'Explainer: what is protectionism and could it benefit the US Economy" *The Conversation* (01 March 2017) https://theconversation.com/explainer-what-is-protectionism-and-could-it-benefit-the-us-economy-73706 (Accessed 15 May 2022).
[37] The issue of ride-sharing has been raised at this juncture to merely provide an example of the government protectionist stance towards the taxi industry. It will be more coherently discussed in the later part of the paper to show industry synergy for comparison purposes.
[38] Markets and Markets. n.d. 'Ride Sharing Market by Type (E-Hailing, Station-Based, Car Sharing & Rental), Car Sharing (P2P, Corporate), Service (Navigation, Payment, Information), Micro-Mobility (Bicycle, Scooter), Vehicle Type, and Region - Global Forecast to 2026' https://www.marketsandmarkets.com/Market-Reports/mobility-on-demand-market-198699113.html (Accessed 15 August 2021).

significantly lower number of personal vehicles per 1,000 persons as compared to Western countries.[39] Both the Fiji LTA and the Fijian Competition and Consumer Council have labelled ride-sharing operators as 'illegal competition' and that they were not allowed to operate in Fiji.[40]The Fiji Land Transport Authority has even gone to the extent of publicly informing corporate customers that they were to desist from using such 'illegal services' as it represented a safety concern to the general public.[41] There has however been the establishment of smart phone applications such as "Hitch",[42] "Fiji Cabs"[43] and "Vodo"[44] but only as a means of improving serviceability and connectivity between customers and taxi drives. The protectionist stance in Fiji is quite evident when comparing the experiences of New Zealand and Australia. New Zealand allowed the operation of Uber in Zealand in 2014 on the basis of giving its citizens access to a variety of "convenient and affordable transport" as well as deepening the earning opportunities for New Zealanders. Uber NZ is now expanding from its initial 6 cities to a further 7 cities within the span of 5 years.[45] Uber's launch in Australia in October 2012 was met with enthusiasm as well as resistance. Australia's experience towards ride-sharing can be seen as progressive in terms of keeping pace with technological advancement, being consultative towards the public on an array of issues as well as sympathetic towards taxi drivers. Today, every state and territory in Australia have established ridesharing regulatory

[39] Ibid.
[40]Prakash, P 'Uber not permitted to operate in Fiji' *Fiji Broadcasting Corporation* (Fiji) (03 March 2020) https://www.fbcnews.com.fj/news/uber-not-permitted-to-operate-in-the-country/ (Accessed 17 August 2021).
[41] Fiji Competition and Consumer Council "Fijian Competition and Consumer Commission and Land Transport Authority Crack Down on Illegal Uber Operations in Fiji" *Fiji Sun* (Fiji) 03 March 2020 https://fijisun.com.fj/2020/03/03/fccc-and-lta-crack-down-on-illegal-uber-operations-in-fiji/ (Accessed 21 September 2021).
[42] Chambers, C. 'Hitch Fiji – An Inside View Of New Taxi App' *Fiji Sun* (Fiji) 14 March 2020 https://fijisun.com.fj/2020/03/14/hitch-fiji-an-inside-view-of-new-taxi-app/ (Accessed 15 May 2021)
[43] Talebula, W. "Fiji Cabs App To Assist Fijians Calling For A Taxi." *Fiji Sun* (Fiji) 05 April 2020 https://fijisun.com.fj/2020/04/05/fiji-cabs-app-to-assist-fijians-calling-for-a-taxi/ (Accessed 15 May 2021)
[44] Vodo. "Introducing Vodo: Built To Improve Mobility In Fiji And The Islands." *Fiji Sun* (Fiji) 10 August 2018 https://fijisun.com.fj/2018/08/10/introducing-vodo-built-to-improve-mobility-in-fiji-and-the-islands (Accessed 15 May 2021).
[45] Aimee, S. "Ridesharing Giant Uber to Expand into Six More New Zealand Cities in October." *New Zealand Herald* (New Zealand) 21 August 2019 https://www.nzherald.co.nz/business/ridesharing-giant-uber-to-expand-into-six-more-new-zealand-cities-in-october/FBQM6USH435EW47QOGXJOKOL6A/ (Accessed 15 May 2021)

regimes. As part of the regulatory reforms, the jurisdictions gave owners of taxi licenses assistance packages as a result of the roll-out of ridesharing operations.[46]

Fijian taxis, like in most other countries, offer a point-to-point service charging a tariff through the use of meters. In comparison to other global cities, Fiji's Taxi fares are comparably low.[47] Public Transportation is hence the preferred mode of transportation amounting to roughly 57% of all road trips. Statistics revealed that in 2014 that there were equally the same of taxi's compared to private vehicles operating in the Suva Central Business District.[48] In the year 2018, there were approximately 6,394 registered taxis in Fiji. This represented the third highest demographic of vehicle categories behind private and commercial vehicles but well ahead of government, rental and 'other' vehicles.[49] The year 2021 saw a surge to a total of 7,684 registered taxis on Fiji's roads. In addition, at the time that this paper was finalized, information received from the LTA held that there were over 45,500 Taxi Driver permits currently in issuance.[50]

Despite Fiji's protectionist stance towards the taxi sector through the dis-enfranchisement of the ride-sharing sector coupled with government driven financial initiatives, there however appears to be an alarming situation in respect of accident trends and economic realities of taxi drivers.

1.4.2 Accident Trends and Economic Realities

Between years 2007 and 2013 taxi's drivers were responsible for 40 percent of total reported accidents in Fiji.[51] In 2013, taxis had surpassed private cars in terms of the number of recorded accidents[52] to the extent that the Fiji Roads Authority have now as a

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[46] Australian Government 'Uber in Australia' (2018) https://www.industry.gov.au/data-and-publications/uber-in-australia (Accessed 15 August 2018)
[47] Fiji Roads Authority *Greater Suva Transportation Strategy 2015-2030* (2014) 106.
[48] Ibid at 23.
[49] Office of the Auditor General of the Republic of Fiji *Report of the Auditor General of the Republic of Fiji: Performance Audit on Management of Traffic Congestion* (2020) 24.
[50] Email from Navneel Sharma <navneel.sharma@usp.ac.fj> to Abhishek Chandra <abhishek.chandra@lta.com.fj> 24 October 2021. [Mr. Chandra is currently the Acting Manager Registration, Licensing and Driving for the Fiji Land Transport Authority].

[51] Ahmed, F "PSV accident rate alarming" *Fiji Sun* (Fiji) 21 June 2013 https://fijisun.com.fj/2013/06/21/psv-accident-rate-alarming/ (Accessed 20 January 2021).
[52] Supra n49 at 34.

result established training programs to specifically educate taxi drivers on safe driving practices and well as addressing their behavior.[53] The United States 2017 Crimes and Safety Situation National Report on Fiji has also revealed that Taxi drivers in Fiji operate their vehicles recklessly and often do not follow traffics laws. It was also revealed in the same report stated that taxi drivers are often under the influence of alcohol and kava whilst operating their vehicles.[54] While recent statistics for the period leading up to 2020 show a reduction by almost 22 percent, taxi drivers were still responsible for 3,297 accidents over the past 5 years. This represented close to fifty (50%) percent of all related Public Service Vehicle accidents on Fiji Roads ahead of buses, minibuses and hire cars during the 2015-2020 period. Apart from the numbers associated with fatalities, hospitalizations and non-hospitalizations, the largest portion of accidents belong to the category 'damage only' i.e. property damage. 'Careless driving', 'speeding' and 'driving too close' were the three common violations.[55]

In a practical sense, the issue arises in imposing judgements only on the primary tortfeasor (the taxi driver) when such judgements are matched against national economic realities. Fiji's national basic needs poverty line is at $2,179.39 per adult per year with almost 29.9% living below this threshold. This would equate to 258,053 of the total population, or 45,724 households. To better contextualize it, $2179.39 would equate to $5.97 per day.[56] The Fiji Taxi Association General Secretary has recently raised concern that taxi drivers net take home pay during the COVID-19 pandemic was between $2-$5 per day.[57] Whereas before the COVID-19 pandemic the average daily net income was only moderately above $7 per day.[58] This brief analysis shows that Taxi drivers are currently below the poverty line. Additionally, the Household Income and Expenditure Survey has

[53] Supra n49 at 107.
[54] Overseas Security Advisory Council 'Fiji 2018 Crime & Safety Report' (2018) https://www.osac.gov/Content/Report/9a8374d8-fb4d-4523-b589-15f4ae75e7c1 (Accessed 17 August 2021).
[55] Interview with Harpreet Singh, Fiji Police Force (Nabua, Suva 27 May 2021)
Mr. Harpreet Singh is currently the Senior Research Officer (Plans) with the Fiji Police Force.
[56] This is supported by the 2019-2020 Household Income and Expenditure Survey with $41.91 per week. Fiji Bureau of Statistics, *2019-2020 Household Income and Expenditure Survey* (2021).
[57] Nacei, L, 'COVID 19: Income of cabbies shrink significantly' *Fiji Times* (Fiji) 25 March 2020 https://www.fijitimes.com/covid-19-income-for-cabbies-shrink-significantly/ (Accessed 24 July 2021).
[58] Silaitoga, S 'Income of taxi drivers plummet' *Fiji Times* (Fiji) 02 June 2021 https://www.fijitimes.com/income-of-taxidrivers-plummet/ (Accessed 29 June 2021).

the daily per person expenditure rate at $10.07[59] (with $3,678 being the annual adult expenditure per year). While statistics are not available in terms of a taxi drivers daily expenditure rate, if one were to use the case of *Fowler v Ranadi* as a fair market indicator regarding daily expenditure rates, taxi drivers alone have to pay Taxi owners $60 daily for the use of their taxi's. [60]Whereas $50 would be the rate outside city centers.[61] In summary, the national Household Income and Expenditure Survey reveals that Taxi drivers are in a difficult financial position. This immediately questions their ability to pay if found liable for property damage caused.

The above situation invites discussion briefly on two aspects. Firstly, in respect of loss distribution where often the best solution is to attach liability to the person with the ability to pay i.e. 'the deepest pocket' theory. This argument can be developed further by bringing into the fold *insurance*.[62] The agreement by torts academics is for risk of harm should be managed by the defendant and spread through a risk bearing community, not placed entirely upon the vulnerable claimant. Atiyah made an apt analysis and warned that passing the responsibility to insurance companies would involve an enormous number of insurance policies instead of a relatively few, with a consequent increase in insurance costs.[63] Secondly, an economic analysis of law is the application of economic theory to the analysis of law used to explain the effects of laws, to assess which legal rules are economically efficient.[64] Hylton specifically analyzed the normative aspect of the economic theory of torts law and criticized the operational efficiency of the tort system. Critique was levied in respect of how costly litigation is and that the reality is that not every victim will find it profitable to bring suit with victims ultimately bearing their losses without seeking compensation through the tort system. Even when victims choose to bring suit, they will do so on the basis of an arbitrary standard: whether the anticipated damage

[59] Supra n58 at 1.
[60] Infra n73 at 66.
[61] Supra n60.
[62] Infra n141 at 580.
[63] Infra n141 at 26.
[64] Hylton, K 'Litigation Cost and the Economic Theory of Tort Law' (1991) *Scholarly Commons at Boston University School of Law* 112 https://scholarship.law.bu.edu/cgi/viewcontent.cgi?article=2029&context=faculty_scholarship (Accessed 24 April 2022).

award exceeds the cost of litigating. Furthermore, because litigation is costly, the probability of winning a lawsuit becomes an important consideration in the decision to bring suit. This, however, implies that the deterrence properties of the tort system will depend on litigation prospects and how this is in fact true in the real world.[65] With judgements being made, there is overtly a practical aspect behind it and that is cost especially if an award is made only against a driver rather than the owner. Pursuing judgements then transforms the plaintiff into a judgement creditor, in abject reality, now again chasing enforcement action against a driver. This is the ultimate reality further adding to the overall costs of tortious litigation.

On one hand, International and National mandates have promoted the growth of the public service vehicle sector, however it has had a negative effect in terms of the rates of accident and resulting property damage on Fiji's roads today. While we have national initiatives towards financially addressing physical and death caused via accidents, such initiatives have not extended towards property rights despite it statistically being the most prevalent result of accidents. The criticism of the common law in its current form in Fiji is seemingly allowing an owner to use drivers as a method of reducing litigation exposure at the expense of those who have suffered property loss. Some criticize that it appears to be a mere means, i.e. tokenism at best, of obtaining compensation for loss[66] yet a perverse way of protecting the actual wrongdoers from the financial consequences of their actions.[67] However, while holding drivers liable, it may quickly manifest towards consideration of enforcement action that does not falter well in respect of the economic theory of torts law because drivers are not financially capable of compensating Focus hence

should be on a feasible defendant as impecunious employees are not worth suing because it does very little in terms of securing financial recompense.

This paper will now progress towards recommending three reform initiatives as well as assessing the viability of each. The first addresses the application of existing vicarious

[65] Ibid at 113.
[66] Giliker, P. *Vicarious Liability in Tort: A Comparative Perspective* (2020) 1.
[67] Morgan, P 'Recasting Vicarious Liability' (2012) 71 *The Cambridge Law Journal* 625.

liability principles and the other two are the two most commons methods of overcoming common law vicarious limitations.

2.0 REFORMING THE LEGAL APPROACH TOWARDS VICARIOUS LIABILITY

2.1 The common law pathway

The Fiji Land Transport Act 1998 stipulates that a vehicle used for carriage for persons for hire or reward is deemed to be a Public Service Vehicle. [68] A vehicle needs to be firstly licensed as a Public Service Vehicle[69] and then a specific permit (specifying its class i.e. either a taxi, hire vehicle, rental vehicle, road service vehicle or mini-bus) needs to be obtained by the owner of the vehicle.. The LTA (Driver) Regulations 2000[70] stipulates that a driver needs a Public Service Vehicle driver's permit. The legislation and regulation have hence been designed in a way where an owner and driver can be separate individuals and not necessarily the same person.

The case of *Fowler v Ranadi*[71] involved a claim against an estate of a deceased taxi driver for recovery of damages to a car owned by Mrs. Fowler. The claim was for $55,532.76; being of the value of the damages sustained. The claim was also made against the taxi owner (Regent Taxis Limited) as the Second Defendant being the vicarious party. The Second Defendant denied any liability on the basis that the first Defendant was an 'independent contractor'. The key issue was hence whether the relationship between the first and second defendants was sufficient to impose vicarious liability on the second defendant.

[68] Land Transport Act 1998 (Fiji) – s.61.
[69] Ibid at s.62.
[70] Land Transport Authority (Driver) Regulations 2000 (Fiji) – r.23.
[71] *Fowler v Ranadi* [2020] FJHC 299.

As a general principle of law, having the relationship determined as that of an 'independent contractor' relationship negates any attributable liability towards a taxi owner for actions of its drivers whereas having establishing an employer/employee relationship is an integral first step in holding an employer vicariously liable. The Judgement ultimately was only entered into against the First Defendant (and not the Second Defendant i.e. owner) as it was determined that the relationship between the driver and owner was that of an independent contractor and not that of an employer and employee. This case ultimately confirms current jurisprudence in this sector. As it will be seen, the facts (albeit limited) of *Hassan v Transport Workers Union*[72] was significantly relied upon by the Judge in arriving at a conclusion in *Fowler v Ranadi.* While this may at present show the delimiting nature of the current common law in respect of a plaintiff's ability to effectively recover from tortious actions of taxi drivers, it also presents an opportunity for an examination towards a possible review of the factors that determines the 'relationship' status which ultimately has formed the current common law position.

2.1.1 The Relationship Test in various common law jurisdictions

Witting stated that employers were previously in a position to advise their workers as to what task to do as well as how to do it. This was because employers had greater technical skills than their employees.[73] Lord Dyson aptly stated that there is now an ever-increasing complexity and sophistication of skillsets in the modern world[74] and courts have as a result ceased to assume that if someone performing work for another is their employee.[75]

The common law hence applies the 'relationship test' which distinguishes between the two. There are those who are engaged in 'contracts of service' as opposed to those who are engaged in 'contracts for service'. The former commonly referred to as 'employees' and the latter 'independent contractors' The latter's actions are not attributable to the employer and hence vicarious claims are not applicable.[76] Much of it depending on a

[72] Infra n119.
[73] Witting, C. *Street on Torts* (2015) 625.
[74] *Mohamud v Vm Morrison Supermarkets plc* [2016] UKSC 11 & [2016] AC 677.
[75] Steele, J. *Tort Law: Texts, Cases, and Materials* (2017).
[76] Supra n69 at 634.

factual enquiry in respect of the features of the relationship. This reason for this is that independent contractors, being independent and working for their own profit, form their own separate enterprise': it is the contractor who is the entrepreneur'.[77]

In following a course of some notable common law precedent, from the 1800's in *Fowler v. Locke*[78] the plaintiff who was a cab driver whose terms of employment involved taking out a horse and cab in return paying the owner 18 shillings at the end of the day. The driver kept all of the excess. The owner was responsible for maintaining the horse. The cab driver appeared to be under no control of his movements by the owner nor did he carry out any directions of the owner. A plaintiff was injured when the cab overturned. A divided court, ruled that the relationship between the cab driver and owner was analogous to that of bailor and bailee and not that of a master-servant. Almost a decade later in *Yewen v Noakes*[79] a defendant attempted to benefit from a law which allowed for a lesser amount of duty to be paid on properties which were inhabited by an employee of the owner. The court held that the occupier was not an employee, since he was not a person who is subject to the command of his master as to the manner in which he shall do his work. Progressing to the 20th century[80] courts still marked the distinction between an employee and an independent contractor primarily through the assessment of the level of 'control'. Similarly around the same time, in *Doggett v. Waterloo Taxi-Cab Co., Ltd*[81] a taxi driver drove a taxi owned by the respondents. The case considered a claim for workmen's compensation. The factual findings of the court saw that the contract between the parties involved driver paying the respondents 75 percent of his daily takings and retaining the balance for himself. The driver was not bound to come to work, and if he did come, the owner was not obliged to let him have a taxi. The driver was not paid any wages. The driver was only accountable to the proprietor for 75 percent of the takings with his own remuneration being a sum equal to 25 percent of the takings. The owner exercised no control over the driver and was free to go where the driver pleased. The Court of Appeal in England held that the relationship between the parties was not one of a contract of

[77] William, G. 'Liability for Independant Contractors' (1956) *The Cambridge Law Journal* 196.
[78] *Fowler v. Locke*. 7 L.T. 272 (C.P. 1872).
[79] *Yewen v Noakes* [1880] 6 QBD 530.
[80] *Performing Right Society Ltd v Mitchell and Booker (Palais de Danse) Ltd* [1924] 1kb 762, at 767.
[81] *Doggett v. Waterloo Taxi-Cab Co., Ltd*., reported in (1910) 3 BWCC 371.

service but one of bailment and hence the claimed failed. In *Yellow Cabs of Australia Ltd v Colgan*[82] emphasis was again placed on the element of control. Factual findings saw drivers working the days or hours they wanted, were not under any directions as to the places in which they should look for work, paid for their own petrol and had to pay for the cost of repairs to the taxis. In deciding if the drivers could claim for wages, Street and Cantor JJ stated:

``*... in all arrangements where the parties occupy a relationship in the nature of that of joint adventurers, there is necessarily involved a certain degree of direction and control arising out of the nature of the relationship created by the agreement itself…mainly determined by the degree and extent of the detailed control vested in one party over the acts of the other party in the actual execution of the work contemplated in the joint venture."*[83]

Almost 20 years later, Lord Denning again in *Stephenson, Jordan and Harrison Ltd v Macdonald & Evans*[84] stated that while it was difficult to exactly distinguish an employee from an independent contractor, he expressed some confidence in examining the aspect of 'control' by a person towards the manner of doing work by another. Even today, in case of *E v English Province of Our Lady of Charity* reminiscence of it remain and it was stated as follow::

"To distil it in a single sentence, I would say that an employee is one who is paid a wage or salary to work under some, if only slight, control of his employer in his employer's business for his employer's business. The independent contractor works in and for his own business…."[85]

[82] *Yellow Cabs of Australia Ltd v Colgan* [1930] AR (NSW) 137 at 165.
[83] Ibid at 163.
[84] *Stephenson, Jordan and Harrison Ltd v Macdonald & Evans* [1952] 69 RPC 10.
[85] *E v English Province of Our Lady of Charity* [2013] QB 722, at [70].

The case *Christian Brothers*[86] (as it commonly referred to) however disrupted a long line of judicial precedent. The case concerned an institute who provided children with a Christian education and whether they could be held vicariously liable for the sexual abuse of the children by brothers of an institute, who taught at the school. The brothers were not contracted to the Institute but to the Middlesbrough Defendants, under secular contracts of employment. Lord Phillip in his assessment took into account the following control factors in determining if a vicarious relationship existed between the brothers and the Institute: (1) the teaching activity undertaken by the brothers was in furtherance of the objective, or mission, of the Institute; (2) the manner in which the brother teachers were obliged to conduct themselves as teachers was dictated by the Institute's rules and (3) the business of the Institute was not to train teachers or to confer status on them. It was to provide Christian teaching for boys. All members of the Institute were united in that objective. The relationship between individual teacher brothers and the Institute was directed to achieving that objective.[87] Based on the application on consideration of the factors above, the Supreme Court held that a Catholic Institute was vicariously liable for acts committed by teachers even though it did not employ the brothers. However, this case had seen the introduction of 'Policy considerations' which were five-fold and hinged on overriding concepts of fairness, just and reasonableness. These were as follows:

"*(i) the employer is more likely to have the means to compensate the victim than the employee and can be expected to have insured against that liability; (ii) the tort will have been committed as a result of activity being taken by the employee on behalf of the employer; (iii) the employee's activity is likely to be part of the business activity of the employer; (iv) the employer, by employing the employee to carry on the activity will have created the risk of the tort committed by the employee; (v) the employee will, to a greater or lesser degree, have been under the control of the employer.*"[88]

[86] *Catholic Child Welfare Society and others v Various claimants* [2012] UKCS 56.
[87] Ibid at paras 57 & 59.
[88] Supra 93 at para 35.

Post *Christian Brothers,* there was concern that the traditional distinction between a 'contract of service' and 'contract for service' had been abolished. The new trend appeared to favor a wider policy approach instead of a factual inquiry towards an assessment of the level of control to ascertain if, on the facts of the case, a tortfesor was in an employment relationship or carrying out their own independent business. The cases of *Cox v Ministry of Justice*[89], *Kafagi v JBW Group Ltd*[90] and *Barclays Bank plc v Various Claimants*[91] (prior to it being appealed) seemed to support this new trend which was favored a greater policy approach.

However, recently the landmark UK Supreme Court decision in *Barclays* has now held that there remains distinction between employment relationships on the one hand, and the relationship with an independent contractor on the other and that it should not necessarily be subjugated by greater policy considerations in the first instance. The *Barclays* decision essentially set a two-fold test.[92] The first involves a factual inquiry in understanding the details of the relationship.[93] The second involves the application of policy considerations only in the event that the initial factual inquiry does not assist. It was stated as follows in the *Barclays* decision:

"The question therefore is, as it has always been, whether the tortfeasor is carrying on business on his own account or whether he is in a relationship akin to employment with the defendant. In doubtful cases, the five "incidents" identified by Lord Phillips may be helpful in identifying a relationship which is sufficiently analogous to employment to make it fair, just and reasonable to impose vicarious liability. Although they were enunciated in the context of non-commercial enterprises, they may be relevant in deciding whether workers who may be technically self-employed or agency workers are effectively part and parcel of the employer's business. But the key, as it was in Christian Brothers, Cox and Armes, will usually lie in understanding the details of the relationship. Where it is clear

[89] *Cox v Ministry of Justice* [2016] AC 660.
[90] *Kafagi v JBW Group Ltd* [2018] EWCA Civ 1157.
[91] *Barlcays Bank Plc v Various Claimants*]2018] EWCA Civ 1670.
[92] Supra n7 at 14.
[93] Supra n7 at para 27.

that the tortfeasor is carrying on his own independent business it is not necessary to consider the five incidents."[94]

The *Barclays* case involved 126 claimants bringing an action against the defendant bank in respect of sexual assaults committed by Dr Gordon Bates who undertook medicals for prospective employees as part of the banks recruitment process. During the course of these medicals the assaults took place. Lady Hale in examination of the factual relationship between the bank and the Dr. Bates decided that an employment relationship was not apparent based on the following factors: (1) Dr. Bates was a part-time employee of the health services, (2) Dr. Bates was not on a retainer where he was mandated to accept referrals from the bank; (3) he had the ability to refuse examinations; (4) he carried his own medical liability insurance and (5) he had other clients apart from the bank referrals.

Savage and Broomfield have praised the *Barclays* decision on the basis that it now provides a 'universally applicable test'[95] and hence provides clarity in terms of the previous inconsistency that had emerged with *Christian Brothers.* They are of the opinion that it again reasserts the distinction between those in a contract of service as opposed to a contract for service. Similarly, McCloskey J states that there is now clarity and affirmation as to the test that needs to be taken into account in determining the distinction between whether the tortfeasor is an employee or independent contractor.[96]

Apart from providing clarity as to the test that needs to be applied, the *Barclays* decision, in making an assessment into the details of a relationship between parties, stated that the element of 'control' is now however only considered as the "irreducible minimum" legal requirement in determining a contract of service or a contract for service.[97] In *Barclays*, the assessment was not only limited towards assessing the element of control but assessed more holistically.

Lord Philip in is lecture series at the University of Hong Kong in 2015 stated as follows:

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[94] Supra n7at para 27.
[95] Supra n7 at para 29.
[96] McCloskey, J 'Barclays Bank v Various Claimants [2020] UKSC 13' (2020) https://www.carson-mcdowell.com/news-and-events/insights/barclays-bank-v-various-claimants-2020uksc-13 (Accessed 31 September 2021).
[97] *Montgomery v Johnson Underwood Ltd* [2001] EWCA Civ 318.

"*control of the wrongdoer no longer has the significance that it had in the past. More significant is the question of whether the wrongdoer was playing an integral part in the business activities of the employer when the tort was committed*." [98]

Even historically, factors such as whose tools, equipment, and premises are to be used, the extent to which the employer can control the details of the work, whether the method of payment is on a time or a job basis and the skill called for in the work and the power to dismiss were all taken into consideration towards determining the type of relationship.[99] The more recent case of *Lee Tin Sang v Chung Chi-Keung*[100] involved a skilled stone mason making a claim for compensation after injuring himself and in order to be successful he had to be classified as an 'employee'. Upon undertaking a broader factual examination (and not being limited to the aspect of 'control'), it was seen that Mr. Sang was paid on a piece-work rate or at a daily rate, he did not possess any equipment, did not hire any helpers and he was not required to exercise management of the job nor share in the financial risk in the enterprise.[101] The Court of Appeal hence found that Mr. Sang was an employee. Justice Lindsay in *MacFarlane v Glasgow CC*[102] also stated that if a person had the option of delegating to another, such an arrangement would indicate an independent contractor relationship rather than an employer/employee relationship. Witting states that the important features in determining the type of relationship is both the issue of control and that of risk-for-reward (or investment in the enterprise).[103]The case of *E v English Province of Our Lady of Charity*[104] focused on whether a workman was working on behalf of an enterprise or on his own behalf and, if the former, how central the workman's activities were to the enterprise and whether these activities were integrated into the organizational structure of the enterprise. In *Johnson v Coventry*

[98] The Right Honourable The Lord Phillips of Worth Matravers, The Common Law Lecture Series: Vicarious Liability on the move' (Common Law Lecture Series, University of Hong Kong, 22 January 2015) https://www.hkcfa.hk/filemanager/speech/en/upload/134/20150122%20Phillips%20-%20HKU's%20common%20law%20lecture%20on%20Liability%20On%20The%20Move.pdf (Accessed 01 August 2021).
[99] *Quarman v Burnett* (1840) 6 M & V 499, 19.
[100] *Lee Tin Sang v Chung Chi-Keung* [1990] 2 AC 374.
[101] Supra n69 at 627.
Witting classified the above as one of 'personal investment in the enterprise'.
[102] *MacFarlane v Glasgow CC* [2001] IRLR 7.
[103] Supra n69 at 625.
[104] Supra n87

Churchchill International Ltd[105] an focus was on the 'intention of the parties' and how it defeats any contractual classification or prior stipulated agreement between the parties. In this case, the courts while examining the stipulated terms of the parties agreement governing the relationship equally scrutinized the operationalization or actual conduct of their affairs towards determining the type of relationship.

Ackner LJ in the case of *Young & Woods Ltd V West,* [106] similarly stated as follows:

'*It is by now well settled that the label which the parties choose to use to describe their relationship cannot alter or decide their true relationship; but in deciding what their relationship is, the expression by them of their true intention is relevant but not conclusive. Its importance may vary according to the facts of the case*.'

The case concerned a sheet-metal worker who had entered into a contract with the employer to be treated as self-employed absolving them of tax and national insurance payment. However, when dismissed, Mr. West claimed to be employed in order to seek employment benefits. Similarly, in the United States jurisdiction, the recent case of *Uber Bv and Others v Aslam and Others*[107] concerned the plight of Uber drivers to be treated as 'employees' in order to qualify for the national minimum wage, paid annual leave and other workers' rights held as follows:

"*that there was no legal presumption that a contractual document contains the whole of the parties' agreement and no absolute rule that terms set out in a contractual document represent the parties' true agreement just because an individual has signed it. The wording of the contractual documents, while relevant, is not conclusive. It is also necessary to have regard to how relevant obligations are performed in practice".*[108]

A person's employment status is hence dependent on the balance of other relevant factors apart from merely examining the degree of control. While the above cases show extended considerations apart from mere 'control' it however does not provide guidance on the

[105] *Johnson v Coventry Churchchill International Ltd* [1992] 3 ALL ER 14.
[106] *Young & Woods Ltd V West* [1980] IRLR 201.
[107] *Uber Bv and Others v Aslam and Others: SC 19 Feb 2021* at para 85.
[108] Ibid.

exact elements that need to be considered. It is noted that it transcends further in defeating even the intention of the parties. It is apparent that Courts are now in effect adopting a purposive or a holistic stance. United Kingdom academics, Dhorjiwala and Atkinson, state that while such an approach was not entirely new and could be dated back to *Carter v Bradbeer*[109] it still involves a 'dramatic shift' away from the previous narrow approach of the concept of 'control' towards a broader enquiry.[110] Both Atkinson and Dhorajiwala state that such an approach involves an analysis at an 'abstract level' as well as a 'concrete level'. This involves an analysis of the purpose of employment statutes and the disregard of the written documentation that does not reflect the reality of the working relationship.[111] Courts should also consider factors that help them identify workers in subordinate and dependent position and distinguish these workers from individuals who should be "treated as being able to look after themselves" in order to identify the 'true' arrangement between the parties.[112]

Both Lord Phillips in *Christian Brothers*[113] and Lord Reed in *Cox*[114] had also appeared prior to *Barclays* to support the view for the continuous refinement of the factual criteria. Savage and Broomfield in their analysis of the *Barclays* decision similarly stated that one size does not fit all and that it was foreseeable that different criteria will develop for different industries or spheres of commerce taking into account history, industry practice and the realities of commercial life.[115]

2.1.1.1 The relationship test - An appraisal of the Fiji situation: Fowler v Ranadi

An analysis will now be undertaken of Fiji's jurisprudence in respect of the application of the 'relationship test' and the reasoning pertaining to it.

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[109] *Carter v Bradbeer* [1975] 1 WLR 1204, 1206-1207.
[110] Dhorajiwala, H and Atkinson, J 'After Uber: Purposive Interpretation and the Future of Contract' (2021) *UK Labour Law Blog* https://uklabourlawblog.com/2021/04/01/after-uber-purposive-interpretation-and-the-future-of-contract-by-joe-atkinson-and-hitesh-dhorajiwala/ (Accessed 01 November 2021).
[111] Ibid.
[112] Ibid..
[113] Supra n93.
[114] Supra n96.
[115] Supra n7 at 15.

The case of *Fowler v Ranadi* was the first time *Barlcays* was considered by the Courts of Fiji. In making an assessment in respect of the 'relationship test' towards ascertaining the second defendants (taxi owner) liability, Justice Amaratunga made specific reference to the *Barclays* decision quoting paragraph 27 of the decision as follows:

"The question therefore is, as it has always been, whether the tortfeasor is carrying on business on his own account or whether he is in a relationship akin to employment with the defendant. In doubtful cases, the five "incidents" identified by Lord Phillips may be helpful in identifying a relationship which is sufficiently analogous to employment to make it fair, just and reasonable to impose vicarious liability. Although they were enunciated in the context of non-commercial enterprises, they may be relevant in deciding whether workers who may be technically self-employed or agency workers are effectively part and parcel of the employer's business. But the key, as it was in Christian Brothers, Cox and Armes, will usually lie in understanding the details of the relationship. Where it is clear that the tortfeasor is carrying on his own independent business it is not necessary to consider the five incidents."[116]

Justice Amaratunga essentially applied the revised *Barclays* test in determining the 'relationship' status between the taxi owner and taxi driver. Justice Amaratunga however in making the factual assessment of the features of the relationship between the parties limited himself only to the factors that were taken into consideration in the Fiji Supreme Court decision of *Hassan v Transport Workers Union.*[117]

By way of background, Ali Hassan was the owner of a fleet of taxi cabs entered into standard contracts with his drivers. The contracts stipulated that (1) the driver would pay the sum of $66 net to him each day with the amount beyond this sum being the driver's own income; (2) driving operations being restricted to certain localities and any digression would need his permission and (3) he would have control over the taxi drivers' daily driving. The General Secretary of the Transport Workers' Union sought to have Mr. Hassan voluntarily recognize the Union for the purpose of it being a bargaining agent and

[116] Supra n13 at para 29.
[117] *Hassan v Transport Workers Union* [2006] FJSC 11; CBV0006U.2005S (19 October 2006).

representative of the drivers in all matters relating to their employment inclusive of wages, hours of work and other terms and conditions of employment. Mr. Hassan refused and asserted that the drivers were self-employed under independent contracts. The Permanent Secretary of the Ministry of Labour, Industrial Relations and Productivity then issued a compulsory recognition order after being requested by the General Secretary of the Union to do so. Mr. Hassan filed for judicial review against the recognition of the drivers as "employees".

The Court of Appeal had dismissed the Mr. Hassan's appeal and ruled that the Permanent Secretary properly complied with the Recognition Act before issuing the compulsory recognition order and that the contract entered between Mr. Hassan and the drivers signified an employer-employee relationship. However, upon appeal to the Supreme Court, the Judge set-aside the decision of the Court of Appeal and held the relationship between Hassan and the Drivers to be that of an independent contractor type. The following factors were taken into consideration which can be summarized as follows:

(1) Each driver was assigned a taxi in which to offer taxi services to members of the public for a fare which was to be paid by the member of the public to the driver;

(2) Drivers had to pay $66 daily to Mr. Hassan and could retain the balance;

(3) the driver was free to use the vehicle for his own purposes;

(4) it was also noted that under contractual agreement that owner shall have no control over the daily driving;

(5) there was no express provision for termination however drivers were required to give one week's notice of termination;

(6) liability of driver if they were assessed to be at fault while using the vehicle for private mean;

(7) restriction on the area of operation;

(8) no repair work without the consent of the owner and;

(9) no one else was permitted to drive the vehicle.[118]

[118] Ibid at para 83.

In furtherance of the factual analysis, the Supreme Court took into account policy considerations as well. It held that the contractual arrangements between Hassan and the drivers were similar to contractual arrangements entered into by the majority of taxi drivers in Fiji, as well as other drivers such as couriers and tanker drivers. They conduct their own financial affairs in relation to the payment of national taxes and contributions to their own superannuation on the basis that they are independent contractors. The Judge stated that to neglect such realities would have a negative impact upon the operation of a number of business operations in Fiji and could have unforeseen and unforeseeable economic effects for the economy. In addition, *Hassan* raised a further policy consideration quoting Creighton and Stewart as follows:

"... with a modicum of care and ingenuity it remains possible for businesses to obtain work from individuals who are virtually indistinguishable from employees yet whom the common law does not characterize as "employees".[119]

The decision in *Hassan* again made reference to Creighton and Stewart in their commentary in respect of a report prepared for the International Labour Conference in 2003 which stated that:

"The growing lack of protection of many dependent workers, although not the same in all countries, is a challenge to the effective functioning of labour law. The non-protection of dependent workers harms workers and their families; it also affects the viability of enterprises and has consequences for society and governments."[120]

The decision in *Hassan* showed a two-tier approach rather than a fail-safe option seen in the recent *Barclays* decision whereby factual considerations are seen as paramount with policy considerations applied only as a reserve position. Given that *Hassan* was a 2006 decision, such a position was correct at that time.

More importantly *Hassan* showed a willingness to accept additional factors towards determining the relationship status. The *Hassan* case left open vital questions that needed to be answered and there was no direction from the court if in the event that it were found to exist. *Hassan* chose to unfortunately weigh heavily on limited factors towards

[119] Creighton, B & Stewart, A. *Labour Law* (2005) para 11.43.
[120] Ibid at para 11.45

determining the relationship status between the owner and driver. There were also other factual considerations that the court was willing to consider but unfortunately lacked any evidential findings. However, the fact that it was raised by the court would show that it could well have had a bearing on the ultimate outcome in determining the relationship status. The court acceptance to do this was well noted. The court noted that there was a lack of evidence to ascertain: (1) the ability to direct drivers to pick up passengers when they would call the base for a taxi; (2) a tightly organized and controlled operational environment of which the drivers were an essential part; and (3) the necessity to serve the owners fixed customers.[121] One would question the bearing on the case if these elements were satisfied.

In *Fowler v Ranadi*, Amaratunga, J stated that the case before him displayed a similar factual relationship to *Hassan* and hence there was no need for him to factually distinguish it from *Hassan*.[122] Amaratunga in his decision also stated that there was no need to apply greater policy considerations as there was no doubt as to the status of the relationship between the taxi drivers and owner.[123] This ultimately shows a direct acceptance of the *Barclays* test in Fiji. However, the *Fowler v Ranadi* approach while in tandem with the *Barclays* position was however limited by following a line of non-distinguishable judicial precedent similar to the case of *Commissioner of Taxation v De Luxe Red and Yellow Cabs Co-operative (Trading) Society Ltd*[124] where the Judges did not depart from well-established common law precedent and instead maintaining the status quo relying on a few similar 'taxi cases' towards making an assessment of the type of relationship. Reliance was made on *Fowler v Locke*[125] *Doggett v Waterloo Taxi-Cab Company Ltd*[126]and *Yellow Cabs of Australia Ltd v Colgan.*[127]

It is argued that such cases appear to be limited and do not show a holistic application towards determining the relationship status. While Amaratunga, J remained bound to

[121] Supra 124 at para 85-86.
[122] Supra n73 at para 50.
[123] Supra n73 at para 46.
[124] *Commissioner of Taxation v De Luxe Red and Yellow Cabs Co-operative (Trading) Society Ltd* (1998) 82 FCR 507 at para 522.
[125] Supra n80.
[126] Supra n83.
[127] Supra n83.

limited factual considerations in *Hassan*, he expressed hope that the position could change with time.[128] This appears to be an obvious oxymoron of sorts. . In contrast, the plethora of renewed consideration is apparent in the now newly dominant ridesharing market and hence comparisons can be made with now the seemingly the 'older' taxi industry. According to Reis and Chand, on side of the spectrum, rideshare drivers could be classified as employees based on the following reasons where the company:

(i) establishes rules regarding car maintenance and manners that must be followed by the drivers;
(ii) fixes ride prices and handles the payment processing;
(iii) approves drivers' applications;
(iv) can cancel the access and use of the platform for drivers and;
(v) can impose sanctions.

These features indicate that there is some level of subordination and dependence that could fair well towards holding a relationship to one of employer and employee.

On the other spectrum one could also view ride-share drivers as independent contractors whereby drivers:

(i) provide services whenever and wherever they want to and are not fixed on schedules;
(ii) provide the main tool (their own cars) necessary to provide services;
(iii) can refuse a client or a location to work;
(iv) are free to contract with other parties and there is no exclusivity and;
(v) get close to 80% of value of the services, the fact that one of the parties gets such a high percentage can indicate a partnership.

[128] Supra n73 at para 73.

Such considerations from these additional viewpoints are not consistent with the traditional understanding of an employment relationship.[129]The competing considerations and its similar experience within the 'gig economy' cumulated ultimately in some businesses in the United States addressing the conundrum via a 'hybrid' approach. The hybrid approach essentially involved businesses offering drivers some job and health benefits, without establishing employee status.[130]

2.1.1.2 The relationship test – Advocating for Reconsideration

One could pose the criticism that the common law in its current state in Fiji is seemingly allowing an owner to use drivers as a method of reducing litigation exposure at the expense of the third party. Essentially, what the 'taxi' examples have failed to consider more wholesomely 'other' elements in examining the type of relationship between owner and driver. Judicial precedent has already indicated that it should. The ride-sharing market is already displaying such traits signaling a change in stance.

It has already been ascertained that 'control' is not the only determinative elements towards determining a relationship status.[131] The inability to 'control' precisely how the work is carried out does not necessarily mean that here is no employer/employee relationship. Jones gave an apt example where he stated that an employer cannot tell its pilots how to fly a plane nor can the surgeon be told how to conduct an operation,[132] yet they still remain employees of the hospital or airline However, what appears not to be decided is to what elements within the relationship test are to be emphasized.[133]

As already mentioned, the case of *Fowler v Ranadi* saw a similar level of facts to that of *Hassan.* This was even acknowledged by the Judge.[134] While *Hassan* set the platform for an examination of additional features incidental to a relationship, counsel in *Fowler* did

[129] Chand, V & Reis, A V 'Uber Drivers: Employees or Independent Contractors?' (2020) http://kluwertaxblog.com/2020/04/03/uber-drivers-employees-or-independent-contractors/ (Accessed 26 August 2021).
[130] Ibid.
[131] Supra n4 at 422.
[132] Supra n4 at page 422.
[133] Supra n69 at 626.
[134] Supra n73 at para 44.

not utilize the opportunity to transgress the boundaries and remained within the reasoning parameters in *Hassan* but at the same time did not heed to the opportunity presented within *Hassan* itself.

Morgan, P in his aptly titled article "Ripe for reconsideration: Foster carers, context, and vicarious liability",[135] stated that the law should be guided by an understanding of the contextual framework, and one should be cautious of seemingly settled law.[136] In noting the particular high rate of abuse of children in New South Wales in foster care and the changing nature of foster carers and how foster care parenting had evolved from a voluntary act towards a level of professionalism. He recommended a modern, rationalized form of vicarious liability towards holding authorities vicarious liable for foster parents.[137]

According to Atiyah what is fundamental is the 'when and where', not how, the work is performed.[138] Dixon CJ stated in the case of *Zuijs v Wirth Brothers Pty Ltd* that there was: '*little room for direction or command in detail may exist. But that is not the point. What matters is lawful authority to command so far as there is scope for it*.'[139]There is also judicial precedent analyzing 'purpose' such as in the case of *Ormrod v Crossville Motor Services Ltd*[140] whereby the owner of a car asked a friend to drive it to Monte Carlo where he would eventually join him. The owner had an interest in getting his vehicle to Monte Carlo. The friend got involved in the accident and the claimant sough to holder the Owner vicariously liable. Denning LJ said that the owner is liable if the driver is his agent, that is to say if the driver is, with the owners consent, driving the car on the owner's business or for the owner's purposes. The case of *Candler v Thomas*[141] similarly involved a vehicle owner who lent his van to the first defendant. It was lent on the basis that the driver would deliver a package for the owner and then go on to use the van for his own purpose. In applying the same principle of 'purpose' as in *Ormord* it was held that the owner of the vehicle was vicariously liable as he was driving for the owner's business or for the owner's

[135] Morgan, P 'Ripe for Reconsideration: Foster Carers, Context, and Vicarious Liability' (2012) 20(2) *Torts Law Journal* 110.
[136] Ibid at 112.
[137] Supra n143 at 112.
[138] Atiyah, P.S. *Vicarious Liability in the Law of Torts* (1967) 47.
[139] *Zuijs v Wirth Brothers Pty Ltd* (1955) 93 CLR 561.
[140] *Ormrod v Crossville Motor Services Ltd* [1953] 1 WLR1120.
[141] *Candler v Thomas* [1998] RTR 214.

purposes. The element of 'purpose' was again applied in the case of *Launchbury v Morgan*[142]but found not in favor of vicarious liability. In this case a husband often used his wifes car to go to work and visit public houses. The husband was involved in an accident and the claimant sought to hold the wife vicariously liable. It was held on appeal that the wife was not vicarious liable because the husband was using the vehicle entirely for his own purpose. Lord Wilberforce stated that '*in order to fix vicarious liability on the owner of car in such a case as the present, it must be shown that the driver was using it for the owner's own purposes, under delegation of a task or duty*'. No delegation of task or duty was apparent on the facts of the case.

The case of *Darnice Linton v. Desoto Cab Company Inc*[143] despite being a United States decision shows a more diverse approach towards analyzing the relationship between a taxi owner and a taxi driver. This is an approach that is proposed in this paper towards judicial reconsideration in determining an owner and driver relationship. Witting[144]states that one must take into account several factors, no single one of which is conclusive. He identified some common treads seen in case law and these were: (a) whether the method or payment is on a time or a job basis, (b) whose tools, equipment, and premises are to be used (c) the skills called for in the work, (d) the freedom of selection of labour by the employer and (e) the power to dismiss. It is argued that such principles can be applied to the taxi cases as well. The *Darnice* reasoning forms an embodiment of good reasoning in its application yet it is not an anomaly or greatly unique in any sense; just more holistic.

The facts of *Darnice* concerned the Defendant who had a fleet of about 230 taxis. Mr. Linton formally established a relationship with the Defendant via a Lease Agreement. The Lease Agreement was drafted by the Defendant. There was no negotiation of terms of the Lease Agreement. The Lease included language disclaiming any employment relationship between the parties. Either party was entitled to cancel the lease with 30 days' prior notice,

[142] *Launchbury v Morgan* [1972] UKHL 5.
[143] *Darnice Linton v. Desoto Cab Company Inc* A146162.
[144] Supra n75 at 626.

or without notice in the event of a breach. Mr. Linton drove the Defendants taxi's from September 2008 to August 2012.[145]

The operational part of their relationship involved Mr. Linton receiving relayed requests from the dispatcher via radio. Mr. Linton along with other drivers could respond with their locations. The dispatcher would assign the closest driver to pick up the customer. Dispatch radio calls accounted for around 35 to 40 percent of his fares with the balance largely coming from street hails. Mr. Linton was free to reject or accept dispatch calls. Mr. Linton was not required to check-in during his shifts nor report when he would take breaks. At the end of each of his shift, he returned the leased taxi and paid a $100 gate fee. This was the only source of income from the Defendant. Mr. Linton kept all fares and tips. The gate fee regardless of the Mr. Linton's earnings remained fixed and the reality was that Mr. Linton would occasionally lose money on a shift.[146]

Mr. Linton received a notice of termination on 18 August, 2012, after a complaint alleged him of credit card fraud. It was alleged that Mr. Linton made repeated charges on a passenger's credit card. As a result, Mr. Linton filed a claim with the Labor Office claiming that he was owed outstanding wages on the basis that he was an employee. The Labor Office held that Mr. Linton was an employee and subsequently ordered the Defendant to pay him his due wages. The Defendant company appealed and was successful. Mr. Linton appealed again and the appellate court again reversed the decision of the trial court.[147]

The appellate court made important observations in its assessment towards the relationship status between Mr. Linton and the taxi company. The court rightfully held that the 'control test' was not the only assessment method and should not be applied with rigor, in isolation or mechanically. The court applied the 'Borello test' which emerged from the decision of *S.G. Borello & Sons Inc. v. Department of Industrial Relations*[148], a seminal case which decided upon the difference between employment and independent

[145] Supra n151 at 1212.
[146] Ibid.
[147] Ibid.
[148] *S.G. Borello & Sons Inc. v. Department of Industrial Relations* (1989) (48 Cal.3d 341).

contractor relationships in California. The test relies upon multiple factors to make a determination. The Court reviewed the relationship between the parties based on the following:

1. the Defendants had a right to terminate;

2.there was particularly low level of skills required to drive a taxi,

3. duration of continuous service (4 years) provided by Mr. Linton;

4.there was regular daily payment of gate fees (as opposed to per job basis);

5. Mr. Linton performed work that was part and parcel of what the defendant does i.e. provide taxi services in the San Francisco area;

6. there was reliance on the defendant for Mr. Linton's services to provide customer service;

7. the tools (taxi and taxi meter) used by Mr. Linton on a daily basis was provided by Defendant and;

8. the Defendant provided the insurance needed to place the taxi's on the road.[149]

Imposing on the *Borello* test is the *"ABC"* test. The ABC Test originated from the case of *Dynamex Operation West, Inc. v. Superior Court*[150] which held that an employer arguing that a worker is an independent contractor must show that:

"1. The worker is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact;

2. That the worker performs work that is outside the usual course of the hiring entity's business; and

[149] Supra n151.
[150] *Dynamex Operation West, Inc. v. Superior Court,* 4 Cal. 5th 903.

3. That the worker is customarily engaged in an independently established trade, occupation or business of the same nature as the work performed." [151]

However, California's courts have established that the "ABC" test applies to wage orders while keeping the *Borello* test in place for non-wage order actions and workers' compensation. Given the confusing decisions that will result from both tests being valid, commentators have pitched that "ABC" test to eventually replace the *Borello* test.[152]

The *Darnice Linton v. Desoto Cab Company Inc* decision despite being a United States decision however presents an example of a more encapsulating, expansive and truer approach towards the assessment of a parties relationship status. The *Borello* test is not entirely unique in its approach nor does it alter precedent drastically. It already exists it the Commonwealth jurisdictions and it is quite evident already as seen in the examination of numerous case law. What is unfortunately lacking is a clear direction from the courts on what factors must or should be considered in deciding the type of relationship. A multitude of facts have been considered (with scope for even more) by the Fijian courts as seen in *Hassan.* However, current precedent has it fixated on an assessment of only a limited range of factual considerations. If the courts were to make an expanded assessment, it could well see the consideration of factors other than what it has limited itself to. Factors such as skills sets, ownership of tools, the right to terminate and the synergy between work performed with the employers trade are but some of the considerations that are clearly absent from the Fijian jurisprudence.

2 .1.2 Non-delegable duties.

If a person commits a tort and is classified as an 'independent contractor' there will be no vicarious liability applicable. The imposition of a 'non-delegable duty' may however still

[151] Kern, R 'New Independent Contractors Classification Rules' (2018) https://pknwlaw.com/newsletters/2018/q4/new-independent-contractors-classification-rules/ (Accessed 21 August 2021).
[152] Ibid.

impose liability when an independent contractor acts tortiously.[153] The concept of a non-delegable duty allows for the delegation of *tasks* but not *duties*.[154] The *duty* cannot be passed on by entrusting its performance to others, whether employees or contractors. If the duty is breached, liability will not attach to the defendant vicariously, but as a primary tortfeasor.[155] Lord Philip viewed non-delegable duties as an 'alternative route' towards imposing liability for the wrong doing of another.[156]

In case of *Cassidy v Ministry of Health*[157] a decision had to be made as to whether the Ministry was liable for the negligence of two medical professionals whilst in their employment at a hospital. Lord Denning stated that:

"I take it to be clear law, as well as good sense, that, where a person is himself under a duty to use care, he cannot get rid of his responsibility by delegating the performance of it to someone else, no matter whether the delegation be to a servant under a contract of service or to an independent contractor under a contract for services."[158]

Lord Philips stated that *Lister v Hesley Hall Ltd* [159] could have come to the same conclusion if decided on the basis of a non-delegable duty point of view.[160] Lord Philips made further reference to the *Cassidy*[161] and *Trotman v North Yorkshire County Council*[162] decisions and quoted as follows:

"*What these cases and Trotman's case illustrate is a situation where the employer has assumed a relationship to the plaintiff which imposes specific duties in tort upon the employer and the role of the employee (or servant) is that he is the person to whom the employer has entrusted the performance of those duties. These cases are examples of that*

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[153] Supra n75 at 574.
[154] Supra n75 at 574.
[155] Supra n75 at 574.
[156] Supra n105 at 24.
[157] *Cassidy v Ministry of Health* [1951] 1 All ER 574.
[158] Ibid at para 586.
[159] *Lister v Hesley Hall Ltd* [2001] UKHL 22.
The case established new precedent in finding an employer vicariously liable for sexual abuse by employees based on the "relative closeness" connecting the tort and the nature of an individual's employment. This was a change in position where sexual abuse by employees on others could not be seen as in the 'course of their employment'.
[160] Supra n105 at 29-30.
[161] Supra n165.
[162] *Trotman v North Yorkshire County Council* [1999] LGR 584.

class where the employer, by reason of assuming a relationship to the plaintiff, owes to the plaintiff duties which are more extensive than those owed by the public at large … The classes of persons or institutions that are in this type of special relationship to another human being include schools, prisons, hospitals and even, in relation to visitors, occupiers of land. They are liable if they themselves fail to perform the duty which they consequently owe. If they entrust the performance of that duty to an employee and that employee fails to perform the duty they are still liable"[163]

According to Steele, the case of *Woodland v Swimming Teachers' Association*[164] outlined the five (5) circumstances in which a non-delegable duty will arise. These are: (1) a claimants vulnerability or dependence on the defendant which is commonly associated with patients, children, prisoners and elderly; (2) focus on a positive duty to protect rather than the duty to refrain from conduct which involves an element of control; (3) the claimants inability to control how the defendant performs its obligations; (4) the duty is an integral part of the positive duty and (5) the third party has been negligent not in some collateral respect but in the performance of the primary duty that has been defendant.[165]

2.1.2.1 Applicability of Non-delegable duties to taxi services

The ability of a person to claim against a taxi owner for property damage caused by a taxi driver on the basis of a non-delegable responsibility faces a significant hurdle as its imposition appears to be limited to only patients, children, prisoners, elderly and occupiers of land.[166] It appears to not have progressed into other types of relationships hence being stringent in its applicability.[167] Kirby J in the case of *New South Wales v Lepore*[168]resisted efforts to expand the categories of nondelegable duties because of the difficulties that arise in identifying "the precise characteristics of relationships said to

[163] Supra n165 at paras 54-55.
[164] *Woodland v Swimming Teachers' Association* [2013] UKSC 66.
[165] Supra n77 at 601.
[166] Witting, C 'Leichhardt Municipal Council v Montgomery: Non-Delegable Duties and Roads Authorities' (2008) 31 *Melbourne Law Review* (1) 347 https://law.unimelb.edu.au/__data/assets/pdf_file/0003/1705755/32_1_11.pdf (Accessed 04 September 2021).
[167] Ibid at 347.
[168] *New South Wales v Lepore* [2003] HCA 4, (2003) 212 CLR 511.

justify the imposition of a non-delegable duty of care."[169] This is supported by Rob Ivessa's comments stating that the categories of non-delegable are better understood with reference to established categories rather than unifying principle.[170] Case law has similarly restricted the expansion of non-delegable duties as seen in the case of *Leichhardt Municipal Council v Montgomery*[171]where Callinan, J stated that the court should: *"...scrutinize with great care, and generally reject, the imposition of non-delegable duties, unless there are very special categories warranting an exception."*[172]

Kirby, J discussed the imposition of a possible non-delegable duty on road authorities.[173] Kirby, J however expressed difficulty in comparing cases such as the vulnerability of patients to duties owed by road authorities. This was primarily because road users do not constitute a closed class of persons whose identity is ascertainable in advance and the degree of vulnerability that exists compared to the group outlined in *Woodland* i.e. patients, children, prisoners and elderly.[174] He also aptly stated that the limited expansion of the categories of non-delegable duties was because it is levied towards the protection of bodily integrity. It is further strengthened by the fact that non-delegable duty-holders are engaged in 'ongoing activities' such as the offering of medical services and educational services and should act to avoid risks of harm through the introduction of appropriate systems, processes and procedures. Hence, there is a stricter onus in respect of their roles per se. According to Witting, the above such rationale unfortunately does not apply to the case of a vehicle-owner who allows another to drive their vehicle. The ongoing nature of the activities in established non-delegable fields provides the opportunity to reduce risks of harm directly rather than indirectly (as in the case of road-users).[175] In the situation of allowing another to drive their vehicle the aspect of 'direct

[169] Ibid at para 289.
[170] Ivessa, R.'The Outer Limits of Vicarious Liability and Agency in Tort'(2017) 79 https://www.hearsay.org.au/the-outer-limits-of-vicarious-liability-and-agency-in-tort/#_Toc480452152 (Accessed 21 October 2021).
[171] *Leichhardt Municipal Council v Montgomery* (2007) 230 CLR.
[172] Ibid.
[173] Supra 174.
[174] Supra 174 at para 65-6.
[175] Supra 17l4 at 348.

control' is a difficult task to achieve. Control is more indirect rather than direct and possibly even less stringently applied given the practical flexibility allowed to drivers.

In the matter of *Gounder v Murr*[176] the Supreme Court of Fiji (just like its overseas counterparts) also expressed reluctance to transcend boundaries in respect of the categories for non-delegable duties. In this case, the tenant sought damages for lost property on the basis of an alleged contractors non-delegable duty arising out of a failure to maintain the Fiji Electricity Authority standards of electrical safety. The claim was focused on a claim for failing to ensure that air conditioners were installed to comply with national Electricity Regulations. Such Regulations, made it mandatory to notify the Fiji Electricity Authority and obtain its certification before any alteration or addition or any part of any installation that has been repaired is connected to the supply. The contractor, had he complied with simple safety procedure, would have avoided the claimants building from the destructive consequences of an electrical fire as a result of overloading. The court ultimately relied on what it termed 'unsettled precedent' from the Australian jurisdiction and it was specifically stated that the issue on non-delegable duties was still not well 'catalogued' and a 'thorny subject'.[177]

In reliance on Witkin,[178] Alexi Pfeffer-Gillett stated that a company cannot avoid liability by delegating work to an independent contractor when it is publicly licensed or franchised and its work presents a safety concern to the public.[179] It is hence seen as strict in a sense. This was similar to the position held by Dougherty[180] where he stated that nondelegable duties were an exception to the general rule. This may allow for an exception to the rule that warrants discussion. He stated that an employer will be liable for acts of an independent contractor in two situations. These are when: (1) affirmative duties are imposed on an employer by statute, contract, franchise, charter, or common law and (2) duties imposed on an employer that arise out of work itself because its performance creates dangers to others, i.e., inherently dangerous work. He stated that if work performed fits

[176] *Gounder v Murr* [2011] FJSC 12; CBV0009.2010 (12 August 2011).
[177] Ibid at para 30.
[178] Witkin, B. E 'Summary Torts' (2005) *Summary of California Law* 642.
[179] Pfeffer-Gillett, Alexi 'When 'Disruption' Collides with Accountability: Holding Ridesharing Companies Liable for Acts of Their Drivers' (2016) *California Law Review* 253.
[180] Dougherty, Francis M 'Liability of Employer with Regard to Inherently Dangerous Work for Injuries to Employees of Independent Contractor' (1984) *American Law Reports* 914.

into one of these two categories, the employer may delegate the work to an independent contractor, but he cannot delegate the duty. Amanda Q.C. in her commentary of the *Barclays* decision stated that "*one size does not necessarily fit all: it is foreseeable that different criteria will develop, or be "refined" (to use the language of Lord Philip and Lord Reed), for different industries or spheres of commerce taking into account history, industry practice and the realities of commercial life*".[181] According to Geoffrey, the doctrinal roots of non-delegable duties are not deep or well established. He cited Hayne J in *Leichhardt* and Gummow and Hayne JJ in *Lepore* as having described the imposition of non-delegable duties as reaching a desired result by devious reasoning and the fictitious use of language.[182] This would show that the grounds for reasoning would still be malleable.

The United States federal jurisdictions presents some interesting analysis towards holding vehicle and licence holders liable under the doctrine of non-delegable duties. The case *Paige v. Red Top, Inc*[183] concerned a lease between a taxicab company, Red Top, and an independent contractor. The lease was for both the company car and its license to operate in Newark. Because operation required a license, the court held that Red Top could not delegate its authority and avoid liability for the driver's actions, regardless of whether the driver was an independent contractor or employee. In *Teixeira v. Car Cab Three, Inc*[184] a case from Massachusetts, in reliance of *Red Top* found a taxicab company liable when the company's independent contractor driver assaulted a passenger. In this case, the driver leased only a license from the taxicab company, not his vehicle. The court held that the taxi company's license to operate-represented a nondelegable duty to protect its passengers, and the driver's assault constituted a breach of this duty by the company. In the case of *Tinkham v. Groveport-Madison Local Sch. Dist*[185] the taxicab company entered into a contract with a school district to safely transport students. A driver kidnapped and raped a student while transporting her. The court rejected argument as to whether the

[181] Supra n7 at para 183.
[182] Hancy, G 'Strictly Liable Vicariously' (2017) *AILA* 18 https://hancy.net/wp-content/uploads/2017/05/20170427-paper-AILA-Vicarious-Liability-by-Geoffrey-Hancy-barrister-1.pdf (Accessed 07 September 2021).
[183] *Paige v. Red Top, Inc*., 255 A.2d 279, 281 82 (N.J. Super. Ct. App. Div. 1969).
[184] *Teixeira v. Car Cab Three, Inc*., 1994 Mass. App. Div. 154, 1 (Dist. Ct. 1994).
[185] *Tinkham v. Groveport-Madison Local Sch. Dist*., 602 N.E.2d 256, 259 (Ohio Ct. App. 1991).

driver was either an employee or independent contractor. The court held that the company breached its nondelegable duty being an actual license to operate-represented a nondelegable duty to protect its passengers. The United States experience certainly gives credence to a greater public policy concern in that it represents an increased sense of fairness towards ensuring that there will be a financially responsible defendant for compensation purposes.[186]

Alexi Pfeffer-Gillett explored the 'non-delegable' pathway, as opposed to vicarious liability, as he was of the opinion that tests developed in the over the 20th Century for classifying workers via employment tests was not helpful in addressing 21st Century problems.[187] He stated that the taxi industry is similar to TNC operations in the sense that TNC drivers are not independently licensed or insured; they operate under the commercial license and commercial Insurance of their parent TNC companies. In his analysis, he saw that the current California framework requires TNCs, not drivers, to conduct criminal background checks and vehicle inspections, and to carry accident insurance, driver safety checks and drug use. [188] The California regulations of TNCs touch on nearly every possible source of danger because California licensing requirements place affirmative and specific duties on TNC's towards safety in transporting passengers.[189] Hence the argument is that the onus should fall on the taxi owner as the responsibility has been given to them via legislation. This proposition is now explored in greater detail.

2.1.2.2 Is Non-delegable duties possible under Fiji's Transport Statutory Framework

Section 63 (1) of the LTA states that:

"*The Authority may issue to a person who meets the prescribed requirements of a public service vehicle licence of a class described in subsection (3) to enable a motor vehicle*

[186] Supra 186 at 634, 636 & 642.
[187] Supra n187 at 238.
[188] Decision Adopting Rules and Regulations to Protect Public Safety While Allowing New Entrants to the Transportation Industry, at 16 17, R. 12-12-011, Dec. 13-09-045, 2013 WL 10230598 (Cal. Pub. Util. Comm'n Sept. 19, 2013), http://docs.cpuc.ca.gov/PublishedDocs/Published/GOOO /M077/K192/77192335.PDF [http://penna.cc/Z2JG-U4XZ] [hereinafter 2013 CPUC Order].
[189] Supra 177 at 259.

owned by that person to operate in the manner described in a public service permit held by that person".

For a specific taxi licence the requirement is stipulated in 63(3) whereby the vehicle must be equipped for the conveyance of not less than 4 and not more than 5 persons excluding the driver. There is then an additional requirement to obtain a taxi permit in order for the licensed vehicle to operate as a taxi. This is contained in s.65 (2)(a) of the LTA which states:

"65(2) A person may apply to the Authority for a public service permit of the following types – (a) a taxi permit which authorizes the use of a motor vehicle licensed as a taxi, subject to this Act and licence and permit conditions…"

Whilst not expressly clear, it appears that the licence holder and the permit holder are to be the same person based on s.64(2) of the LTA Act which states as follows:

"*64(2) The holder of a public service permit is, upon application in accordance with regulation, and upon payment of the prescribed fee, entitled to the renewal of the permit unless the Authority is satisfied that the holder is in breach of this Act or the regulations in respect of a public service licence or of any condition attached to the permit".*

The Land Transport (Public Service Vehicles) Regulations 2000 establishes fitness requirements as a condition for permits ensuring standards of safety and comfort. Under regulation 8 (3) of the Land Transport (Public Service Vehicle) Regulations 2000, the Land Transport Authority may order the holder of the permit to make a vehicle available for inspection. The onus of responsibility for vehicle standard and safety rests entirely on the owner of the vehicle. There are specific requirements regarding vehicle fitness under the Land Transport (Vehicle Registration and Construction) Regulations 2000. These range from compliance to safety provisions[190], lamps and reflectors[191], brakes, tires,

[190] Land Transport (Vehicle Registration and Construction) Regulations 2000 (Fiji) – r.43-45.
[191] Land Transport (Vehicle Registration and Construction) Regulations 2000 (Fiji) – r55-68.

wheels[192], fuels and exhaust systems[193], vehicle dimensions and loads[194] and other miscellaneous provisions[195].

The 'specific' compliance requirements is to be noted as opposed to 'general' compliance as it has a legal bearing. Defendants have managed to avoid nondelegable duty liability because the law governing their industry was too general to create affirmative duties. The case of *Felmlee v. Falcon Cable TV,*[196] concerned an employee of the cable company's independent contractor sustaining an injury while repairing a cable television line. The California Court of Appeal held that an ordinance requiring a defendant cable company simply to maintain "good service" and "safe conditions for its employees" did not create a breach of nondelegable duty. This was because it was seen as a mere general duty to maintain safe conditions, to which the nondelegable duties doctrine was not inapplicable.[197] Vehicle safety standards rest upon the owner.

In respect of safety concerning the driver, it appears from a non-delegable point of view that the onus could be placed on the LTA based on specific requirements under the Land Transport Act. Under the Form 4 of the Land Transport (Prescribed Form) Regulations 2000, a person must submit a Police Clearance no longer 3 months old as part of their application for a Driver's License. In addition, pursuant to s. 58(2) of the LTA Act, a taxi permit may be refused to a vehicle driver based on the nature of a conviction. The onus is hence not on the owner of the vehicle but placed clearly on the LTA. Regulation 24 (3) of the Land Transport (Driver) Regulations 2000 states that:

"(3) The Authority may refuse to issue or renew a public service vehicle drivers permit if it is satisfied that a person –

(a)…

[192] Land Transport (Vehicle Registration and Construction) Regulations 2000 (Fiji)- r69-75.
[193] Land Transport (Vehicle Registration and Construction) Regulations 2000 (Fiji) – r76-78.
[194] Land Transport (Vehicle Registration and Construction) Regulations 2000 (Fiji) – r79-91.
[195] Land Transport (Vehicle Registration and Construction) Regulations 2000 (Fiji) – r92-98.
[196] *Felmlee v. Falcon Cable TV*, 43 Cal. Rptr. 2d 158, 158, 162 (Ct. App. 1995), modified (July 28, 1995).
[197] Supra 187 at 259.

(b) has a record as a driver of motor vehicle or has such habits or shows such conduct that in the interest or shows such conduct that in the interest of public safety the person should not hold such a permit;

(c) has a continuing record of disregarding the Act or regulations; or

(d) has not satisfied any other requirements to drive public service vehicle imposed by the Authority.

Furthermore, provisions relating to Driver Safety Checks again rests between the Driver and the LTA whereby it is a requirement under s.61(6) of the LTA Act for all Public Service Drivers to have attended and participated in a formal course and program of instruction in defensive driving and road safety run by the LTA.

In analyzing Alexi Pfeffer-Gillett's second element, he determined the applicability of a non-delegable duty on the basis of it being a safety concern to the public. It was aptly put by Alexi that where the purpose of licensing is to protect public safety, a licensee cannot avoid its duty to the public by delegating the license to independent contractors. [198] In assessing the danger of TNC's vehicle operations, Alexi however did not provide data to confirm his position, but however brought to the forefront the level of heightened regulation of the TNC industry stating that:

"*TNCs must also conduct background checks of drivers, establish a driver-training program, inspect drivers' vehicles, implement a zero-tolerance policy on drugs and alcohol, and hold commercial insurance for their drivers. In passing these new requirements, the CPUC has shown a clear recognition that TNCs pose a danger to the public."*[199]

The regulatory environment for the Fiji Taxi industry is similar as outlined above in the assessment of vehicle worthiness and the responsibilities of the driver. This is further bolstered with the current statistics sourced concerning the accident rates of Public Service Vehicles and the negative role that Taxi Drivers have played towards the safety of the

[198] Supra 177 at 259.
[199] Supra 177 at 260.

public pertaining to its operations. The rate of accidents that is occurring in Fiji is indeed a safety concern.

Alexi Pfeffer-Gillet's analysis unfortunately associates non-delegable duties towards driver and passenger personal safety rather than property protection of a 3rd party. This is obviously the major hinderance towards the applicability of non-delegable responsibility in respect of property protection. Witting arrived at the same conclusion in his analysis of the *Leichhardt* case stating that a breach of a non-delegable duty largely arises in an action for personal injuries.[200] The establishment of the ACCF has also levied focus on injury and death compensation. No recourse has been made towards property protection. At this point, comprehensive insurance coverage is also only an option for vehicle road users.

The Fiji LTA Act 1998 ultimately provides a hybrid or spilt approach in the possible application of non-delegable duties towards taxi owners and the Land Transport Authority. The applicability of non-delegable duty will most likely depend on the cause of the accident i.e. depending on whether it is vehicle or driver fault. It however faces two significant hurdles. The first being expanding outside the current classified categories established by *Woodman* and then secondly it being more commonly associated with protection of bodily integrity rather than towards property indemnity.

2.2 Legislative reform

The year 2010 saw the launch of Uber in San Francisco. As opposed to taxi services, its popularity was associated with its convenience, accessibility, comfort and affordability. To-date services are able to operate cheaply as drivers carry non-commercial licenses and use their personal vehicles rather than company cars.[201] Uber's success has seen the emergence of other TNC operators such as uberX, Lyft, and Sidecar all of which have now flourished.

However, in December 2013, a driver for UberX failed to stop at a crosswalk killing a six-year-old girl and injuring the mother and brother. The UberX driver hit and killed the girl

[200] Supra n174 at 343.
[201] Supra 187 at 236.

while he was logged into Uber's phone application and searching for customers. The parents of the girl sued not only the driver but also Uber Technologies, LLC, UberX's parent company. [202] Uber mounted a defence primarily based on the position that at the time of the incident, the driver was not providing services on the Uber platform. The driver was merely logged into the system searching for customers. This was opposed to the driver actually responding to a request or having carriage of a customer.[203] The other argument was that TNC's were mere platforms connecting passengers with drivers, and therefore cannot have any liability for driver actions.[204] Subsequently, Lyft's first passenger fatality was on November 1, 2014[205].

The CPUC and the California State legislature as a result begun creating new TNC regulations focused on protecting the general public from what now was an emerging danger of using TNC services.[206] The first major regulatory step was to bring TNC's under the CPUC's jurisdiction by requiring all TNC's to obtain licenses to operate in California. This then allowed for the creation of the 2013 regulations making TNC's accountable for their drivers.[207]

The CPUC began specifically requiring all TNC vehicles to carry accident insurance.[208] The Assembly Bill 2293 required minimum levels of insurance coverage for both i.e. while transporting passengers as well as when drivers were online and available to pick up passengers.[209] The 2013 Regulations also required TNC's to also conduct background checks on drivers[210] as well as the undertaking of driver training programs.[211] These raft of regulations successfully closed the gap between TNCs and taxicabs as regulations was now similar to their taxi counterparts in acknowledging that TNCs and taxicabs whereby

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[202] Supra 187 at 234.
[203] Supra 187 at 235.
[204] Supra 187 at 240.
[205] Supra 187 at 234-235.
[206] Supra 187 239.
[207] Supra 187 at 256.
[208] CPUC code 5433
2013 CPUC Order- Decision Adopting Rules and Regulations to Protect Public Safety While Allowing New Entrants to the Transportation Industry, at 16 17, R. 12-12-011, Dec. 13-09-045, 2013 WL 10230598 (Cal. Pub. Util. Comm'n Sept. 19, 2013), http://docs.cpuc.ca.gov/PublishedDocs/Published/GOOO /M077/K192/77192335.PDF [http://penna.cc/Z2JG-U4XZ].
[209] See Assembly Bill 2293 and CPUC Code 5433 (West 2014).
[210] Supra 187 at 242.
[211] Supra 187 at 256.

TNC's were not governed by a lesser standard.[212] Through such regulatory intervention, the legislature had made their intent very clear and that was to protect the public from the risk that TNCs posed. TNCs now follow a variety of regulations in order to operate in the State of California and plaintiffs are now able to hold TNCs liable for acts of their drivers.[213]

Legislative intervention was also seen in the Social Welfare sector in respect of tortious liability in Australia particularly in NSW. The Royal Commission into Institutional Responses to Child Sexual Abuse ('Commission') released its Redress and Civil Litigation Report in September 2015[214] and it concluded that there has been a failure to protect children across a number of generations.[215] The Commission recommended reforms to legal obstacles with civil liability legislation that ultimately now allow survivors of sexual abuse to pursue civil claims for damages against foster care institution.[216]

The government of NSW responded by making substantive reforms to its statutory civil liability provisions. It enacted a 'statutory duty of care' provision to its Civil Liability Act requiring foster care institutions to take reasonable precautions to prevent child abuse and introduced the phrase "individual associated".[217] There was also the creation of a rebuttable presumption of a breach unless the organization establishes that it took reasonable precautions to prevent abuse. Section 6F (2) states as follows:

"*An organisation that has responsibility for a child must take reasonable precautions to prevent an individual associated with the organisation from perpetrating child abuse of the child in connection with the organisation's responsibility for the child.".*

The definition of "individual associated" is contained in 6E (1*)* includes:

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[212] Supra 187 at 257.
[213] Supra 187 at 262.
[214] Royal Commission into Institutional Responses to Child Sexual Abuse, *Final Report* (15 December 2017) https://www.childabuseroyalcommission.gov.au/final-report (Accessed 01 October 2021).
[215] Ibid at 5.
[216] Stewart, P and Silink, A 'Australian civil litigation reform in response to the recommendations of the Royal Commission into Institutional Child Sexual Abuse'(2020) *Torts Law Journal* 1.
[217] Civil Liability Amendment (Organizational Child Abuse Liability) Act 2018 (NSW) inserted new pt 1B in Civil Liability Act 2002 (NSW), see particularly ss 6D–6F.

"an individual who is an office holder, officer, employee, owner, volunteer or contractor of the organisation and also includes the following--
(a) if the organisation is a religious organisation--a religious leader (such as a priest or a minister) or member of the personnel of the organisation,

(b) if the organisation or part of the organisation is a designated agency within the meaning of the Children's Guardian Act 2019 --an individual authorised by the designated agency (under that Act) as an authorised carer,

(c) an individual, or an individual belonging to a class of individuals, prescribed by the regulations.

(2) An individual is not associated with an organisation solely because the organisation wholly or partly funds or regulates another organisation.

(3) An individual associated with an organisation to which the exercise of care, supervision or authority over a child has been delegated, in whole or in part, is also taken to be an individual associated with the organisation from which the exercise of care, supervision or authority was delegated."

Such legislative provisions effectively created a form of primary responsibility (not vicarious) upon foster care organizations. This mandated a greater sense of responsibility directed at foster care institutions towards the supervision of its "individuals associated' with its child care responsibilities. A plaintiff will have to still prove that the breach of this statutory duty of care in negligence caused the abuse (i.e. not strict) and the ensuing harm, in order to recover damages against the institution.[218]

Apart from creating a direct duty of care upon foster care institutions, the government of NSW additionally enacted a form of statutory vicarious liability upon all organizations as a direct result of the change in the common law position in 2016.[219] Because of its previous 'deeply rooted'[220] doctrines, Australian common law did not allow vicarious liability to extend to the wrongdoing of independent contractors or other non-employees. In addition, according to Stewart, P such a position raised difficulties in the context of faith-based organizations where the relationships of priests or religious officials to church organizations almost always fell outside the traditional employment paradigm.[221] The 2003 decision in *New South Wales v Lepore & Anor*[222] had also left the common law

[218] Ibid at s.6F(3) & (4).
[219] Supra n222 at 3.
[220] *Sweeney v Boylan Nominees Pty Ltd* (2006) 226 CLR 161 (Sweeney) at para 33.
[221] Supra n224 at 23.
[222] Supra at n176.

approach towards vicarious liability unclear as various formulations of that test were espoused.[223] In addition, from the panel of seven judges in the case, one said it did, three said sexual abuse did not fall within the conduct in the course of employment, two said there were circumstances in which it might and the final judge did not address the issue. This situation was hardly ideal. Only then in 2016 did the case of *Prince Alfred College Incorporated v ADC*[224] provide clarity in a unified judicial approach moving Australian law closer to the Canadian and English positions which also directly resulted in the legislative reform as a result in the change in the common law position in Australia.[225] The common law in Canada and England for institutional vicarious liability concerning the relationship for child sexual abusers had already been reformed. Relationships that are 'akin to' employment have been held to suffice to give rise to vicarious liability of an institution. The cases of *Various Claimants v Catholic Child Welfare Society*[226], *Cox v Ministry of Justice*[227] and *Armes v Nottinghamshire County Council*[228] hold that if an employer and the tortfeasor are in a quasi-employee relationship or one akin to employment, liability may be found if it is fair, just and reasonable to do so.[229] The case of *JGE v Trustees of the Portsmouth Roman Catholic Diocesan Trust*[230] otherwise known as *E*'s case is the origin of the "akin to employment" test. It held that where a person is not strictly an employee or independent contractor, close attention should be made towards the employer's level of control over the employee, and the integration of the employee's activity into the employer's. In the *E*'s case it was determined that the relationship between a priest and a bishop was closer to an employee than an independent contractor and hence vicarious liability applied.

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[223] Laura Reisz & Amanda. Ryding 'The High Court Clarifies the Law Regarding Employers' Vicarious Liability for an Employee's Wrongful Acts' (05 October 2016) https://www.cbp.com.au/insights/insights/2016/october/the-high-court-clarifies-the-law-regarding-employe (Accessd 22 September 2021).
[224] *Prince Alfred College Incorporated v ADC* [2016] HCA.
[225] Supra n222 at 21.
[226] *Various Claimants v Catholic Child Welfare Society* [2012] UKSC 56.
[227] Supra n96.
[228] *Armes v Nottinghamshire County Council* [2017] UKSC 60.
[229] Yang, Low Kee &. Lai Siang Ping 'A Pause in the Expansion of Vicarious Liability?' (2020) (July) *Law Gazette* https://lawgazette.com.sg/feature/a-pause-in-the-expansion-of-vicarious-liability/ (Accessed 22 October 2021).
[230] *JGE v Trustees of the Portsmouth Roman Catholic Diocesan Trust* [2012] EWCA Civ 938.

Prince Alfred established the Australian "relevant approach" test. The test now essentially entails a factual examination into various features such as whether the apparent performance of such a role may provide the occasion for the wrongful act, the particular features that may be taken into account include authority, power, trust, control and the ability to achieve intimacy with the victim.[231] Noting such a development in the common law position, the NSW Parliament legislated the approach that was taken in *Prince Alfred College.* The resulting NSW Civil Liability Act 2002 s6H (1) & (2) now makes an organization 'vicariously liable for child abuse' if:

"(a) The apparent performance by the employee of a role in which the organization placed the employee supplies the occasion for the perpetration of the child abuse by the employee, and: (b) The employee takes advantage of that occasion to perpetrate the child abuse on the child."[232]

To determine whether the apparent performance of the employee's role supplies the occasion for abuse, a court must take into account whether the employee's position gave the employee one or more of:

"(a) authority, power or control over the child, (b) the trust of the child, (c) the ability to achieve intimacy with the child."[233]

In is interesting to note that section 6H(3) of the Act states as follows:

"*This section does not affect, and is in addition to, the common law as it applies with respect to vicarious liability*"

Such a clause is unique in the sense that despite it being of legislative stature, it essentially safeguards the future development of common law in the area of organizational child abuse ensuring it permissibility as well as its continued evolvement. [234]

It is to be noted that the NSW legislature has deliberately not extended vicarious application to the same range of workers to which the statutory duty of care applies. The

[231] Supra n231.
[232] Civil Liability Act 2002 (NSW) s6H (1).
[233] Civil Liability Act 2002 (NSW) s6H (2).
[234] Supra n222 at 23.

duty provision expressly defines 'an individual associated with an organization' to include a 'contractor of the organization'. The involvement of a contractor in abuse may trigger the presumption of breach of the statutory duty of care by the organization but the involvement of a contractor will not automatically make the organization strictly vicariously liable for the harm caused.[235] The legislative focus appears to be more on a primary duty of care on an extended group as opposed to a limited class towards vicarious responsibility.

The above are two contemporary examples of legislative reform in response to emerging trends. The CPUC reforms was in response to a notable deficiency in the law from the emergence of ride-sharing popularized largely via UBER since 2009. It effectively addressed the disjoint in application of the law when compared to traditional taxi services imposing regulatory requirements and holding service providers vicariously liable amidst the growing trend of safety concerns at the hands of drivers. The second example, although not concerning the transport sector, represents a response by an Australian federal territory to the failure of the Australian foster care system towards its foster care children. The legislative response now places greater responsibility on foster care providers in terms of an enhanced primary statutory duty of care as well the imposition of statutory vicarious liability. Simultaneously, common law has also revised its position with legislation amendment following suit and working simultaneously with legislation and even giving credence and a degree of superiority to common law.

The above two examples present the most direct method of addressing and or imposing vicarious imposition on taxi owners. Legislative examples from countries such as the United States and Australia has proven successful given that there is a will from Government to address the pressing issue at hand. Fiji currently does not have an equivalent Civil Liability Act. Proposed amendments rectifying the common law treatment of the relationship between owner and driver could be made under the Land Transport Act or even the Employment Relations Act 2007.

[235] Supra n212 at 25-26.

3.0 CONCLUSION

This research project has attempted to articulate the inherent limitation of the common law's ability to provide claimants with an effective form of recovery for damages sustained to their property at the hands of taxi drivers on Fijian Roads. In the absence of legislative provisions, current judicial precedent does not favor a claimant whose property has been damaged by a taxi driver. Whilst a judgement may hold a taxi driver liable, it practically does not provide claimant with an effective form of recovery. It is more likely than notthat judgements made against taxi drivers will default. The case of *Fowler v Ranadi* is a clear example of the current situation of the common law amongst a pressing problem on Fiji's roads today. To-date, despite the judgement against the 1st Defendant, it still has not been satisfied. International, national as well as reform measures have unfortunately largely directed measures towards the protection of bodily integrity rather than effective property indemnity measures. Recourse for those who have suffered property damage at the hands of taxi drivers appear to be at the mercy of the courts who appear to be applying the 'relationship test' very conservatively rather than liberally. Options for property protections such as third-party comprehensive insurance cover remain just an optional buy-in for Fijian road users.

Whilst this paper did not focus of effective judgement enforcement measures, it firstly offered an alternative as well as an enhanced approach towards vicarious reconsideration. A purposive approach is necessary in examining the factual considerations that needs to be made towards the assessment of the relationship status between a taxi owner and taxi driver. Unfortunately, *Fowler v Ranadi* limited itself towards considerations applied in *Hassan* in analyzing such a relationship yet did not allow a full appreciation of what of *Hassan* suggested towards more expanded considerations. International judicial precedent clearly shows that with an enhanced factual analysis the position could well change towards towards a more purposive stance. In-fact, it already exists and courts need to better articulate and orientate itself towards deciding in respect of what factors to consider.

Secondly, the imposition of non-delegable duties may offer some promise, but this is something for the future. Judicial precedent unfortunately has limited itself to only a few types of relationships that would see a non-delegable duty in the primary sense. The prospect of this being expanded to the transport sector at this point appears limited. The imposition of a non-delegable duty on the basis of a statutory duty of care in Fiji will most likely depend on clear legislative amendment for it to apply to property.

Lastly and the more direct route would be via legislative amendment. The United States experience has been quite dynamic with legislative reform. Uber and Lyft lobbied Congress to provide drivers with some employment benefits (such as minimum wage) but still not classify them as workers. Such 'portable benefits' acts to serve as middle ground i.e. a third classification rather than just deciding across two spectrums. A remodel in the structure of the relationship will be necessary. Issues such as taxi daily hire rates, compulsory superannuation, employment contracts and workmen's compensation are just some of the issues that will have to be addressed. This sort of hybrid model as in the 'gig economy' catering for community based/third party interests without establishing employee statuses could be viable.

Political will is necessary as was seen in the previous Obama administration when the United States government classified as many workers as they could as employees.[236] Unfortunately, such amendments, as history dedicated came at a time of need or as and when it was realized. The plight for claimants for recovery against tortious actions of taxi drivers at this point has not been realized despite statistics and trends to the contrary and would no doubt share the same fate by being labelled as reactionary rather than proactive.

Steve Maraboli said that "sometimes problems do not require a solution to solve them; instead they require maturity to out grow them". Unfortunately, this is not a problem that can be ignored with the hope that it was dissipate with time. Statistical information has revealed that this problem will persist as well as possibly increase with the growing number of taxi's and PSV driver permits being issued. Two out of the three solutions offer

[236] Casuga, J.A & Harris, A.B *Uber Will Push to Shape Direction of Biden Gig Worker Regulation* (2021) https://news.bloomberglaw.com/daily-labor-report/uber-will-push-to-shape-direction-of-biden-dols-gig-worker-rule (Accessed 11 November 2021).

significant promise towards addressing this pressing lacuna.

4.0 BIBLIOGRAPHY

Personal Communication

Chandra, A. personal communication, October 24, 2021.

Singh, H. personal communication, May 27, 2021.

Codes & Orders

2013 California Public Utilities Commission Order.

California Public Utilities Code 5433.

Bills

California Assembly Bill 2293.

Regulations & Statutes

Accident Compensation Act 2017.

Accident Compensation (Levies) Regulations 2017.

Accident Compensation Regulation 2017.

Civil Liability Act 2002 (NSW).

Civil Liability Amendment (Organizational Child Abuse Liability) Act 2018 (NSW).

Land Transport Act 1998.

Land Transport Authority (Driver) Regulations 2000.

Land Transport (Prescribed Form) Regulations 2000.

Land Transport (Public Service Vehicles) Regulations 2000.

Land Transport (Vehicle Registration and Construction) Regulations 2000.

New South Wales Civil Liability Act 2002.

Cases

Armes v Nottinghamshire County Council [2017] UKSC 60.

Barclays Bank plc v Various Claimants [2018] EWCA Civ 1670.

Barclays Bank plc v Various Claimant [2020] UKSC 13.

Bernard v A-G of Jamaica [2004] UKPC 47.

Candler v Thomas [1998] RTR 214.

Carter v Bradbeer [1975] 1 WLR 1204, 1206-1207.

Cassidy v Ministry of Health [1951] 1 All ER 574.

Catholic Child Welfare Society and others v Various claimants [2012] UKCS 56.

Commissioner of Taxation v De Luxe Red and Yellow Cabs Co-operative (Trading) Society Ltd (1998) 82 FCR 507 at para 522.

Cox v Ministry of Justice [2016] AC 660.

Darnice Linton v. Desoto Cab Company Inc A146162.

Doggett v. Waterloo Taxi-Cab Co., Ltd., reported in (1910) 3 BWCC 371.

Dynamex Operation West, Inc. v. Superior Court, 4 Cal. 5th 903.

E v English Province of Our Lady of Charity [2013] QB 722.

Felmlee v. Falcon Cable TV, 43 Cal. Rptr. 2d 158, 158, 162 (Ct. App. 1995), modified (July 28, 1995).

Fowler v. Lock. 7 L.T. 272 (C.P. 1872).

Fowler v Ranadi [2020] FJHC 299.

Gounder v Murr [2011] FJSC 12; CBV0009.2010 (12 August 2011)

Hassan v Transport Workers Union[2006] FJSC 11; CBV0006U.2005S (19 October 2006).

Imperial Chemical Industries Ltd v Shatwell [1965] AC 656.

JGE v Trustees of the Portsmouth Roman Catholic Diocesan Trust [2012] EWCA Civ 938,

Johnson v Coventry Churchchill International Ltd [1992] 3 ALL ER 14.

Kafagi v JBW Group Ltd [2018] EWCA Civ 1157.

Launchbury v Morgan [1972] UKHL 5.

Lee Tin Sang v Chung Chi-Keung [1990] 2 AC 374.
Leichhardt Municipal Council v Montgomery (2007) 230 CLR.
Lister v Hesley Hall Ltd [2001] UKHL 22.
MacFarlane v Glasgow CC [2001] IRLR 7.
Mohamud v Vm Morrison Supermarkets plc [2016] UKSC 11 & [2016] AC 677.
Montgomery v Johnson Underwood Ltd [2001] EWCA Civ 318.
MW Morrison Supermarkets plc v Various Claimants [2020] UKSC 12.
New South Wales v Lepore [2003] HCA 4, (2003) 212 CLR 511.
Ormrod v Crossville Motor Services Ltd [1953] 1 WLR1120.
Paige v. Red Top, Inc., 255 A.2d 279, 281 82 (N.J. Super. Ct. App. Div. 1969).
Performing Right Society Ltd v Mitchell and Booker (Palais de Danse) Ltd [1924] 1kb 762.
Prince Alfred College Incorporated v ADC [2016] HCA.
S.G. Borello & Sons Inc. v. Department of Industrial Relations (1989) (48 Cal.3d 341).
Stephenson, Jordan and Harrison Ltd v Macdonald & Evans [1952] 69 RPC 10.
Sweeney v Boylan Nominees Pty Ltd (2006) 226 CLR 161.
Teixeira v. Car Cab Three, Inc., 1994 Mass. App. Div. 154, 1 (Dist. Ct. 1994).
Tinkham v. Groveport-Madison Local Sch. Dist., 602 N.E.2d 256, 259 (Ohio Ct. App. 1991).
Trotman v North Yorkshire County Council [1999] LGR 584.
Quarman v Burnett (1840) 6 M & V 499.
Uber Bv and Others v Aslam and Others: SC 19 Feb 2021.
Viasystems (Tyneside) Ltd v Thermal Transfer (Northern) Ltd [2005] EWCA Civ 1151.
Various Claimants v Catholic Child Welfare Society[2013] AC 1.
Various Claimants v Catholic Child Welfare Society [2012] UKSC 56.
Woodland v Swimming Teachers' Association [2013] UKSC 66.
Yellow Cabs of Australia Ltd v Colgan [1930] AR (NSW) 137 at 165.
Yewen v Noakes [1880] 6 QBD 530.
Young & Woods Ltd V West [1980] IRLR 201.
Zuijs v Wirth Brothers Pty Ltd (1955) 93 CLR 561.

Ahmed, F. (2013, June 21). PSV Accident Rate Alarming. *Fiji Sun*. https://fijisun.com.fj/2013/06/21/psv-accident-rate-alarming/

Charles Chambers. (2020, March 14). Hitch Fiji – An Inside View Of New Taxi App. *Fiji Sun*. https://fijisun.com.fj/2020/03/14/hitch-fiji-an-inside-view-of-new-taxi-app

Dougherty, F. M. (1984). Liability of Employer with Regard to Inherently Dangerous Work for Injuries to Employees of Independent Contractor. *American Law Reports*, *34*(3), 914.

Fiji Competition and Consumer Council. (2020, March 3). Fiji Competition and Consumer Council and Land Transport Authority Crack Down on Illegal Uber Operations in Fiji. . *Fiji Sun*. https://fijisun.com.fj/2020/03/03/fccc-and-lta-crack-down-on-illegal-uber-operations-in-fiji/

Hylton, K. (1991). Litigation Costs and the Economic Theory of Tort Law. *Scholarly Commons at Boston University School of Law*. https://scholarship.law.bu.edu/cgi/viewcontent.cgi?article=2029&context=faculty_scholarship

Morgan, P. (2012a). RECASTING VICARIOUS LIABILITY. *The Cambridge Law Journal*, *71*(03), 615–650.

Morgan, P. (2012b). Ripe for reconsideration: Foster carers, context, and vicarious liability. *Torts Law Journal*, *20*(2), 110.

Nacei, L. (2020, March 25). *COVID-19: Income for cabbies shrink significantly*. The Fiji Times. https://www.fijitimes.com/covid-19-income-for-cabbies-shrink-significantly/

Pfeffer-Gillett, A. (2016). When "Disruption" Collides with Accountability: Holding Ridesharing Companies Liable for Acts of Their Drivers. *California Law Review*, *104*, 233–268.

Prakash, P. (2020). *Uber not permitted to operate in Fiji*. Fiji Broadcasting Commission. https://www.fbcnews.com.fj/news/uber-not-permitted-to-operate-in-the-country/.

Shaw, A. (2019, August 21). Ridesharing giant Uber to expand into six more New Zealand cities in October. *New Zealand Herald*. https://www.nzherald.co.nz/business/ridesharing-giant-uber-to-expand-into-six-more-new-zealand-cities-in-october/FBQM6USH435EW47QOGXJOKOL6A/

Silaitoga, S. (2021, June 2). *Income of taxi drivers plummet*. The Fiji Times. https://www.fijitimes.com/income-of-taxidrivers-plummet/

Silink, A Stewart, P (2020). Australian civil litigation reform in response to the recommendations of the Royal Commission into Institutional Child Sexual Abuse. *Torts Law Journal*, *26*(1). https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3628973

Talebula, W. (2021, April 2020). Fiji Cabs App to Assist Fijians Calling for a Taxi. *Fiji Sun.https://fijisun.com.fj/2020/04/05/fiji-cabs-app-to-assist-fijians-calling-for-a-taxi/*

Tziamalis, A (2017).Explainer: what is protectionism and could it benefit the US Economy *The Conversation* https://theconversation.com/explainer-what-is-protectionism-and-could-it-benefit-the-us-economy-73706.

Vodo. (10, August 2018). Introducing Vodo: Built To Improve Mobility In Fiji And The Islands. *FIji Sun*. https://fijisun.com.fj/2018/08/10/introducing-vodo-built-to-improve-mobility-in-fiji-and-the-islands/

William, G. (1956). Liability for Independant Contractors. *Cambridge Law Journal*, *180*, 196.

Witkin, B. E. (2005). Summary Torts. In *Summary of California Law* (p. 642).

Witting, C. (2008). Leichhardt Municipal Council v Montgomery: non-delegable duties and roads authorities. *Melbourne Law Review*, *32*(1), 332–349. https://law.unimelb.edu.au/__data/assets/pdf_file/0003/1705755/32_1_11.pdf

Yang, L. K. & L. S. P. (2020). A Pause in the Expansion of Vicarious Liability? *Law Gazette*, *July*. https://lawgazette.com.sg/feature/a-pause-in-the-expansion-of-vicarious-liability/?utm_source=rss&utm_medium=rss&utm_campaign=a-pause-in-the-expansion-of-vicarious-liability

Reports

Economy, F. M. of. (2017). *5-year and 20-year National Development Plan: Transforming Fiji*. https://www.fiji.gov.fj/getattachment/15b0ba03-825e-47f7-bf69-094ad33004dd/5-Year-20-Year-NATIONAL-DEVELOPMENT-PLAN.aspx

Fiji Roads Authority. (2014). *Greater Suva Roads Transportation Strategy 2015-2030*. https://www.fijiroads.org/wp-content/uploads/2018/11/GSTS-REPORT-2015-2030.pdf

Government of Fiji. (2011). *Fiji Decade for Action for Road Safety 2011-2020 National Action Plan*. https://www.fijiroads.org/wp-content/uploads/2016/08/Decade_of_Action_for_Road_Safety_Bookle.pdf.

Office of the Auditor General of the Republic of Fiji. (2020). *Report of the Auditor General of the Republic of Fiji: Performance Audit on Management of Traffic Congestion*. http://www.parliament.gov.fj/wp-content/uploads/2020/02/4-Office-of-the-Auditor-General-Report-on-Performance-Audit-on-Management-of-Traffic-Congestion.pdf.

Overseas Security Advisory Council. (2018). *Fiji 2018 Crime & Safety Report*. OSAC. https://www.osac.gov/Content/Report/9a8374d8-fb4d-4523-b589-15f4ae75e7c1.

Royal Commission into Institutional Responses to Child Sexual Abuse. (2017). *Royal Commission into Institutional Responses to Child Sexual Abuse, Final Report*. https://www.childabuseroyalcommission.gov.au/final-report.

Statistics, F. B. of. (n.d.). 2019-20 Household Income and Expenditure Survey. *Statistical News*, *4*. https://www.statsfiji.gov.fj/images/documents/2007_Census_of_Pop_Housing/Population-Censuses-and-Surveys/2019-20_Household_Income_and_Expenditure_Survey_Preliminary_Release.pdf

United Nations. (2011). *Global Plan for the Decade of Action for Road Safety 2011-2020*. https://www.who.int/roadsafety/decade_of_action/plan/plan_english.pdf

World Health Organisation. (2021). *Decade of Action for Road Safety*. https://www.who.int/teams/social-determinants-of-health/safety-and-mobility/decade-of-action-for-road-safety-2021-2030

Books

Atiyah, P.S (1967). *Vicarious Liability in the Law of Torts*. Butterworths.

Giliker, P. (2010). *Vicarious Liability in Tort: A Comparative Perspective*. Cambridge University Press.

Jones, M. A. (2002). *Textbook on Torts* (8th ed.). Oxford University Press.

Steele, J. (2017). *Tort Law: Texts, Cases, and Materials* (4th ed.). Oxford University Press.

Witting, C. (2015). *Street on Torts* (14th ed.). Oxford University Press.

Internet

Accident Compensaton Commission of Fiji. (2021). *Establishment of ACCF*. https://accf.com.fj/About-Us

Australian Government. (2018). *Uber in Australia*. Department of Industry, Science, Energy and Resources. https://www.industry.gov.au/data-and-publications/uber-in-australia

Casuga, J.-A. Harris, A.B (2021). *Uber Will Push to Shape Direction of Biden Gig Worker Regulation*. Bloomberg Law. https://news.bloomberglaw.com/daily-labor-report/uber-will-push-to-shape-direction-of-biden-dols-gig-worker-rule

Chand, A. & Reis, V. (2020). *Uber Drivers: Employees or Independent Contractors?* Kluwer International Tax Blog. http://kluwertaxblog.com/2020/04/03/uber-drivers-employees-or-independent-contractors/

Creighton B and Stewart A. (2005). *Labour Law* (4th ed.). Federation Press.

Dr. Hitesh Dhorajiwala, Atkinson, J (2021). *After Uber: Purposive Interpretation and the Future of Contract*. UK Labour Law Blog. https://uklabourlawblog.com/2021/04/01/after-uber-purposive-interpretation-and-the-future-of-contract-by-joe-atkinson-and-hitesh-dhorajiwala/

Hancy, G. (2017). *Strictly Liable Vicariously*. AILA. https://hancy.net/wp-content/uploads/2017/05/20170427-paper-AILA-Vicarious-Liability-by-Geoffrey-Hancy-barrister-1.pdf

Ivessa, R. (2017). The Outer Limits of Vicarious Liability and Agency in Tort. *Hearsay, 79*. https://www.hearsay.org.au/the-outer-limits-of-vicarious-liability-and-agency-in-tort/#_Toc480452152

Kern, R. (2018). *New Independent Contractors Classification Rules*. https://pknwlaw.com/newsletters/2018/q4/new-independent-contractors-classification-rules/

Markets and Markets. (n.d.). *Ride Sharing Market by Type (E-hailing, Station-Based, Car Sharing & Rental), Car Sharing (P2P, Corporate), Service (Navigation, Payment, Information), Micro-Mobility (Bicycle, Scooter), Vehicle Type, and Region - Global Forecast to 2026*. Retrieved August 15, 2021, from https://www.marketsandmarkets.com/Market-Reports/mobility-on-demand-market-198699113.html

McCloskey, J. (2020). *Barclays Bank v Various Claimants [2020] UKSC 13*. Carson McDowell LLP. https://www.carson-mcdowell.com/news-and-events/insights/barclays-bank-v-various-claimants-2020-uksc-13

Ryding, L. R. & A. (n.d.). *The High Court clarifies the law regarding employers' vicarious liability for an employee's wrongful acts*. Colin, Biggers and Paisley. Retrieved September 22, 2021, from https://www.cbp.com.au/insights/insights/2016/october/the-high-court-clarifies-the-law-regarding-employe.

Savage, A., & Broomfield, N. (2020). *Vicarious Liability : whose liability is it anyway ?* 4 New Square. https://www.4newsquare.com/wp-content/uploads/2020/04/Whose-Liability-is-it-anyway-vicarious-liability-article-final.pdf

Swinton. (2021). *The difference between car insurance and taxi insurance*. https://www.swinton.co.uk/taxi-insurance/taxi-guides/differences-taxi-and-car-insurance

The Right Honourable The Lord Phillips of Worth Matravers. (2015). *No Title*. The Common Law Lecture Series: Vicarious Liability on the Move. https://www.hkcfa.hk/filemanager/speech/en/upload/134/20150122 Phillips - HKU's common law lecture on Liability On The Move.pdf