

A NON-DELEGABLE OPTION IN THE TAXI SECTOR IN FIJI?

*Navneel Sharma**

This paper discusses the High Court of Fiji case of Fowler v Ranadi. It was a decision on the 'relationship' test, and imposed a limitation on the vicarious liability of taxi owners in Fiji for the actions of their drivers. It also explores a non-delegable duty for compensation from taxi owners for property loss caused by taxi drivers.

Cet article analyse la portée de l'arrêt "Fowler v Ranadi", rendu par la High Court de Fidji. En l'espèce, il s'agissait de déterminer les conditions dans lesquelles les propriétaires de taxis à Fidji pouvaient être tenus pour responsables des activités professionnelles de leurs chauffeurs et en conséquence d'avoir à indemniser les pertes matérielles causées par ces derniers. Dans cet arrêt, la High Court a été amenée à préciser la portée du critère de "relation", un des fondements de la notion deresponsabilité du fait d'autrui.

I INTRODUCTION

The case of *Fowler v Ranadi*¹ involved a claim by Mrs Fowler against the estate of a deceased taxi driver for damages. The claim was for \$55,532.76 being the value of the damages sustained to the vehicle of Mrs Fowler. The claim was also made against the taxi owner (Regent Taxis Limited) as a vicariously liable party. The Fiji Land Transport Act (LTA) and its Regulations have been designed in a way that an owner and a driver can be separate entities. The owner denied liability. The key point of argument was whether the relationship between both defendants was sufficient to impose vicarious liability on the owner. Ultimately judgment was entered against the first defendant as it was determined that the relationship of the driver to the owner was that of an independent contractor and not that of an employee. As a general principle of law, having the relationship determined to be that of an independent contractor negates any liability of a taxi owner for actions of its drivers whereas

* Assistant Lecturer in Law, University of the South Pacific.

1 *Fowler v Ranadi* [2020] FJHC 299.

establishing an employer/employee relationship is an integral first step to holding an employer vicariously liable for the driver's actions.

Witting stated² that in the past, employers were 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. However, as Lord Dyson stated, there is now an ever increasing complexity and sophistication of skillsets in the modern world³ and courts have as a result ceased to assume that someone performing work for another is an employee.⁴ The common law 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 are commonly referred to as 'employees' and the latter 'independent contractors'. The latter's actions are not attributable to the employer and hence claims of vicarious liability are not applicable.⁵ Much depends on a factual enquiry in respect of the features of the relationship. The reason for this according to William is that independent contractors, being independent and working for their own profit, form their own separate enterprise. It is essentially the contractor who is the entrepreneur.⁶

While the 'relationship test' has now being clarified in the *Barclays Bank plc v Various Claimant*⁷ ("Barclays") decision, its application still appears to be problematic. This paper outlines the problem in having the relationship between a taxi owner and taxi driver classified as that of an independent contractor. Taxi drivers appear to be operating with a relative level of impunity on Fiji's roads given their apparent insolvency – the reality is that taxi drivers cannot afford to pay for damages awarded against them.

II THE INDUSTRY SNAP-SHOT

Impecunious persons are not worth pursuing so focus should be on a feasible defendant. Given the common law limitations with the vicarious liability pathway in Fiji, this paper will focus on the viability of a non-delegable route towards imposing liability on the taxi owner. The growth of the taxi sector has resulted from annual

2 Witting, *C Street on Torts* (2015) 625.

3 *Mohamud v Vm Morrison Supermarkets plc* [2016] UKSC 11 and [2016] AC 677.

4 Steele, *J Tort Law: Texts, Cases, and Materials* (2017).

5 Morgan, P 'Recasting Vicarious Liability' (2012) 71(3) *Cambridge Law Journal* 625.

6 William, G. 'Liability for Independent Contractors' (1956) 14(2) *Cambridge Law Journal* 196.

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

budget incentives aimed at promoting the use of taxis by the general public. Those incentives expired in June 2021.⁸

Apart from duty concessions that make the taxi industry more lucrative, public transportation also enjoys protection from the ride-sharing industry. Both the Fiji Land Transport Authority and the Fijian Competition and Consumer Council have labelled ride-sharing operators as 'illegal competition' and they have not been allowed to operate in Fiji.⁹ The Fiji Land Transport Authority has even gone to the extent of informing the general public that they are to desist from using such 'illegal services' as they represent a safety concern¹⁰ taking the form of protectionism that essentially restricts the global ridesharing trend in favour of local taxi operations.

The Accident Compensation Commission of Fiji 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. This is essentially a no-fault scheme which extends beyond third parties.¹¹ The ultimate aim of such a legislative re-structure was to provide claimants with a nationally facilitated compensation scheme, with efficient processing of claims whereby claimants would no longer have to pay large sums to lawyers for drawn-out compensation struggles with insurance agencies who were benefiting from the previous third-party payment arrangement.¹² The Accident Compensation Commission of Fiji's focus is not on property loss. The Accident Compensation Act is limited to compensation for death and injury arising out of motor vehicle accidents in Fiji.¹³ Unlike this compulsory annual motor vehicle levy, comprehensive

8 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.

The 2017-2018 Fiji National Budget allowed for concessionary duties on taxis to encourage the growth of public transportation in Fiji. In the 2018-2019 Fiji National Budget, the incentives expanded to allow for half the subsisting duty rates on used vehicles less than two years old

9 Prakash, P 'Uber not permitted to operate in Fiji' *Fiji Broadcasting Corporation (Fiji)* (3 March 2023) <https://www.fbcnews.com.fj/news/uber-not-permitted-to-operate-in-the-country/> (Accessed 26 February 2023).

10 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)* 3 March 2020 <https://fijisun.com.fj/2020/03/03/fccc-and-lta-crack-down-on-illegal-uber-operations-in-fiji/> (Accessed 26 February 2023).

11 Rule 4 - Accident Compensation Regulation 2017 (Fiji).

12 Accident Compensation Commission on Fiji, 'Establishment of the ACCF' (2021).

13 Section - Accident Compensation Act 2017 (Fiji).

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.

Between 2007 and 2013 taxi drivers were responsible for 40 percent of all reported road accidents in Fiji.¹⁴ In 2013, taxis surpassed private cars in terms of the number of recorded accidents¹⁵ to the extent that the Fiji Roads Authority has established training programmes specifically to educate taxi drivers on safe driving practices as well as addressing their behaviour.¹⁶ The United States 2017 Crimes and Safety Situation National Report on Fiji also reported that taxi drivers in Fiji operate their vehicles recklessly and often do not follow traffic laws. The same report also stated that taxi drivers are often under the influence of alcohol and kava whilst operating their vehicles.¹⁷ Statistics for the period up to 2020 show a reduction by almost 22 percent, but taxi drivers were still responsible for 3,297 accidents over the past 5 years. This represented close to fifty percent of all public service vehicle accidents on Fiji roads, and ahead of buses, minibuses and hire cars during the 2015-2020 period. Apart from fatalities, hospitalisations and non-hospitalisations, the largest portion of accidents belong to the category 'damage only' ie property damage. 'Careless driving', 'speeding' and 'driving too close' were the three most common violations.¹⁸

In a practical sense, the issue arises in imposing judgments 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 contextualise it, \$2179.39 equates to \$5.97 per day.¹⁹ The Fiji Taxi Association General Secretary has recently noted with concern that taxi drivers' net take home pay during the

14 Ahmed, 11F "PSV accident rate alarming" *Fiji Sun* (Fiji) 21 June 2013 <https://fijisun.com.fj/2013/06/21/psv-accident-rate-alarming/> (Accessed 27 February 2023).

15 Fiji Roads Authority Greater Suva Transportation Strategy 2015-2030 (2014) 34.

16 *Ibid* at 107.

17 Overseas Security Advisory Council 'Fiji 2018 Crime & Safety Report' (2018) <https://www.osac.gov/Content/Report/9a8374d8-fb4d-4523-b589-15f4ae75e7c1> (Accessed 27 February 2023).

18 Interview with Harpreet Singh, Fiji Police Force (Nabua, Suva 27 May 2021). Harpreet Singh is currently the Senior Research Officer (Plans) with the Fiji Police Force.

19 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).

COVID-19 pandemic was between \$2 and \$5 per day.²⁰ Whereas before the COVID-19 pandemic the average daily net income was moderately above \$7 per day.²¹ This brief analysis shows that taxi drivers are currently below the poverty line or only marginally above the poverty line. The Household Income and Expenditure Survey reveals that taxi drivers are in a difficult financial position. This immediately raises questions about their ability to pay if found liable for damage.

III FOWLER V RANADI

The case of *Fowler v Ranadi* was the first time the landmark decision of *Barclays Bank plc v Various Claimant*²² was considered by the courts of Fiji. The *Barclays* case involved 126 claimants who brought an action against the bank in respect of sexual assaults committed by the doctor who conducted medical examinations for prospective employees as part of the bank's recruitment process.

The *Barclays* decision essentially set up a two-fold test.²³ The first involves a factual inquiry into understanding the details of the relationship.²⁴ The second involves the application of policy considerations only in the event that the factual inquiry did not assist. The decision provided clarity and affirmed the test that determines the distinction between an employee or independent contractor type of relationship.²⁵ Prior to the decision, the demarcation between a 'contract for service' as opposed to a 'contract of service' had become somewhat negligible. The *Barclays* decision has been praised on the basis that it provides a 'universally applicable test'²⁶ and hence clarity compared to the previous law.

20 Nacei, L, 'COVID 19: Income of cabbies shrink significantly' Fiji Times (Fiji) 25 March 2020 <https://www.fjitime.com/covid-19-income-for-cabbies-shrink-significantly/> (Accessed 24 July 2021).

21 Silaitoga, S 'Income of taxi drivers plummet' Fiji Times (Fiji) 02 June 2021 <https://www.fjitime.com/income-of-taxidrivers-plummet/> (Accessed 29 June 2021).

22 Above n7.

23 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 03 March 2023) at para 14.

24 Ibid at para 27.

25 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 03 March 2023).

26 Above n 23 at para 29.

In making an assessment of the type of relationship in *Fowler v Ranadi*, Justice Amaratunga made specific reference to the *Barclays* decision quoting para 27 of the decision as follows:²⁷

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.

In determining the 'relationship' status between the taxi owner and taxi driver, Justice Amaratunga in making the factual assessment of the features of the relationship between the parties limited himself to the factors that were taken into consideration in the Fiji Supreme Court decision of *Hassan v Transport Workers Union*.²⁸ The factors taken into consideration in that case were:²⁹

27 Above n7 at para 29.

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

By way of background, Ali Hassan was the owner of a fleet of taxi cabs who 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 were 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 recognise the Union for the purpose of its being a bargaining agent and 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 dismissed the 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 the Supreme Court 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 of relationship.

29 Above n 28 at para 83.

- (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.

Hassan had showed a willingness to accept additional factors towards determining the relationship status. There were also other factual considerations that the court was willing to consider but for which there was no evidence. The fact that it was raised by the court would show that it could well have had a bearing on determining the relationship status. The court noted that there was a lack of evidence to ascertain: (1) the ability to direct drivers to pick up passengers who called the base for a taxi; (2) if there was a tightly organised and controlled operational environment of which the drivers were an essential part; and (3) if there was a necessity to serve the owner's fixed customers.³⁰

Amaratunga, J simply stated that the case before him displayed a similar factual relationship to that in *Hassan* and that there was no need for him to factually distinguish it from *Hassan*.³¹ While Amaratunga, J bound himself to the limited factual considerations in *Hassan*, he expressed the hope that the position could change with time.³² This appears to be an oxymoron of sorts given there was already significant latitude to take into account additional factors. One would also question the veracity of arguments which could have assisted the court as possibly seen below.

The extent of renewed consideration is apparent in the newly dominant ridesharing market and fair comparisons can be made. According to Reis and Chand, on one side of the spectrum, rideshare drivers could be classified as employees where the company; (i) establishes rules regarding car maintenance and manners that must

30 Above n 28 at para 85-86.

31 Above n 28 at para 50.

32 Above n 1 at para 73.

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; and (v) can impose sanctions. These features indicate that there is some level of subordination and dependence that could well lead towards holding a relationship to be one of employer and employee. On the other side of the spectrum ride-share drivers could be viewed as independent contractors because drivers: (i) provide services whenever and wherever they want to and are not fixed to 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). Such considerations are not consistent with the traditional understanding of an employment relationship.³³ The competing considerations and similar experience within the 'gig economy' cumulated ultimately in some businesses in the United States addressing the conundrum via a 'hybrid approach' approach. The hybrid approach essentially involved businesses offering drivers some job and health benefits, without establishing their employee status.³⁴

IV A NON-DELEGABLE APPROACH?

Given the current limitation of the common law approach to the relationship test pertaining to the industry, a non-delegable approach is seen as an 'alternative route' towards imposing liability for the wrong doing of another. It is done by imposing primary responsibility on a person rather than the vicarious method of imputing blame.³⁵

If a person commits a tort and is classified as an 'independent contractor', no vicarious liability can arise. The imposition of a 'non-delegable duty' may however impose liability when an independent contractor acts tortiously.³⁶ The concept of a non-delegable duty allows for the delegation of *tasks* but not *duties*.³⁷ The *duty*

33 Chand, V and Reis, A V 'Uber Drivers: Employees or Independent Contractors?' (2020) <http://kluwertaxblog.com/2020/04/03/uber-drivers-employees-or-independent-contractors/> (Accessed 03 March 2023).

34 Ibid.

35 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.hkcfh.gov.hk/filemanager/speech/en/upload/134/20150122%20Phillips%20-%20HKU's%20common%20law%20lecture%20on%20Liability%20On%20The%20Move.pdf> (Accessed 03 March 2023).

36 Above n 2 at 574.

37 Above n 2 at 574.

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.³⁸

*Cassidy v Ministry of Health*³⁹ made an assessment as to whether the Ministry was liable for the negligence of two medical professionals whilst in its employment at a hospital. Lord Denning said:⁴⁰

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.

Lord Phillips stated that *Lister v Hesley Hall Ltd*⁴¹ could have come to the same conclusion if decided on the basis of a non-delegable duty.⁴² Lord Phillips made further reference to the *Cassidy*⁴³ and *Trotman v North Yorkshire County Council*⁴⁴ decisions and stated:⁴⁵

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 class [my emphasis]** 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

38 Above n 2 at 574.

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

40 Ibid at para 586.

41 *Lister v Hesley Hall Ltd* [2001] UKHL 22 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 previously by employees was not seen as being in the 'course of their employment'.

42 Above n 35 at 29-30

43 Above at n 39.

44 *Trotman v North Yorkshire County Council* [1999] LGR 584.

45 Above n 39 at paras 54-55.

entrust the performance of that duty to an employee and that employee fails to perform the duty they are still liable.

According to Steele, the case of *Woodland v Swimming Teachers' Association*⁴⁶ outlined the five circumstances in which a non-delegable duty will arise. These are: (1) a claimant's vulnerability or dependence on the defendant which is commonly associated with patients, children, prisoners and the 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 claimant's 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.⁴⁷

According to academics, the ability of a person to claim against a taxi owner for property damage caused by a taxi driver is limited, as the imposition on non-delegable responsibility appears to be commonly limited to patients, children, prisoners, elderly and occupiers of land.⁴⁸ It appears not to have progressed into other areas and is stringent in its applicability.⁴⁹ Kirby J in *New South Wales v Lepore*⁵⁰ denied the expansion of the categories of nondelegable duties because of the difficulties that arise in identifying "the precise characteristics of relationships said to justify the imposition of a non-delegable duty of care."⁵¹ This is supported by Rob Ivessa's comments stating that the categories of non-delegable duties are better

46 *Woodland v Swimming Teachers' Association* [2013] UKSC 66.

47 Above n4 at 601.

48 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 13 March 2023).

49 Ibid.

50 *New South Wales v Lepore* [2003] HCA 4, (2003) 212 CLR 511.

In addition, the case of *Wilsons and Clyde Coal Ltd v English* [1937] UKHL 2 is an important legal precedent in the area of non-delegable duty. In this case, the plaintiff was an employee of the defendant, Wilsons and Clyde Coal Ltd, who was injured while working in the defendant's mine. The plaintiff sued the defendant for damages, claiming that the defendant had breached its duty of care owed to him. This case established the principle of non-delegable duty, which had since expanded in a wide range of contexts. Non-delegable duty means that a party cannot delegate its duty of care to another party, even if that party is an independent contractor. This principle is particularly important in situations where a dangerous activity is being carried out, or where a vulnerable person is being cared for.

51 Ibid at 289.

understood with reference to established categories rather than unifying principle.⁵² Case law has similarly supported restricting the expansion of non-delegable duties as seen in the case of *Leichhardt Municipal Council v Montgomery*⁵³ 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."⁵⁴

The Fiji case of *Gounder v Murr*⁵⁵ similarly evidenced reluctance to transcend boundaries in respect of the categories of non-delegable duties. In that case, a tenant sought damages for lost property on the basis of an alleged contractor's non-delegable duty arising out of a failure to maintain the Fiji Electricity Authority standards of electrical safety. The claim was focused on failing to ensure that air conditioners were installed to comply with the 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 procedures, would have saved the claimant's 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 Australia; the issue of non-delegable duties pertaining to the factual circumstances of the case was according to the Supreme Court a 'thorny subject'.⁵⁶

Academic discussion and case authority in Australia has not presented a case for the imposition of a non-delegable duty in respect of taxi services. Kirby, J however discussed the imposition of a possible non-delegable duty on road authorities.⁵⁷ Kirby, J expressed difficulty in comparing cases such as the vulnerability of patients to duties owed by road authorities. He stated that 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* ie patients, children, prisoners and elderly.⁵⁸ He also stated that the limited expansion of the

52 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 05 March 2023).

53 *Leichhardt Municipal Council v Montgomery* (2007) 230 CLR 22.

54 *Ibid.*

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

56 Above at para 30.

57 Above n 48.

58 Above n 48 at 65-6.

categories of non-delegable duties was because it is directed towards the protection of bodily integrity. This approach is strengthened by the fact that non-delegable duty-holders are engaged in 'ongoing activities' such as the offering of medical services and educational services, hence there is a stricter onus on them in respect of their duties. According to Witting, the ongoing nature of the activities in established non-delegable fields provides the opportunity to reduce risks of harm 'directly' rather than 'indirectly'.⁵⁹ In the situation of allowing another to drive their vehicle the aspect of 'direct control' is difficult to achieve. Control is more indirect than direct and possibly not stringently applied given the practical flexibility allowed to most drivers in their day-to-day operations.

Amanda Savage 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".⁶⁰

The United States federal jurisdictions present some interesting analyses towards holding vehicle and licence holders liable under the doctrine of non-delegable duties. The case of *Paige v Red Top, Inc*⁶¹ concerned a lease between a taxicab company, Red Top, and an independent contractor. The lease was for both the company car and its licence to operate in Newark. Because the operation required a licence, 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*⁶² a case from Massachusetts, relying on *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 licence from the taxicab company, not the vehicle. The court held that the taxi company's licence to operate imposed a non-delegable 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*⁶³ 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 driver was either an employee or independent contractor. The court held that the company

59 Above n 48 at 348.

60 Above n 23 at para 183.

61 *Paige v Red Top, Inc.*, 255 A.2d 279, 281 82 (NJ Super Ct App Div 1969).

62 *Teixeira v Car Cab Three, Inc* 1994 Mass App Div 154, 1 (Dist. Ct. 1994).

63 *Tinkham v Groveport-Madison Local Sch Dist* 602 N.E.2d 256, 259 (Ohio Ct App 1991).

breached its non-delegable duty. The licence to operate imposed a non-delegable duty to protect its passengers. This perspective reflects a public policy concern in that it represents an interest in ensuring that there will be a financially responsible defendant for compensation purposes.⁶⁴

Alexi Pfeffer-Gillett explored the 'non-delegable' pathway, as opposed to vicarious liability, as he was of the opinion that tests developed in the 20th century for classifying workers via employment tests was not helpful in addressing 21st century problems.⁶⁵ He stated that the taxi industry is similar to Transport Network Companies "TNC" operations in the sense that TNC drivers are not independently licenced or insured; they operate under the commercial licence and commercial insurance of the parent TNC company. 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 tests.⁶⁶ The California regulations of TNCs touch on nearly every possible source of danger because California licensing requirements place affirmative and specific duties on TNCs towards safety in transporting passengers.⁶⁷ Hence the argument is that the onus should fall on the taxi owner as the responsibility has been given to them by legislation.

Developing on the above, Francis Dougherty stated that while non-delegable duties are an exception to the general rule, 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 the work itself because its performance creates dangers to others. He stated that if the work performed fits into one of these two categories, the employer may delegate the work to an independent contractor but cannot delegate the duty.⁶⁸

The above two situations are now examined in the context of Fiji's legislation: primarily the Land Transport Act (LTA). Section 63 (1) of the LTA states that:

64 Witkin, B. E 'Summary Torts' (2005) *Summary of California Law* at 634, 636 and 642.

65 Pfeffer-Gillett, Alexi 'When 'Disruption' Collides with Accountability: Holding Ridesharing Companies Liable for Acts of Their Drivers' (2016) *California Law Review* 238.

66 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/G000/M077/K192/77192335.PDF> [<http://penna.cc/Z2JG-U4XZ>] [hereinafter 2013 CPUC Order].

67 Above n 65 at 259.

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

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 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 s 63(3): the vehicle must be equipped for the conveyance of no fewer than 4 nor 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:

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....

The Land Transport (Public Service Vehicles) Regulations 2000 establish fitness requirements as a condition for permits ensuring standards of safety and comfort. Under reg 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 and not on the driver. There are specific requirements regarding vehicle fitness under the Land Transport (Vehicle Registration and Construction) Regulations 2000. These range from compliance with safety provisions⁶⁹ covering lamps and reflectors,⁷⁰ brakes, tires, wheels,⁷¹ fuels and exhaust systems,⁷² vehicle dimensions and loads⁷³ and other miscellaneous matters.⁷⁴ Such 'specific' compliance requirements are opposed to 'general' compliance requirements as it has a legal bearing. Defendants have managed to avoid non-delegable duty liability because the law governing their industry was too general to create affirmative duties. The case of *Felmlee v Falcon Cable TV*⁷⁵ 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"

69 Land Transport (Vehicle Registration and Construction) Regulations 2000 (Fiji) – r 43-45.

70 Ibid at r 55-68.

71 Above n 69 at r 69-75.

72 Above n 69 at r 76-78.

73 Above n 69 at r 79-91.

74 Above n 69 at r 92-98.

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

and "safe conditions for its employees" did not create a non-delegable duty. This was because it was seen as a mere general duty to maintain safe conditions, to which the non-delegable duties doctrine was not applicable.⁷⁶

Vehicle safety standards clearly rest upon the owner. In respect of safety concerning the driver, it appears from a non-delegable point of view that the onus is placed on the Land Transport Authority based on specific requirements under the LTA. Under Form 4 of the Land Transport (Prescribed Form) Regulations 2000, a person must submit a Police Clearance no more than 3 months old as part of their application for a Taxi Permit. In addition, pursuant to s 58(2) of the LTA, a driver's licence may be refused based on the nature of a conviction. 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) ...
 - (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.

The onus is hence not on the owner of the vehicle but placed clearly on the Land Transport Authority. Furthermore, provisions relating to Driver Safety Checks relate to the driver and the Land Transport Authority: it is a requirement under s 61(6) of the Land Transport Authority Act for all Public Service Drivers to have attended and participated in a formal course and programme of instruction in defensive driving and road safety run by the Land Transport Authority.

In relation to Francis Dougherty's second element, he determined the applicability of a non-delegable duty on the basis of there being a safety concern to the public. Pfeffer-Gillett aptly stated that where the purpose of licensing is to protect public safety, a licensee cannot avoid its duty to the public by delegating the licence to independent contractors.⁷⁷ In assessing the danger of TNC's vehicle operations, Alexi however did not provide data to confirm his position, but highlighted the level of heightened regulation of the TNC industry:⁷⁸

76 Above n 65 at 259.

77 Above n 65 at 259.

78 Above n65 at 260.

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.

The regulatory environment for the Fiji taxi industry is similar to that outlined above in the assessment of vehicle worthiness and the standard required of a driver. This is further bolstered with the current statistics concerning the accident rates of Public Service Vehicles and the negative role that taxi drivers have played. The rate of accidents occurring in Fiji is indeed a safety concern. Unfortunately analysis associates non-delegable duties towards personal safety rather than property protection. This is obviously the major obstacle 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.⁷⁹

The LTA ultimately provides a spilt approach in the possible application of non-delegable duties. There is a non-delegable argument pertaining to the implication of primary liability depending on whether a tortious liability arises out of vehicle fault or driver fault with it resting on either the vehicle owner or the Land Transport Authority for the latter. It however faces two significant hurdles towards its full realisation: expanding outside the current judicial classified categories established by *Woodman*, and its being more commonly associated with protection of bodily integrity rather than property indemnity.

V CONCLUSION

The common law precedents distinguishing employee and contractor status do not assist a plaintiff to obtain effective recovery. They limit a plaintiff to seeking compensation against the driver alone. However, the prospect of changing judicial reasoning offers considerable promise if a more expansive reasoning process is undertaken.

The alternative route of holding a taxi owner primarily liable is unfortunately limited. To change that, it would be necessary to break the bounds of the limited class of cases and their focus on bodily integrity.

79 Above n48 at 343.