LAUTOKA GENERAL TRANSPORT CO LTD v EMI VOSA, SIMELI RANATORA and THE NEW INDIA ASSURANCE CO LTD (CBV0015 of 2008S; CBV0017 of 2008S)

SUPREME COURT — CIVIL JURISDICTION

HETTIGE, SUNDARAM, CHANDRA JJ

11, 24 October 2012

Insurance law — liability — indemnification — insurance policies — public liability — coverage — excess fees — appeals — transport company took out public liability insurance with Assurance company in respect of its bus operations — claim made by transport company under policy after bus fell into a ditch injuring a respondent — bus was said to have been driven by other individual respondent — assurance company resisted claim of Transport company to provide public liability insurance — trial judge held that Transport company was liable for personal injuries sustained during accident and that Assurance company was liable to indemnify it in respect of those injuries — transport company and Assurance company both appealed against adverse findings made against them — whether Transport company was to be held liable for personal injuries sustained as a consequence of accident — whether Assurance company was liable to indemnify Transport company in respect of those personal injuries — Court of Appeal Rules ss 22, 22(3) — Supreme Court Act s 7(3).

Simeli Ranatora (Mr Ranatora) was employed by Lautoka General Transport Co (the Transport Company) as a mechanic. For his daughter's funeral in August 2001, Mr Ranatora requested the General Manager of the Transport Company to provide a bus to transport mourners from the funeral service at his house to the cemetery. The bus was provided on condition that the bus be driven by its regular driver, Mr Buto. When Mr Emi Vosa (Mr Vosa) with fellow mourners boarded the bus, Mr Buto who was in the driver's seat called out to Mr Ranatora to come and drive the bus. Mr Ranatora then took the bus, lost control of it and the bus ended up in a ditch. As a result a number of passengers were injured including the first respondent and Mr Buto was killed. Mr Vosa then issued proceedings against the Transport Company and the Transport Company sought indemnity from the New India Assurance Co (the Assurance Co) under a Public Liability Policy which the Transport Company had with the Assurance Company. The Assurance Company nevertheless declined to indemnify the Transport Company for the reason that the Transport Company had breached the warranty by not taking out Motor Vehicle Liability Insurance Policy as required of it.

The Transport Company then issued third party proceedings against the Assurance Company in the High Court at Lautoka. Mr Vosa, who was the plaintiff in the High Court case, pleaded that Mr Ranatora, whilst being the driver of the bus at the relevant time, was driving it at the request and on instructions of Mr. Buto who was the designated driver of the bus on behalf of the Transport Company. It was accordingly contended that the Transport Company was vicariously liable. The trial Judge, after being satisfied on the evidence that the accident occurred as a result of Mr Ranatora's negligence, and that he drove with the authority and at the direction of Mr Buto as the agent and servant of the Transport Company, accordingly found the Transport Company liable. The trial Judge accordingly held that: the Transport Company was vicariously liable for the negligent driving of the second respondent; the Assurance Company was liable to provide full and complete indemnity against the plaintiff's claim, interest and cost; and that the Assurance company was to indemnify the Transport Company as insurer. The Transport Company and the Assurance company then appealed against the conclusions that were adverse to them.

Held –

(1) The trial Judge was satisfied on the evidence that the accident occurred as a result of the negligence of Mr Ranatora, and that Mr Ranatora drove with the authority and on the direction of Mr Buto the agent and servant of the Transport Company, and accordingly found the Transport Company liable. That finding was open on the evidence.

(2) Mr Buto was the servant of the Transport Company and on this occasion he was serving his master on his instructions. The unauthorized act of Mr Buto requesting Mr Ranatora to drive the bus was connected with the authorized act of taking the mourners to the cemetery and it was not an independent act.

(3) The court was also not inclined to interfere with the finding of fact of the High Court Judge, which was affirmed by the Court of Appeal, that the Transport Company's failure to obtain and maintain a Primary Motor Insurance was by error or by accidental omission. That therefore did not exclude the claim.

(4) In the instant case the Transport Company by error or accidental omission had not obtained the Motor Vehicle liability Insurance Policy therefore there was no insurance cover to indemnify the first $100,000. Hence the Assurance Company under the policy was only liable to indemnify any claim over and above $100,000.

(5) The effect of the warranty was that when there was a deliberate breach of the warranty no claim would be payable but if the breach was by error, or by accidental omission it would be considered as if the Insured had complied, and the insurer had to pay under the Public Liability Policy after the first $100,000.

Appeals allowed in part.

Cases referred to

Canadian Pacific Railway Co v Lockhart [1942] AC 591; *L'Estrange v F Graucob Ltd* [1934] 2 KB 394; *Morgans v Launchbury* [1972] 2 All ER 606; *Parker v South Eastern Railway Co* [1877] 2 CPD 416; *Witon v Farnworth* [1948] 76 CLR 646, applied.

Ganesh & Another v Ali & Others Fiji Court of Appeal, Civil Appeal No 47 of 1978, cited.

Bulu v Housing Authority [2005] FJSC 1 CBV0011.2004S (8 April 2005), considered.

Ilkiw v Samuels [1963] 2 All ER 873; *New South Wales v Lepore; Samin v Queensland; Rich v Queensland* [2003] 212 CLR 511, followed.

F. Khan for the Petitioner.

R. Chaudhary for the first Respondent.

A. Sudhakar with *A. K. Narayan* for the third Respondent.

[1] Hettige, Sundaram, Chandra JJ. The Petitioners and the Respondents in both Special Leave to Appeal Applications agreed to consolidate both Appeals and for this court to deliver one judgment.

Facts of the Case

[2] The Second Respondent was employed by the Petitioner in CBV 0015/08 (Transport Company) as a mechanic. For his daughter's funeral the Second Respondent requested the General Manager of the Transport Company to provide a bus to transport mourners from the funeral service at his house to the cemetery on 23rd August 2001. The bus was provided on condition that the bus be driven by its regular driver, Mr Buto.

[3] When the First Respondent with fellow mourners boarded the bus, Mr Buto who was in the driver's seat called out to the Second Respondent to come and drive the bus. The Second Respondent took the bus, lost control of it and the bus

ended up in a ditch. As a result a number of passengers were injured including the First Respondent and Mr Buto was killed in the accident.

The High Court Case

[4] The First Respondent an injured in the said accident issued proceedings against the Transport Company and the Transport Company sought indemnity from the Assurance Company under a Public Liability Policy which Transport Company had with the Assurance Company. The Assurance Company declined to indemnify the Transport Company for the reasons that the Transport Company had breached the warranty by not taking out Motor Vehicle Liability Insurance Policy as required of it. The Transport Company then issued third party proceedings against the Assurance Company in the High Court at Lautoka Civil Action Number 036 of 2003L.

[5] The First Respondent, the plaintiff in the High Court case pleaded that the Second Defendant (Second Respondent) whilst being the driver of the bus at the relevant time was driving it at the request and on instructions of one Mr Buto who was the designated driver of the bus on behalf of the Transport Company and accordingly the Transport Company was vicariously liable.

[6] The trial Judge after being satisfied on the evidence that the accident occurred as a result of the negligence of Mr Ramatora, (Second Respondent) and that Mr Ramatora drove with the authority and at the direction of Mr Buto the agent and servant of the Transport Company, accordingly found the Transport Company liable and held:

> (a) The Transport Company was vicariously liable for the negligent driving of the 2nd Respondent.
>
> (b) The Assurance Company was liable to provide full and complete indemnity against the Plaintiff's claim, interest and cost and indemnify the Transport Company as insurer.

Court of Appeal Civil Appeal No.ABU 0102 of 2006S

[7] The Transport Company Appealed to the Court of Appeal against the above finding of the High Court Judge in Civil Appeal No ABU0102 of 2006S on the basis that Mr Ramatora was not driving the bus in the course of his employment, Mr Ramatora had been told by the General Manager of the bus Company that only Mr Buto was to drive and the trial judge erred in finding the Transport Company vicariously liable for the negligence of Mr Ramatora. The Court of Appeal dismissed the said Appeal.

[8] The Transport Company sought Special Leave to Appeal against the aforesaid judgment of the Court of Appeal, to the Supreme Court in Special Leave to Appeal No CBV0015 of 2008. In this Special Leave to Appeal Application the Transport Company has sought leave on the ground that the Court of Appeal erred in law in stating/finding/holding that the 1st Respondent sought leave and on the basis that it was granted during the appeal to amend her pleadings to allege that Mr Buto was negligent in permitting and/or instructing the 2nd Respondent to drive the bus, when no such application for amendment at all was made by the 1st Respondent during the appeal or at any time.

[9] The Learned Counsel who appeared for the Transport Company in this Special Leave to Appeal did not pursue the Appeal and as such the Special Leave to Appeal of the Petitioner No CBV0015 of 2008 is dismissed with Cost to the First Respondent in a sum of $ 3000.

Court of Appeal Civil Appeal No ABU 0104 of 2006S

[10] The Assurance Company too filed an Appeal to the Court of Appeal in Civil Appeal No ABU 0104 of 2006S against the Judgment of the Learned High Court Judge on the basis:

(a) That the Learned Trial Judge erred in Law in finding that Simeli Ranatora was acting as servant or agent of the Transport Company given that the situation in which Simeli Ranatora was driving, was solely for his own purposes.

(b) The Learned Trial Judge failed to consider the Primary Motor Insurance Clause in full or in context with the rest of the policy by failing to apply established principles of construction and interpretation, the failure to apply these principles resulted in an interpretation that left one part of the clause inconsistent with the next and led to an absurdity within that clause and the policy as a whole.

(c) The Learned Trial Judge erred in law and in fact in not finding from the inferences that should have been drawn from the evidence that there was a failure to comply with a Primary Motor Insurance clause over at least a four year period and/or a failure to read the policy over at least a four year period despite signing the policy of insurance, and that this was tantamount to recklessness, if not deliberate.

(d) The Learned Trial Judge erred in law and in fact in not holding that the Appellant was not liable to the Transport Company at all.

[11] The Court of Appeal by its Judgment dated 6th November 2008 dismissed the said Appeal.

[12] Against the said judgment of the Court of Appeal the Assurance Company is seeking Special Leave to Appeal on the following grounds;

(a) The Learned Judge erred in law in allowing an amendment of the pleadings of the First Respondent to include vicarious liability of the Transport Company as the result of the negligence of Mr Buto when no application for an amendment was made by the First Respondent.

(b) The learned Judge erred in law in holding the Transport Company vicariously liable for the negligence of Mr Buto.

(c) The learned Judge erred in law in failing to hold that the Transport Company through its Mr Singh by signing all the policies without reading the terms and conditions of the policy was reckless and thereby misapplied the law as to the presumptions created by a signed contractual document which would have resulted in the petitioner not being liable under the policy at all.

(d) The learned Judge erred in law in misconstruing the words of the policy by reading the second line of the warranty with a full stop when in fact there was a colon, resulting in the Learned Judges altering the meaning of the warranty, thus holding that the interpretation gave no effect to the sentence which read "This warranty shall not apply to error or accidental omission by the insured, his agents or employees:"

(e) The Learned Judge erred in law in not applying the proper principles of construction in assigning the meaning placed by them on the primary motor vehicle warranty in the policy which if they had properly applied would have led to the following effect:

(i) That no sum would be payable under the Public Liability Policy if there was a breach.

(ii) That the Petitioner would have to pay under the Public Liability Policy after the first $100,000.00 when there had been a compliance with the warranty.

(iii) That the Petitioner would only have to pay under the Public Liability Policy after the first $100,000.00 when there had been an error or accidental omission i.e complying with the primary motor vehicle policy warranty.

(f) The learned Judge erred in law in holding that the only way to interpret the warranty while giving meaning to each of its three sentences (whereas in reality there were only two sentences) is that if the failure to obtain primary motor insurance is due

to an error or accidental omission then there is either no warranty or no breach of the warranty and therefore there can be no consequence for breach, diverting from the rules of interpretation of documents whereby the documents should have been read in its entirety giving a right to the petitioner to deny liability for a deliberate breach of the warranty.

(g) The learned judge erred in law in holding that when there is a breach of the warranty, there can only be a claim under the policy when the third respondent had paid sums in excess of $100,000 in respect of any one accident when the correct position is that when there is a deliberate breach of the warranty no claim would be payable but if the breach is accidental or by omission then it will be taken as though a policy with the minimum of $100,000.00 limit existed.

(h) The learned Judge erred in law in wholly dismissing the Appeal No.ABU 104 of 2006

Ground (a)

[13] The Learned Judge erred in law in allowing an amendment of the pleadings of the First Respondent to include vicarious liability of the Transport Company as the result of the negligence of Mr Buto.

[14] From the submissions of the First Respondent it appears that the First Respondent had made an application to the Court of Appeal to exercise their powers pursuant to Section 22 of the Court of Appeal Rules and to find Buto negligent. Even if there is no application, the Court of Appeal on its own motion could have invoked the powers provided to the Court under Section 22 of the Court of Appeal Rules.

[15] The mere fact that a reference was made in the Court of Appeal Judgment to the effect that an amendment was sought and allowed will not have a bearing in the judgment as it in fact refers to an exercise of the power of the court under Section 22 of the Court of Appeal Rules.

[16] Section 22 of the Court of Appeal Rules provides as follows:

"General Powers of the Court

22.[1] In relation to an appeal, the Court of Appeal shall have all the powers and duties as to amendment and otherwise of the High Court

[2] The Court of Appeal shall have full discretionary power to receive further evidence upon questions of fact, either by oral examination in court, by affidavit, or by deposition taken before an examiner or commissioner:

Provided that in the case of an appeal from a judgment after trial or hearing of any cause or matter upon the merits, no such further evidence [other than evidence as to matters which have occurred after the date of the trial or hearing] shall be admitted except on special grounds.

[3] The Court of Appeal shall have power to draw inferences of fact and to give any judgment and make any order which ought to have been given or made and to make such further or other order as the case may require.

[4]The powers of the Court of Appeal under the foregoing provisions of this rule may be exercised notwithstanding that no notice of appeal or respondent's notice has been given in respect of any particular part of the decision of the Court below or by any particular party to the proceedings in that court, or that any ground for allowing the appeal or for affirming or varying the decision of that court is not specified in such a notice; and the Court of Appeal may make any order, on such terms as the Court thinks just, to ensure the determination on the merits of the real question in controversy between the parties.

[5] The powers of the Court of Appeal in respect of an appeal shall not be restricted by reason of any interlocutory order from which there has been no appeal."

[17] The Plaintiff had pleaded the liability of both Mr Buto and Mr Ramatora in the High Court case to the effect that the 2nd Respondent whilst being the driver of the bus at the relevant time was driving it at the request and on instructions of one Mr Buto who was the designated driver of the bus on behalf of the petitioner and accordingly the petitioner is vicariously liable.

[18] The trial Judge was satisfied on the evidence that the accident occurred as a result of the negligence of Mr Ramatora, and that Mr Ramatora drove with the authority and on the direction of Mr Buto the agent and servant of the Transport Company, and accordingly found the Transport Company liable.

[19] The Court of Appeal in its judgment observed:

> *"It is however evident that the late Mr Buto was negligent in permitting, indeed on the evidence, demanding that Mr Ramatora drive the bus. Mr Buto knew or ought to have known that his co-employee was a mechanic not a bus driver and Mr Buto knew that his employer had given specific instructions that only he, Mr Buto, was to drive the bus that day. Mr Buto was not on a frolic of his own, and if the plaintiff had pleaded this negligence against Mr Buto then the trial judge would have been bound to find negligence and further bound to find the bus company vicariously liable."*

[20] In the above circumstances the Court of Appeal under Section 22[3] of the Court of Appeal Rules could exercise its powers to draw inference of fact from the evidence led, and could make a finding that Mr Buto was negligent and that caused the accident and the petitioner vicariously liable. This finding could be included in the judgment of the Court of Appeal and the Court could made consequential orders.

[21] Before drawing the above inference the Court of Appeal had considered the consequences of drawing such an inference and observed in paragraph [21] and [22]:

> *"All relevant factual matters were before the trial judge and were determined by the trial judge. The witness who gave evidence on Mr Buto's instructions to Mr Ramatora were cross-examined. Mr Buto was killed in the accident, and this is not a case where if the plaintiff's case had been pleaded as now amended, other evidence would have been called below."*
>
> *In saying this the Court notes that Mr Ramatora did not give evidence. He was a Co-defendant with and, so the Court was told, is still an employee of the bus company and there is no suggestion that he was not called to give evidence because of the way liability was pleaded against the bus company. There can be no prejudice in the relevant sense to the other parties in allowing the amendment."*

[22] The amendment referred to in the above portions of the judgment as I have already discussed is to draw inferences of fact and to give a judgment under Section 22 of the Court of Appeal Rules which in effect varied the judgment of the trial court.

[23] The Court of Appeal to give effect to the demands of justice has exercised its discretion and drawn the inference that Mr Buto was negligent and the bus company vicariously liable for the negligence of Mr Buto. Based on this finding the appeal of the Petitioner was dismissed by the Court of Appeal.

[24] For the reasons stated above this Court is of the view that there is no merit in the ground of appeal (a).

Ground (b)

[25] The learned Judge erred in law in holding the Transport Company vicariously liable for the negligence of Mr Buto.

[26] The learned Counsel submitted that Mr Buto on the day of the accident was not performing his function in the course of the employment of the Transport Company and the purpose for which the bus was driven by Mr Buto was not for the purpose of the Transport Company. Therefore the Transport Company is not vicariously liable for the negligence of Mr Buto.

[27] The learned counsel relied on the judgment of the Privy Council in *Canadian Pacific Railway Co v Lockhart* [1942] AC 591 at 599 where Lord Thankerton said:

> *"The general principles ruling a case of this type are well known, but, ultimately, each case will depend for decision on its own facts. As regards the principles, their Lordships agree with the statement in Salmond on Torts,9th ed.,p.95, namely:"it is clear that the master is responsible for acts actually authorized by him: for liability to exist in this case, even if the relation between the parties were merely one of agency, and not one of service at all. But a master opposed to the employer of an independent contractor, is liable even for acts which he has not authorized, provided that they are so connected with acts which he has authorized that they may rightly be regarded as modes-although improper modes-doing them. In other words, a master is responsible not merely for what he authorize his servant to do, but also for the way in which he does it….On the other hand, if the unauthorized and wrongful act of the servant is not so connected with the authorized act as to be a mode of doing it, but is an independent act, the master is not responsible: for in such a case the servant is not acting in the course of his employment, but has gone outside of it."*

[28] It is in evidence that Mr Boto was employed by the Transport Company as a driver and Mr Buto was in employment on the day of Accident and he was given in charge of the bus that met with the Accident. Specific instruction was given by the General Manager of the Transport Company to Mr Buto to be as the driver of the bus and to drive the bus. He had taken the bus to the Third respondent's house where the funeral service took place. It is in evidence that when the First respondent with fellow mourners boarded the bus, to be transported to the cemetery Buto who was in the driver's seat called out to the Third respondent to come and drive the bus.

[29] The facts of this case clearly reveals that Mr Buto was the servant of the Transport Company and on this occasion he was serving his master on his instructions. The unauthorized act of Mr Buto requesting the Second Respondent to drive the bus is connected with the authorized act of taking the mourners to the cemetery and it is not an independent act and therefore the Master (Transport Company) is responsible not merely for what he authorizes his servant to do, but also for the way in which he does it.

[30] The Learned Counsel for the Assurance Company submitted that granting permission to drive the bus to a function cannot be considered as driving the bus in the course of his employment. In support of his contention he cited *Ganesh & Another v Ali & Others* Fiji Court of Appeal, Civil Appeal No 47 of 1978 in which the Court cited with approval the House of Lords decision of *Morgans v Launchbury* [1972] 2 All ER 606 at 602 where the House of Lords quoted Lord Salmon who said:

> "As I understand the authorities the law at present makes the owner or bailee of a car vicariously responsible for the negligence of the person driving it, if, but only if, that person is (a) his servant and driving the car in the course of his employment or (b) his authorized agent driving the car for and on his behalf …….Thus, mere permission to drive is not enough to create vicarious responsibility for negligence….. So far as I

know, until the present case, du Parcq LJ's statement of law in *Hewitt v Bonvin* [1940] 1 KB 188 at 194, has never been questioned:

The driver of a car may not be the owner's servant, and the owner will be nevertheless liable for his negligent driving if it be proved that at the material time he has authority, express or implied, to drive on the owner's behalf. Such liability depends not on ownership, but on the delegation of a task or duty."

[31] The evidence shows that Mr Buto was an employee of the Transport Company at the relevant time and he was assigned this duty by the General Manager of the Transport Company. Mr Buto was not driving the bus for his own purpose but for the purpose of the Transport Company to provide transport to persons attending a funeral of the daughter of one of the employees of the Transport Company. As such Mr Buto as the servant of Transport Company was driving the bus in the course of his employment and it cannot be construed as giving mere permission to drive the bus. At all material times Mr Buto was performing his function in the course of the employment of the Transport Company.

[32] The other issue raised by the Counsel of the Assurance Company was whether the bus was used in the cause of Transport Company's business? There is evidence to show that a proper procedure was followed in obtaining the services of the bus to transport mourners from the funeral house to the cemetery. The 3rd Respondent had made a request to the Company and the General Manager had assigned the bus with the driver of the company with specific instructions to drive the bus. In the normal circumstances the Company would have charged a fee for the services rendered by the Company for running the bus for a specific purpose. In this event no fee was charged as the request was from an employee of the Company for his daughter's funeral.

[33] The Transport Company's business is to deploy the bus on payment of fees and the mere fact that on this occasion the bus was not deployed on payment of fees would not take the deployment of the bus out of the cause of Transport Company's business. The consideration of fee could be substituted by other Considerations as the bus was deployed for the benefit of an employee of the Transport Company.

[34] In particular the 'Public Liability Insurance Policy' (Policy) entered in to between the Transport Company and the Assurance Company, specifically provides as follows:

"…… the Insurers agree to indemnify the Insured for all amounts which the Insured shall become legally liable to pay by way of compensation by reason of Personal Injury or Property Damage caused by an occurrence in connection with the Business."

This clause shows that the Assurance Company agreed to indemnify any damage caused by the bus of the Transport Company not only if the bus is used for the purpose of the Company's Business but also for the use in connection with the Business of the Company.

[35] The Learned Counsel for the Transport Company submitted in the Court of Appeal that the trial judge erred in finding the Transport Company liable for the negligence of Mr Ramatora. The submission was that Mr Ramatora was not driving the bus in the course of his employment and he further submitted that the trial judge misapplied the decisions that he referred to, namely *Ilkiw v Samuels* [1963] 2 All ER 879 and *New South Wales v Lepore; Samin v Queensland; Rich v Queensland[@fffd]* [@fffd](2003) 212 CLR 511. The Court of Appeal correctly rejected this submission and observed:

[11] In Ilkiw the authorized lorry driver Waines had instructions from his employer British Sugar not to allow the lorry to be driven by anyone else. In breach of those instructions he allowed a workman Samuels, who was not an employee of British Sugar and who had never driven a lorry before, to drive the lorry and the plaintiff was injured.

[12] Willmer LJ held that British sugar could not be made vicariously liable for the negligence of Samuels who was not their servant. However the trial judge had found that Waines was negligent in allowing Samuels to drive and that British Sugar was vicariously liable for Wainses' negligence, and the Court of Appeal agreed holding that an employer could only escape liability:

"If, but only if, at the time of the negligent act, the vehicle was being used by the driver for the purpose of what has been called a "frolic" of his own. That is not this case."

[36] In the above circumstances the petitioner's submission that the learned Judge erred in law in holding the Transport Company vicariously liable for the negligence of Mr Buto cannot be substantiated.

Grounds (c) to (h)

[37] These grounds deals with the interpretation of the 'Public Liability Insurance Policy' (The Policy) entered in to between the Transport Company and the Assurance Company. The Transport Company sought indemnity from the Assurance Company under this policy. The Assurance Company declined to indemnify the Transport Company for the reasons that the Transport Company had breached the warranty by not taking out motor vehicle liability insurance as required of it.

[38] The preamble to the Schedule to the Policy provides:

"In consideration of the payment of premium and subject to the terms conditions definitions exclusions warranties and limits of liability incorporated herein, the Insurers agree to indemnify the Insured for all amounts which the Insured shall become legally liable to pay by way of compensation by reason of Personal Injury or Property Damage caused by an occurrence in connection with the Business."

This clause clearly provides subject to the terms conditions definitions exclusions warranties and limits of liability incorporated herein, the Insurers agree to indemnify the Insured.

[39] The warranty of the Policy reads as follows:

PRIMARY MOTOR INSURANCE

The Insured warrants that during the currency of this policy, there will be maintained in full force and effect motor vehicle liability insurance covering both Bodily Injury and Property Damage in respect of vehicles owned by or leased or rented to the insured for which registration is required by reason of Road with a limit of liability any one accident of at least $ 100,000.

This warranty shall not apply to error or accidental omission by the Insured, his agent or employees:

In the event of a breach of this warranty, this policy shall not be voided but shall apply only to the extent as if the Insured had complied with.

[40] It is admitted by the insured that the Transport Company had not obtained and maintained motor vehicle liability insurance, covering both Bodily Injury and Property Damage in respect of vehicles owned by or leased or rented to the insured.

[41] The Policy provides:

PROVIDED FURTHER THAT the due observance and fulfilments of the terms, conditions and endorsement of this policy by the insured in so far as they relate to

> anything to be done or complied with by the insured shall be conditions precedent to any liability of the Company to make any payment under this policy. No waiver of any of the terms provisions, conditions and endorsements of this policy or the renewal thereof shall be valid unless made in writing signed by any authorized official of the Company.

[42] In view of the above provision the due observance and fulfilments of the warranty is a condition precedent to any liability of the Company to make any payment under this policy. But the warranty itself has given an exemption to the fulfilment of the warranty ie:

This warranty shall not apply to error or accidental omission by the Insured, his agent or employees:

> In the event of a breach of this warranty, this policy shall not be voided but shall apply only to the extent as if the Insured had complied with.

[43] By the above exemption if the insured could establish that the non fulfilment of the warranty was by error or accidental omission by the Insured, his agent or employees then the insured could be considered as though he had complied with the warranty. Namely; the insured had obtained and maintained in full force and effect motor vehicle liability insurance covering both Bodily Injury and Property Damage in respect of vehicles owned by or leased or rented to the Insured for which registration is required by reason of Road with a limit of liability any one accident of at least $ 100,000.

[44] Had the Transport Company established that the non fulfilment of the warranty was by error or accidental omission by itself, his agent or employees?

[45] The position of the Transport Company was that the Assurance Company had not informed them when obtaining Public Liability Insurance Policy that they should also obtain a motor vehicle liability insurance policy therefore the failure to obtain and maintain motor vehicle liability insurance was an error or accidental omission.

[46] The Learned Counsel for the Assurance Company contended that there is no ambiguity as to the meaning of the Primary Motor Insurance clause, leaving the Transport Company with the argument that the Assurance Company gave no advice to it regarding the requirement to effect Primary Motor Insurance. The significance of signing a contractual document as Scrutton LJ outlines in *L'Estrange v F Graucob Ltd* [1934] 2 KB 394 at 403 is that:

> *"When a document containing contractual terms is signed, then, in the absence of fraud, or, I will add, misrepresentation, the party signing it is bound, and it is wholly immaterial whether he has read the document or not."*

Similar view was expressed by Mellish LJ in *Parker v South Eastern Railway Company* (1877) 2 CPD 416 at 421 and Latham CJ in *Witon v Farnworth* (1948) 76 CLR 646 at 649.

[47] The learned High Court judge in his judgment observed:

> *"[35] Counsel for the third party submits that the failure of the 1st defendant to comply with this requirement from 1997 was either deliberate or reckless and was neither an error nor an accidental omission which might trigger the proviso to the "Primary Motor Insurance" endorsement.*
>
> *[36] On behalf of the 1st defendant it is however submitted that insurance cover was at all relevant times effected on behalf of the 1st defendant with an employee of the third party who at no time advised the 1st defendant of any requirement to effect any other*

insurance policies other than the public liability policy and the third party insurance policy. The evidence of Pyara Singh on behalf of the 1st defendant confirms that no advice was ever given.

[37]on behalf of the 1st defendant it is then submitted that the third party is estopped by conduct of its employee or agent from denying that the 1st defendant maintained motor vehicle liability insurance. The evidence of Mr Singh is that the employee or agent of the third party was relied upon by the 1st defendant to effect its insurance policy."

[49] From the above observation it could be seen that the learned High Court Judge has come to the conclusion that the Assurance Company had not given any advice at any time to the Transport Company to obtain and maintain motor vehicle liability insurance, covering both Bodily Injury and Property Damage. The employee or agent of the Assurance Company was relied upon by the Transport Company to effect its insurance policy. In effect the court has come to the conclusion that the failure to obtain and maintain motor vehicle liability insurance is an error or accidental omission by the Transport Company, his agent or employees. The High court Judge also observed that no evidence was led by the Assurance Company to rebut this position that the insurance was effected by an agent of the Assurance Company.

[50] The finder of fact, the trial judge accepted the evidence of Pyara Singh and arrived at a finding that the failure to obtain and maintain the motor vehicle liability insurance covering personal injury and property damage was an error or accidental omission. The judge observed that the position of Pyara Singh was not rebutted.

[51] In the Court of Appeal His Lordships observed:

"[39] In relation to proving accident or omission, once it was established that the primary policy hadn't been effected, the onus was on the bus company to prove that this was due to error or accidental omission. And that is what it did. The onus of rebutting this, or establishing that the failure was reckless or deliberate, then shifted back to the insurer."

[52] The High Court and the Court of Appeal have made concurrent findings of fact. In *Bulu v Housing Authority* [2005] FJSC 1; CBV0011.2004S(8 April 2005) the Supreme Court Held:

"[5] These grounds, so far as they relate to questions of fact, have been the subject of concurrent findings in the Court of Appeal and the High court.

[6] The appellate jurisdiction of the Privy Council in cases from Fiji and other jurisdictions was exercised in appeals as of right and by special leave. Even in appeals as of right the Privy Council would rarely disturb concurrent findings of fact. See *Srimati Bibhabati Devi v Kumar Ramendra Narayan Roy* [1946] AC 508. There is no appeal as of right to this court and a petitioner seeking special leave to review concurrent findings of fact faces considerable difficulties."

[53] In the above circumstances this court is not inclined to interfere with the finding of fact of the High Court Judge, which was affirmed by the Court of Appeal, that the Transport Company's failure to obtain and maintain a Primary Motor Insurance is by error or by accidental omission.

The provisions of the warranty

[54] The first limb of the warranty reads as follows:

"The Insured warrants that during the currency of this policy, there will be maintained in full force and effect motor vehicle liability insurance covering both

Bodily Injury and Property Damage in respect of vehicles owned by or leased or rented to the insured for which registration is required by reason of Road with a limit of liability any one accident of at least $ 100,000."

To comply with this warranty the Transport Company would have obtained and maintained a motor vehicle liability insurance covering both Bodily Injury and Property Damage with a limit of liability any one accident of at least $100,000. If the Transport Company had complied with this warranty at the time of accident it would have two insurance policy namely; Motor Vehicle liability Insurance policy and Public liability insurance policy in addition to the compulsory third party insurance.

[55] The Public Liability Insurance Policy in clause 8 provides:

"If at any time claim arises under the policy there in any other existing insurance covering the same liability the company shall not be liable to pay or contribute more than its rateable proportion of any compensation cost of expenses."

In other words if the Transport Company had complied with the warranty it would had been indemnified by the Motor Vehicle Liability Insurance Policy up to $100,000 and over and above it would have been indemnified by the Public Liability Insurance Policy.

[56] As the Transport Company had not complied with the warranty and as it is a condition precedent to the liability of the Assurance Company to make any payment under the policy the Transport Company is not entitled to any indemnity. But as the failure to comply with the warranty was by error or accidental omission as shown by the Transport Company and found by the Court the Transport Company will fall under the exemption; the second limb of the warranty clause. i.e.:

"This warranty shall not apply to error or accidental omission by the Insured, his agent or employees:

In the event of a breach of this warranty, this policy shall not be voided but shall apply only to the extent as if the Insured had complied with."

[57] Under the above clause the Transport Company will be considered as it has complied with the warranty. The Assurance Company under the policy would indemnify any claim over and above $100,000 and Motor Vehicle liability Insurance Policy would have indemnified up to $100,000. In the instant case the Transport Company by error or accidental omission has not obtained the Motor Vehicle liability Insurance Policy therefore there is no insurance cover to indemnify the first $100,000. Hence the Assurance Company under the policy is only liable to indemnify any claim over and above $100,000.

[58] The second limb cannot be interpreted to mean that the Assurance Company have to indemnify the full amount claimed as the failure to comply with the warranty was by error or accidental omission. The second limb of the warranty has to be read together and any other interpretation to the second limb other than the interpretation given above would lead to absurdity; where a person who had not complied with the warranty would be in a beneficial position than a person who had complied with the warranty and had obtained Motor Vehicle Liability Insurance Policy and paying premium for that policy as well.

[59] The effect of the warranty is that when there is a deliberate breach of the warranty no claim would be payable but if the breach is by error, or by accidental omission it will be considered as if the Insured had complied with. And the

insurer would be obliged to indemnify the Transport Company when the Transport Company became liable for amounts exceeding $100,000.

[60] In the above circumstances the learned High Court Judge had erred that after finding that the breach of the warranty was by error, or accidental omission, the Assurance Company was liable to provide full and complete indemnity against the Plaintiff's claim, interest and cost and indemnify the Transport Company as insurer.

[61] The Court of Appeal had also erred in dismissing the appeal against this finding.

Special leave to Appeal

Section 7(3) of the Supreme Court Act 1998 provides: *"In relation to a civil matters (including a matter involving a constitutional question), the Supreme Court must not grant special leave to appeal unless the case raises-*

(a) a far-reaching question of law;

(b) a matter of great general or public importance;

(c) a matter that is otherwise of substantial general interest to the administration of civil justice."

[63] The points raised in this appeal raises issues of substantial general interest to the administration of civil justice in so far as it relates to all cases of compensation in fatal or personal injury claims affecting the general public at large. They clearly meet the requirements of s 7(3) of the Supreme Court Act 1998. We therefore grant special leave to appeal and go on to consider the substantive Appeal.

The Substantive Appeal

[64] We hold that the Learned Trial Judge had come to the correct conclusion that the failure to obtain and maintain Motor Vehicle Liability Insurance Policy, is an error or accidental omission by the Transport Company, his agent or employees. The Court of Appeal had affirmed this finding.

[65] However, we are of the view that both Courts had come to a wrong finding that when the insured failed to comply with the warranty by error or accidental omission the insurer the Assurance Company was liable to provide full and complete indemnity against the Plaintiff's claim, interest and cost.

[66] The effect of the warranty is that when there is a deliberate breach of the warranty no claim would be payable but if the breach is by error, or by accidental omission it will be considered as if the Insured had complied with, and the insurer has to pay under the Public Liability Policy after the first $100,000.00.

[67] The appeal therefore succeeds on this ground.

The Orders

[68] The Orders are:

Civil Appeal No CBV0015 of 2008

(a) Special Leave to appeal dismissed.

(b) The Petitioner to pay in a sum of $3,000 to the First Respondent.

Civil Appeal No CBV0017 of 2008

(a) The Court set aside the judgment and the orders of the Court of Appeal in Civil Appeal No ABU 0104 of 2006.

(b) The Court affirms the judgment and orders of the High Court subject to the variation; that the third party Assurance Company is liable to indemnify the 1st Defendant (1st Respondent) under Public Liability Policy over and above $100,000.00

(c) The Court makes no variation in the orders of costs awarded in the High Court and in the Court of Appeal in Civil Appeal No ABU0102 of 2006.

(d) The Court makes no orders of costs in this appeal No CBV0017 of 2008 as the case is in the nature of a test case and the insurer has made his legal point.

Appeals allowed in part.

Alex de Costa
Solicitor