

**IN THE COURT OF APPEAL, FIJI**  
**[Civil Appellate Jurisdiction]**

**Civil Appeal No: ABU 0035 of 2013**  
**(High Court File No. 048.2009)**

**BETWEEN** : **SUN INSURANCE COMPANY LIMITED**

**Appellant**

**AND** : **MOSESE QAQANAQELE**

**1<sup>st</sup> Respondent**

: **ABDUL SAKIL**

**2<sup>nd</sup> Respondent**

: **ALI IMDAD**

**3<sup>rd</sup> Respondent**

**Coram** : Almeida Guneratne, JA  
Prematilaka, JA  
Wati, JA

**Counsel** : Mr. A. K. Narayan with Mr. A. Ram for the Appellant  
Mr. A. Kohli for the 1<sup>st</sup> Respondent  
Mr. A. Sen for the 3<sup>rd</sup> Respondent

**Date of Hearing** : 8 September 2016

**Date of Ruling** : 30 September 2016

**JUDGMENT**

**Almeida Guneratne, JA**

**The Background to this Appeal**

- [1] This is a case where a girl of 5 years was killed in a road accident by a motor vehicle belonging to the 3<sup>rd</sup> respondent (original 2<sup>nd</sup> defendant) driven by the 2<sup>nd</sup> respondent (original 1<sup>st</sup> defendant). The present Appellant (insurance company) was added as third party. It had been agreed at the pre-trial conference that the 2<sup>nd</sup> Respondent was driving

the vehicle owned by the 3<sup>rd</sup> Respondent as his servant and agent when it knocked down the child who died the same day although in the 3<sup>rd</sup> Respondent's Statement of Defence this had been denied. (see in that regard paragraph 19.2 of the trial judge's evaluation which I endorse).

[2] The father of the deceased child, having obtained probate in regard to the child's estate filed action as Administrator thereof and claimed a sum of \$4,799.00 as special damages and general damages in terms of the provisions of the Law Reform (Miscellaneous Provisions) (Death and Interest) Act (Cap 27) and the compensation to Relatives Act (cap. 29).

[3] After hearing evidence, the learned High Court Judge, concluded thus:

*"(i) The 1<sup>st</sup> Defendant negligently caused the death of the child and the second defendant is vicariously liable for the negligence and the Defendants are liable to pay damages to the plaintiff.*

*(ii) The 3<sup>rd</sup> party is liable to indemnify the damages ordered against the Defendants."*

*(Paragraph 24 of the judgment at page 20 of the Record of the High Court (RHC)."*

[4] The learned judge thereafter decreed as follows:

*"(a) The Defendants are ordered to pay the damages by the plaintiff In the statement of claim and I direct the learned Master of this Court to assess the damages.*

*(b) The Third party is ordered to indemnify the damages ordered under paragraph (a):*

*(c) Costs to be assessed."*

- [5] Earlier the High Court had refused an application to amend the statement of defence of the third party (the present appellant).

### **GROUND OF APPEAL**

- [6] In as many as 12 grounds of appeal have been urged by the Appellant in the Notice of Appeal dated 29 July 2013. (pages 1 to 4, RHC) which may be reproduced as below for convenience.

1. *The Learned Trial Judge erred in law and in fact in finding that negligence had been proved and failed to properly and or adequately evaluate all the evidence as to liability.*
2. *The Learned Trial Judge erred in law and in fact in drawing an inference in the absence of any expert evidence or applying the stopping distances prescribed that as the vehicle stopped 10 to 12 feet after the collision with the child that he was coming at a speed which error caused him to find the 1<sup>st</sup> Defendant negligent.*
3. *The Learned Trial Judge erred in law in fact in failing to properly consider that conduct of children of the age of the deceased are unpredictable and as such required supervision and in such circumstances and the circumstances pertaining to this matter the accident was caused by such failure and/or contributed thereto.*
4. *The Learned Trial Judge erred in law and in fact in making an apparent finding that the Appellant was liable to pay damages found against the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents in favour of the 1<sup>st</sup> Respondent.*
5. *The Learned Trial Judge erred in law and in fact:*
  - (a) *In finding that notice of the accident apparently given to the Appellant's agent in Labasa was notice to the Appellant of the accident required by sections 11(2) and 16 of the Motor Vehicles (Third Party Insurance) Act ("Act"); and/or*
  - (b) *In finding that Vinod was infact Sun Insurance Company Limited contrary to the meaning given in Section 2(1) of the Act to "Approved Insurance Company" and as otherwise the term "Insurance Company" is used throughout the Act and employed under the relative Third Party Insurance Policy in relation to third party risks.*
6. *The Learned Trial Judge erred in law and in fact in not finding that in the circumstances and having alluded to section 16 of the Motor Vehicles (Third Party Insurance) Act that*



*there had in fact been a breach and/or non-compliance with the provisions thereof such that there should not have been any finding of liability to pay the damages ordered against the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents in favour of the 1<sup>st</sup> Respondent.*

7. *The Learned Trial Judge erred in law and in fact in failing to dismiss the Third Party proceedings against the Appellant on the grounds that:*

1. *There had been a failure to comply with section 16(1) of the Motor Vehicles (Third Party Insurance) Act and/or;*
  2. *There had been a breach of section 16(2) of the Motor Vehicles (Third Party Insurance) Act and/or;*
  3. *There had been a failure to comply with section 11(2) of the Motor Vehicles (Third Party Insurance) Act.*
8. *The Learned Trial Judge erred in law and in fact in failing to appreciate that the Motor Vehicles (Third Party Insurance) Act imposed conditions of liability under the compulsory motor vehicle policy issued by the Appellant in addition to the express words of the policy and which conditions applied irrespective of whose failure and the circumstances which led to that failure.*
9. *The learned Trial Judge failed to consider and take into account and/or failed to properly consider and take into account that the indemnity, if this was totally separate from the statutory obligations was limited in any event and of no consequence as the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents were under an obligation to pay the Appellant any sum payable on their behalf as a debt by virtue of section 16(4) of the Motor Vehicles (Third Party Insurance) Act.*
10. *The Learned Trial finding of liability and/or order to pay damages by the Appellant found against the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents is otherwise erroneous and obtains the relief otherwise prevented by the operation of section 11(2) of the Motor Vehicles (Third Party Insurance) Act.*
11. *The Learned Trial Judge erred in law and in fact in concluding that the notice given to Vinod satisfies the requirements of section 16(1) and there was no necessity to give any further notice to the third party which finding is contrary to section 16 (2) of the Motor Vehicles (Third Party Insurance) Act and further erred in finding that the Appellants solicitor (Mr Ram) caused the delay in notification to the Appellant when there had already been a non-compliance with section 16(2).*
12. *The Learned Trial Judge's criticism of the Appellants solicitor (Mr Ram) and findings against him were erroneous and not justified on the evidence (or the lack thereof) which thereby caused him to err and find there was no need to give any further notice.*

## **PROPOSED ADDITIONAL GROUNDS OF APPEAL**

- [7] By a motion dated 24 August, 2016 the Appellant has given notice of a further two grounds of appeal – viz:

*“1. The Learned Trial Judge erred in law and fact in dismissing the application to amend the Third Party Defence on 6<sup>th</sup> March, 2013, when it actually allowed evidence to be led and heard on the issues that were to be incorporated in the amended Third Party Defence.*

*2. The Learned Trial Judge misapplied the principles on amendments by holding that injustice would be caused to the other party when the amendment was necessary and relevant to the issues to be determined and no prejudice would have been caused to any party.”*

- [8] Appellant’s counsel supported the said motion at the hearing on 8 September, 2016.

- [9] As the said proposed Ground 1 itself reveals, although the trial judge had dismissed the application to amend the third party defence, he had not only allowed evidence to be led but also had heard on the issues that were to be incorporated in the said proposed amendment. He had addressed the said issues as well in the judgment. Accordingly I see no reason to allow the said proposed amendment at this stage. Consequently, I also cannot see any purpose being served in considering the said proposed Ground 2 as well.

- [10] I now turn my attention to the grounds of appeal contained in the Notice of Appeal dated 29 July, 2013.

## **THE ISSUE ON NEGLIGENCE**

- [11] Grounds 1 to 3 in the said Notice of Appeal relate to this issue and I shall deal with them cumulatively. In my quest to deal with them I propose to visit the evidence on the issue which the learned High Court Judge acted upon for the purpose of my legal analysis that would ensue.

- [12] The child’s mother giving evidence had deposed to the following facts:-



- (i) The vehicle was coming down a hill
- (ii) The child was in the middle of the road when the accident took place
- (iii) No horn was tooted
- (iv) The vehicle was about 100 metres away when the child was trying to cross the road
- (v) The vehicle had come to a halt 10 to 12 feet away from the child after it had struck her.

[13] It is to be noted here that, the driver of the vehicle (the 1<sup>st</sup> defendant at the trial who is the 2<sup>nd</sup> Respondent to this appeal) did not participate at the trial. He did not participate at the Appeal before this Court either.

[14] Mr. Narayan, Learned Counsel for the Appellant, sought to counter the negligence issue on several fronts, namely;

- (i) that, failure to toot the horn was not conclusive given the fact that, as the learned High Court Judge himself had observed, there was no evidence to show that the driver was driving in excess of any prescribed speed limit;
- (ii) that, the Police had not charged the driver on the basis that, the deceased child had herself been negligent in crossing the road;
- (iii) that, police maps or sketches (what I would like to call the “Distance Theories”) were also not produced in evidence.
- (iv) That, certain documents or literature Counsel tendered to Court would substantiate his contention (iii) above.
- (v) The child’s parents had failed to take proper care of her (thus suggesting the defence of contributory negligence).

[15] Learned Counsel for the 1<sup>st</sup> Respondent (original plaintiff), Mr Kohli, was equal to the task when he submitted thus:

- (i) That, the mother's evidence was not challenged;
- (ii) That, the driver did not give evidence;
- (iii) That, the vehicle was going through a village when "special care" was required. (though the vehicle was being driven within the prescribed speed limits).
- (iv) That, therefore, 'speeds' had to be assessed and determined in the said circumstances.

**My Assessment of the Submissions referred to above**

[16] To begin with the documents or literature counsel tendered to Court (vide: paragraph 14(iv), being unauthenticated and not permissible by any rule of evidence or procedure I have no hesitation in rejecting the same.

[17] In regard to (i) of paragraph 14 recounted above I am inclined to accept Mr. Kohli's argument which I have recapped at paragraph [15] above.

[18] In so far as (ii), (iii) and (v) are concerned, which I have recounted in paragraph 14 above I shall deal with them later in my legal analysis but before going into that, I must acknowledge the interposition made by my brother, His Lordship Justice Prematilaka when he pointed out to the evidence on Record where, the deceased child's elder brother, though himself young in age had cautioned his sister in regard to the oncoming vehicle. His Lordship's reason for saying so being that, the driver should have seen the boy going across the road cautioning his younger sister which ought to have put the driver on guard seeing a little girl of 4 to 5 years running across the road. Though he was within the speed limit yet in the circumstances, special care was required on his part.

- [19] I hasten to add here that, as against all that, the entire line of cross-examination on behalf of the 2<sup>nd</sup> Defendant's counsel (at the trial) had been based on the failure on the part of the parents of the child to have supervised the child given the fact they had been in the vicinity, the child playing around with her elder brother around 3 or 4 metres away.
- [20] The learned High Court Trial Judge's finding on the uncontroverted evidence of the mother of the said child as recounted earlier (at paragraphs [12] and [15] of this judgment holding as he did that the driver had failed to take proper care to avoid the accident.
- [21] In that background of the evidence that appears on Record and the learned High Court Judge's treatment of the same I shall now proceed to consider the legal matrix that impacts on the issue of negligence.

**Legal Matrix on the Issue of Negligence in its application to the facts of the instant case**

- [22] Negligence is, doing or omitting to do something what a reasonable man would not do or would not omit to do in a given situation. That standard is partly objective and partly subjective. Objective, if the alleged wrongdoer's personal equation, (such as temperament and experience), is taken into account; subjective, in so far as the standard takes account of the circumstances in which he found himself.

**Application of the said hybrid standard to the instant case on a balance of probabilities**

- [23] The learned High Court Judge observed that, the 1<sup>st</sup> defendant (the driver) had been driving at normal speed. But could that alone have absolved him? The deceased child's mother's evidence was that the driver had not even tooted the horn, although there was no evidence to show that the road was crowded. On the other hand, it is also not in evidence that the child suddenly jumped on to the road. The child's mother's evidence in my view suggests quite the contrary. The fact that the police had not charged the driver may be



relevant to a case of criminal negligence, although Police sketches mapping out the scene of the accident which might have shown the relevant distances were not forthcoming.

**Experience is not just what happens to Man – special care in relation to children of tender years**

- [24] The 1<sup>st</sup> defendant driving at normal speed may well be said to have been his usual experience in his duty to adult road users. But as Aldous Huxley reminds us “Experience is not just what happens to man but it is what man does with what happens to him.”
- [25] It is to be borne in mind that, the 1<sup>st</sup> defendant did not participate in the proceedings. It is only he who could have thrown light on unexplained aspects of the accident. Faced with this girl suddenly crossing the road, it was incumbent on him to have exercised extra caution than would have been required in relation to an adult. That is how I would approach and respond to Huxley’s reminder (supra).

**Four considerations that feed the criteria of experience in driving a vehicle**

1<sup>st</sup> consideration – the Degree of Risk Run in relation to the class of person

- [26] The degree of risk run – the likelihood of the injury/accident being in fact caused to the class of persons likely to suffer from his conduct is the first consideration. For example, a reasonable motorist would be expected to approach a child of tender years whom he sees about to cross the street, with more care than he would approach an adult pedestrian. It would be otherwise, if the motorist neither knew nor could reasonably be expected to observe and guard against, the pedestrian’s infirmity. (vide: Bournemouth v. Young [1943] AC 92, 109 – 10.
- [27] If the 1<sup>st</sup> defendant could not have observed and guarded against the deceased child’s infirmity, I cannot help but state that, he could not have been regarded as a motorist competent to drive a vehicle.

## **2<sup>nd</sup> Consideration – the gravity of the consequences**

- [28] Thus, the 1<sup>st</sup> defendant had to be found liable, for the consequences that resulted – the death of the child in question – in failing to take special precaution to have avoided the accident amounting to a breach of duty owed to the child as a victim, who fell into that class of persons to whom a special duty was owed.

## **3<sup>rd</sup> Consideration – the object to be attained**

- [29] This is an aspect that is intrinsically linked with the earlier two considerations which is that, a motorist owes a special duty to a child of tender years. It had been observed as way back in the year 1946 by Asquith, L.J. that,

*“if all the trains in this country were restricted to a speed of 5 miles an hour, there would be fewer accidents, but our national life would be intolerably slowed down. The purpose to be served, if sufficiently important, may justify the assumption of abnormal risk.” (at p.336, Daborn v. Bath Tramways [1946] 2 All ER).*

## **The other side of the Coin**

- [30] Applying the competing factors which that judicial mind had addressed in the said dictum, I venture to reflect upon them as follows:

- (i) The 1<sup>st</sup> defendant cannot be said to have assumed an abnormal risk *per se* driving the vehicle. In fact, the learned trial judge himself observed that the 1<sup>st</sup> defendant had been driving at a speed within the limits of the law.

- (ii) But, that did not absolve him from the special duty of care he owed to the girl who had been crossing the road.
- (iii) Viewing the matter from that perspective, it is my view that, even though he may have been driving at a speed within the limits of the law he, as a motorist, was required to reduce his “normal speed” and taken all precautions to avoid the accident. That view, to my mind would represent the other side of the coin of what Asquith, L.J had propounded. That is, when it comes to children of tender years using a road, a motorist must eliminate any risk of injuring them by exercising additional precaution by reducing even the normal speed he was driving at.
- (iv) The 1<sup>st</sup> defendant did not give evidence and never took part in the proceedings. In the result, only the child’s mother’s evidence was available to the learned High Court Judge to act upon and make a determination on “Negligence” encompassing within that concept, the criteria of ‘foreseeability’ duty and breach of that duty of care owed to children of tender years, principles, entrenched in the law expounded in the seminal English decisions such as **Donoghue v Stevenson** [1932] AC 562 per Lord Atkin; **Heaven v Pender** [1883] 11QBD 503 per Brett, M.R; **Bouhill v Young** (per Lord Denning, *supra*).

#### **4<sup>th</sup> Consideration – Evidential Aspects**

- [31] This relates to the failure on the part of the 1<sup>st</sup> Defendant (the motorist) to participate at the trial, I take off from what I have stated earlier.
- [32] Evidence being given for the Plaintiff and therefore in the minimum the plaintiff having established a prima facie case of negligence, the failure on the part of the 1<sup>st</sup> defendant to come forward and participate at the trial in his defence, in my view, stands procedurally as an additional factor that stood in favour of the plaintiff’s case based on negligence.



- [33] Therefore, I venture to state that, where a plaintiff through his witnesses has led sufficient evidence on an allegation of negligence, the failure on the part of a defendant to adduce evidence to the contrary adds a new factor in favour of a plaintiff.
- [34] While I was in the process of preparing my judgment in draft, my brother Justice Prematilaka, JA made available to me two recent decisions (viz: Prest v Prest [2013] 2 AC 415 and Gordon Ramsay v Gary Love [2015] EWHC 65 which lend support to the proposition I have stated above.
- [35] Consequently, if one leaves the matter to rest with the evidence given by the child's mother recapped by the learned High Court Judge taken in conjunction with the 1<sup>st</sup> defendant not taking part in the proceedings, I feel no constraint in holding that a case of negligence had been established.

### **The Figure of Justice**

- [36] I hold so, for the figure of justice carries but a pair of scales and not a cornucopia and in my view in regard to said scales I have no hesitation in concluding that they stood tilted against the 1<sup>st</sup> defendant for which reason I would not have thought it necessary to invoke the principle of Res Ipsa Loquitur, which the learned High Court Judge is seen having resorted to. I say so for the following reasons:

### **The Scope and Content of Res Ipsa Loquitur**

- [37] No doubt, in the instant case the plaintiff had to prove negligence and it was not for the defendant driver (the 3<sup>rd</sup> Respondent to this appeal) to disprove it. But, as it so happens in many cases this poses hardship to the plaintiff because, he can prove the accident but the true cause of the accident lies solely within the knowledge of the defendant who caused it. It is this hardship to a plaintiff that is avoided by the principle *res ipsa loquitur*.
- [38] But here one finds a case where there was "reasonable evidence of negligence" led on behalf of the plaintiff and "in the absence of any explanation by the defendant" (the

driver) that, “the accident did not take place for want of care,” the learned High Court judge found that a case of negligence had been established. That conclusion I affirm.

[39] I have put above within quotes which appear in the leading case of Scott v. London and St. Catherine Docks Co. [1865] 3H&C.591 on *res ipsa loquitur* which is acknowledged as having reached doctrinal proportions, but, in my humble view ought never to have been so, for where the facts are shown on evidence, there is no reason for the application of the said maxim, in as much as, in such a case the only question is whether an inference of negligence was justified. (vide: Barkway v. South Wales Transport Co. [1950]. 1 AllER 392 at 395 – see also Bolton v. Stone [1951] A.C. 850, at 859.

[40] Once that inference was drawn by the learned High Court Judge there was no need to have resorted to the maxim in question in as much as the conditions for the operation of the said maxim and the effect of operation of the same stood rendered as redundant factors.

[41] On the other hand, still it was open for defendants to prove that, the accident was due to a specific cause which negated the driver’s negligence.

[42] And what was the specific cause/causes put in issue by the defendants? (the appellant and the 3<sup>rd</sup> Respondent?).

- (a) Contributory Negligence on the part of the child and,
- (b) Contributory Negligence on the part of her parents.

### **Contributory Negligence and Applicable Principles**

[43] The term negligence in the expression ‘contributory negligence’ is used in a somewhat different sense to ‘negligence’ *per se*. This is because negligence in its strict sense implies a breach of a duty owed by the party sued to the injured party.

“When contributory negligence is set up as a defence, its existence does not depend on any duty owed by the injured party to the party sued, and all that is necessary to establish



such a defence is to prove that the injured party did not in his own interest take reasonable care of himself and contributed, by this want of care, to his own injury.”

(vide: Nance v. British Columbia Electric Ry. Co. Ltd [1951] A.C. 601 at 611 perviscount simon.

- [44] In other words, while it is not enough for the party sued to show that the injured party's conduct contributed to the accident, he must also show that the injured party's conduct constituted negligence in that he failed to exercise the care which a prudent man would have exercised in the circumstances.

**Can the prudent man's test be applied to a child of tender years?**

- [45] The same degree of care which a prudent man is required to exercise cannot be expected of a child as opposed to an adult's conduct.
- [46] In this regard, I found a useful precedent in Gough v. Thorne [1966] 3 AllER398.
- [47] That case was concerned with a 13 year old girl crossing a main road at the signal of a halted lorry driver, without pausing to see whether the vehicle that hit her was wrongly overtaking the lorry on the far side. She had been waiting with her two brothers on the pavement to cross the road. The trial judge had found the girl guilty of contributory negligence. The Court of Appeal reversed that decision.

Said Lord Denning:

*“I am afraid that I cannot agree with the judge. A very young child cannot be guilty of contributory negligence. An older may be; but it depends on the circumstances. A judge should only find a child guilty of contributory negligence if he or she is of such an age as reasonably to be expected to take precautions for his or her own safety. A child has ..... not the road sense or the experience of his or her elders. He or she is not to be found guilty unless he or she is blameworthy. (at page 399).*



[48] As would be seen that case was concerned with a 13 year old girl. What was said in that case must apply with the greatest force in the instant case. The deceased child was just 4 to 5 years. Was she expected to ask herself: *“my brother cautioned me but he did not ask me to cross? Will a vehicle come down the road? Even if one were to come will not the driver see me?”*

[49] Is a child of 4 to 5 years to be held negligent because she failed to go through those mental processes?

[50] I think not.

[51] For the aforesaid reasons I reject Counsel’s argument that the deceased child was guilty of contributory negligence.

#### **Alleged contributory negligence of the child’s Parents**

[52] It was contended that since the parents of the deceased child were sitting in their house in the verandah drinking tea and in as much as the child was wholly unsupervised, they had contributed to the fate that befell her. (Paragraph 4.4 (iii) of the Appellant’s written submissions).

#### **Causation and Contributory Negligence**

[53] No doubt parents must be vigilant regarding the movements of their children. In the instant case, even if one were to assume that, the child’s parents had lapsed in regard to their child for failure to keep a closer watch on her and perhaps could be said to have been negligent in their natural duty to the child, how can that absolve the driver (2<sup>nd</sup> Respondent) of his legal duty of care which he owed to the child? It was the driver’s negligence that caused the death of the child. (on which both the High Court and this Court found). It was not the child’s mother’s failure to keep a closer watch on the child that caused the death. In other words the cause operating to produce the damage was the driver’s negligence.

[54] Thus, adapting the reasoning in Carwell v. Powell Duffryn Associate Collieries Ltd [1940] AC 152 I can do no better than to echo the words of Lord Atkin and say that I “*find it impossible to divorce any theory of contributory negligence from the concept of causation.*” (per Lord Atkin at page 165 (HL)).

[55] For the aforesaid reasons I reject the contention that the parents of the deceased child had contributed to the accident.

**Re: The Matter of Damages**

[56] The learned Judge left the matter of assessment of damages payable by the 1<sup>st</sup> and 2<sup>nd</sup> defendants (2<sup>nd</sup> and 3<sup>rd</sup> Respondents to this appeal) to the plaintiff (1<sup>st</sup> Respondent in this appeal) to the Master of the High Court.

[57] I affirm the said order of the High Court. However, it would have been desirable had the High Court not left the matter of assessing damages to the Master for it would consume the time of parties to litigation as well as the Courts. It would also have an impact on proper case management. More-over, there was no application by the parties to have the trial split between the substantive issues and the issue as regards damages.

[58] The same would apply to the assessment of costs of the trial.

**Re: The High Court’s Order that, the Appellant (the 3<sup>rd</sup> party) indemnify the damages ordered against the 1<sup>st</sup> and 2<sup>nd</sup> defendants (2<sup>nd</sup>, 3<sup>rd</sup> Respondents to this Appeal).**

[59] Much argument was concentrated on this aspect. Basically the matter turned out to be a contest between the Appellant (3<sup>rd</sup> party insurance company) and the 2<sup>nd</sup> Respondent (the owner of the vehicle that had caused the accident).

- [60] The said argument involved certain statutory provisions of the Motor Vehicle (Third Party) Insurance Act and the Limitation Act in the light of the evidence that was led at the trial.

### **The Relevant Statutory Provisions**

- [61] I shall begin by quoting the relevant statutory provisions.

### **The Motor Vehicle (Third Party) Insurance Act**

- [62] Section 6(4): *"A policy shall be of no effect for the purposes of this Act unless and until there is delivered by the approved insurance company to the person by whom the policy is effected a certificate, in this Act referred to as a "certificate of insurance" in the prescribed form and containing such particulars of any conditions subject to which the policy is issued and of any other matters as may be prescribed."*

Section 11 (1) *"If, after a certificate of insurance has been delivered under the provisions of section 6 to the person by whom a policy has been effected, judgment in respect of any such liability as is required to be covered by a policy under the provisions of paragraph (b) of subsection (1) of section 6, being a liability covered by the terms of the policy, is obtained against any person insured by the policy, then, notwithstanding that the insurance company may be entitled to avoid or cancel or may have avoided or cancelled the policy, the insurance company shall, subject to the provisions of this section, pay to the persons entitled to the benefit of such judgment any sum payable there under in respect of the liability, including any amount payable in respect of costs and any sum payable by virtue of any written law in respect of interest on that sum."*

Section 11 (2) *"No sum shall be payable by an approved insurance company under the provisions of subsection (1)-*

- (a) In respect of any judgment unless before, or within 7 days after the commencement of the proceedings in which the judgment was given the insurance company has notice of the bringing of the proceedings; or*



- (b) *In respect of any judgment so long as execution thereon is stayed pending an appeal; or*
- (c) *In connection with any liability if, before the happening of the event which was the cause of the death or bodily injury giving rise to the liability, the policy was cancelled by mutual consent or by virtue of any provisions contained therein and either-*
- (i) *Before the happening of such event, the certificate of insurance was surrendered to the insurance company or the person to whom the certificate of insurance was delivered made a statutory declaration stating that the certificate of insurance had been lost or destroyed and so could not be surrendered; or*
- (ii) *After the happening of such event but before the expiration of 14 days from the taking effect of the cancellation of the policy, the certificate of insurance was surrendered to the insurance company or the person to whom the certificate of insurance was delivered made a statutory declaration that the certificate of insurance had been lost or destroyed and so could not be surrendered; or*
- (iii) *Either before or after the happening of the event but within a period of 14 days from the taking effect of the cancellation of the policy, the insurance company had commenced proceedings under this Act in respect of the failure to surrender the certificate of insurance.*

Section 16 (1) *“On the happening of any accident affecting a motor vehicle and resulting in the death of or personal injury to any person, it shall be the duty of the owner, forthwith after such accident, or, if the owner was not using the motor vehicle at the time of the accident, it shall be the duty of the person who was so using the vehicle, forthwith after the accident, and of the owner, forthwith after he first becomes aware of the accident, to notify the insurance company of the fact of such accident, with particulars as to the*

*date, and circumstances thereof, and thereafter to give all such other information and to take all such steps as the insurance company may reasonably require in relation thereto, whether or not any claims have actually been made against the owner or such other person on account of such accident."*

Section 16 (2) *"Notice of every claim or action brought against the owner or made or brought against any other person who was using the vehicle at the time on account of any such accident shall be forthwith given to the insurance company with such particulars as such company may require, in the former case, by the owner and, in the latter case, by such other person and, where he has knowledge of claim or action, also by the owner.*

### **The Limitation Act**

[63] *"Section 4: Limitation of actions of contract and tort, and certain other actions.*

*The following actions shall not be brought after the expiration of six years from the date on which the cause of action accrued, that is to say –*

- (a) actions founded on simple contract or on tort;*
- (b) actions to enforce a recognizance;*
- (c) actions to enforce an award, where the submission is not by an instrument under seal;*
- (d) actions to recover any sum recoverable by virtue of any Act, other than a penalty or forfeiture or sum by way of penalty or forfeiture:*

*Provided that –*

- (i) In the case of actions for damages for negligence, nuisance or breach of duty (whether the duty exists by virtue of a contract or of provision made by or under any Act or independently of any contract or any such provision) where the damages claimed by the*

*plaintiff for the negligence, nuisance or breach of duty consist of or include damages in respect of personal injuries to any person, this subsection shall have effect as if for the reference to six years there were substituted a reference to three years; and*

- (ii) *Nothing in this subsection shall be taken to refer to any action to which section 6 applies”.*

### **Applicability of the Said Statutory Provisions in the light of the evidence**

- (i) Re : The Limitation Act

[64] The accident took place on 18 December, 2006 on which same date the victim died, that is, the cause of action accrued on 18 December, 2006. Writ of Summons, that is, the action, was filed on 18 October, 2009. This was well within the three years envisaged in Section 4 Proviso (i) of the Limitation Act.

[64] Hence, I fail to comprehend the contention that, since writ of summons was served on 29 October, 2009 it was statute barred in terms of Section 4.

- (ii) Re : The Motor Vehicle (Third Party) Insurance Act

[65] On a perusal of the provisions of the Act, in so far as the facts and evidence in the instant case are concerned the applicable and relevant provisions are those contained in Section 11 (1) and 2(a) and Section 16(1) and (2) of the Act.(referred to earlier)

[66] Section 11(1) and 11(2) (a) do not specifically state as to who is imposed with the statutory obligation to give the 7 days notice of the commencement of proceedings to the Insurer.



- [67] Although I may have my own views on that matter I am bound by the Supreme Court decision in **Dominion Insurance Limited v Bamforth and Wilson and 3 Others**; Civil Appeal No.CBV 005 of 2002S.
- [68] According to that decision it is a plaintiff's obligation to give the said 7 days notice envisaged in Section 11(2) (a) as a condition precedent for the insurer's statutory liability to have arisen to meet the plaintiff – respondent's claim against it.
- [69] That being the legal position (speaking generally)based as it were on the interpretation to be placed on Section 11(2) (a) which this Court felt obliged, to deal with, in as much as the Appellant's Counsel addressed on that, it is to be however noted that, in the instant case, the plaintiff-respondent never made a claim against the Appellant (Insurance company) and moreover the learned Judge did not make any order either against the Insurance company in favour of the plaintiff.
- [70] That part of this Judgment, I must acknowledge in all humility, came from Her Ladyship, Justice (Madam) Wati.

**Re: Whether the Appellant was liable to indemnify the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents in regard to the damages ordered against them.**

- [71] The relevant provisions in the Motor Vehicles (Third Party Insurance) Act namely, Section 16 (referred to earlier).
- [72] In order to find answers to the titular question I have raised above, I shall first recount the established facts and then refer to the contested areas before moving on to determine whether the High Court Judge's conclusions in that regard bear scrutiny.

**Established Facts**

- [73]           (a)     There was an insurance policy (2DI) which the 3<sup>rd</sup> Respondent (the owner of the vehicle) had obtained.
- (b)     The said policy was in force at the time of the accident.

- (c) The 3<sup>rd</sup> Respondent had informed Mr. Vinod by telephone who had held himself out as an agent of the Appellant Company on the very date of the accident and meeting up with him the following day.
- (d) It was Mr. Vinod in Labasa (where the accident took place) who had issued the insurance documents and it was he who had collected the premium as well.

[74] Those were the established facts.

### **Contested area**

[75] Learned Counsel for the Appellant company, Mr. Narayan strenuously argued that, notice of the accident was not given forthwith to any authorized person of the company whose head office was in Suva as decreed in Section 16(1) of the Act.

### **My Assessment of the Facts**

[76] No doubt, with his characteristic forensic prowess, Mr. Narayan tried his very best to draw a distinction between as to who is “an Agent” and who is a properly “Authorised Person”.

[77] I found that, none of the witnesses who gave evidence at the trial took away from the fact that Mr. Vinod had authority to deal with the 3<sup>rd</sup> respondent (owner of the vehicle). The established facts as recounted above by me show that.

[78] Pray then, what is the tenor of the Appellant’s lament? Although Mr. Vinod had been given authority to issue a policy and collect the premium, he was not the authorized person to have been given notice of the accident in Labasa but that such notice should have been to the office in Suva?

[79] In my view, the distinction Counsel sought to draw between “an agent” and “properly authorized person” is not entitled to succeed.

[80] Section 16(2) being interlinked and consequential to 16(1), I could not find any merit in counsel's contention that, the learned High Court Judge had not been referred to or that he had not considered the said section.

[81] At this point, I have no constraint in saying (though I was tempted to say more) on the principles and the law of Agency. If I were to do that, having to refer to Judicial precedents and such authorities as Boustead and Charlesworth it would perhaps amount to an unnecessary excursus on my part. So, I shall refrain from saying anything on that, if only to guard my judicial knuckles being thumped by the Supreme Court in the event of an appeal being taken to it.

### **Conclusion on the titular question I had posed which led to the above analysis**

[82] For the aforesaid reasons I conclude in holding that, I found no misdirection/non-direction or error of fact or law on the part of the learned High Court Judge's judgment when he in his order (b) held that, the third party (that is, the Appellant) "is ordered to indemnify the damages ordered under paragraph (a)".

### **Some Final Reflections**

[83] I felt obliged to reflect and comment and make an order on a particular aspect as well urged in the Grounds of Appeal.

### **Re: the Conduct of Insurance Companies**

[84] I shall be brief on this.

[85] Here is an Insurance Company represented by Counsel who took the burden of even contesting the issue of negligence, although it had refused to represent the 1<sup>st</sup> and 2<sup>nd</sup> defendants (2<sup>nd</sup> and 3<sup>rd</sup> respondents) at the start (which is a matter of record) but after being added as a party (resistance thereto also having failed and there being no interlocutory appeal) was seen to take refuge within the framework of the provisions of Section 16(1) and (2) of the Motor Vehicles Act notwithstanding what is decreed in



Section 16(3) thereof, drawing as it did, a distinction which counsel on its behalf sought to draw between “who is an agent” of it and “who is an authorised person”.

[86] What is the Insurance Company saying? A person to issue a policy and collect a premium on its (company’s) behalf is good but when a claim is made on an existing third party policy cover, he/she is not to be regarded as such, on the basis that the agent (being in Labasa) was not “an authorized person” to whom the notice contemplated in Section 16(1) read with 16(2), ‘forthwith’, since the Head Office of the company was in Suva (there being no branch office in Labasa).

[87] Taking the risk of striking an emotional strain I cannot help but say that, Insurance Companies ought to act in good faith in satisfying claims based on policies without trying to look for some loopholes to rid themselves of liability to pay off claims, for they (insurance companies) must be reminded that, even if there were to be rigours in legal provisions calling for interpretation, the judicial mind will stand-up to the challenge in ironing out the creases.

[88] I found inspiration for saying so from my learned sister, Her Ladyship Justice Anjala Wati, when she raised an issue touching on the aspects of insurance law based as it were on the concept of good faith.

**Re: Conduct of Mr Ram (at the trial) and the Learned High Court Judge’s comments thereon - 12<sup>th</sup> Ground of Appeal**

[89] I have taken the grounds of appeal 1 to 11 cumulatively and hopefully have addressed them accordingly.

[90] However, Ground 12 remains to be addressed. That, I have recapped at paragraph [6] in this judgment.

[91] It states thus:

*“The Learned Trial Judge’s criticism of the Appellant’s solicitor (Mr Ram)*

*and findings against him were erroneous and not justified on the evidence (or the lack thereof) which thereby caused him to err and find there was no need to give any further notice.”*

**The Elements in the said Ground of Appeal that need to be addressed**

- [92] Mr. Ram was, it must be said was urging a cause on behalf of his client (the Insurance Company), as the record reveals based as it were on the question of whether Mr. Vinod was “an Agent” of the Appellate Company as opposed to him not being an “authorized person” to whom the notice of the accident contemplated in Section 16(1) & (2) ought to have been given.
- [93] Mr. Ram was thus urging a point in the interests of his client. On that point I am willing to go as far as saying was bordering on semantics. But, that effort was a counsel’s effort – quite distinct from the judicial role. The same point was urged after all by Mr Narayan before this Court. Am I then to admonish Mr. Narayan as well? Most certainly, I am not willing to do so.
- [94] For the aforesaid sentiments I have expressed, I am of the view that, the criticisms made by the learned High Court Judge referred to in Ground 12 of the Notice of Appeal ought to be expunged from the Record.

**Prematilaka, JA**

- [95] I agree with the judgment of Justice Almeida Guneratne, JA.

**Wati, JA**

- [96] I also agree with the judgment of Justice Almeida Guneratne, JA.

**The Orders of the Court are:**

1. *The High Court Judgment that, the 1<sup>st</sup> defendant (the 2<sup>nd</sup> Respondent) was negligent in causing the death of the child in question is affirmed.*
2. *The High Court Judgment that, the 2<sup>nd</sup> defendant (3<sup>rd</sup> Respondent) was vicariously liable for the negligence of the 2<sup>nd</sup> Respondent is affirmed.*
3. *The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents shall pay the Plaintiff (1<sup>st</sup> Respondent) the damages and costs of the trial claimed. (to be assessed by the Master).*
4. *The Appellant is ordered to indemnify the damages and costs referred to in Order 3 above.*
5. *Accordingly, the Appellant's Appeal is dismissed.*
6. *The learned High Court Judge's criticism of Mr. Ram's conduct shall stand expunged from the Record.*
7. *In view of Order 5, the Appellant is ordered to pay a sum of \$3,000.00 to the plaintiff (1<sup>st</sup> Respondent) and a sum of \$3,000.00 to the 2<sup>nd</sup> Defendant (3<sup>rd</sup> Respondent) as costs of this Appeal within 28 days of this Judgment.*



*Idet Guneratne*  
.....  
**Hon. Justice Almeida Guneratne**  
**JUSTICE OF APPEAL**

*H. C. Prematilaka*  
.....  
**Hon. Justice Chandana Prematilaka**  
**JUSTICE OF APPEAL**

*Anjala Wati*  
.....  
**Hon. Justice Anjala Wati**  
**JUSTICE OF APPEAL**