IN THE COURT OF APPEAL, FIJI ISLANDS
ON APPEAL FROM THE HIGH COURT OF FIJI

CIVIL APPEAL N0. ABU 0081 OF 2005
[High Court Civil Action No. 260 of 2000]

BETWEEN:

REPEKA NABA (infant by Saimone Veiyala her father and next friend)

APPELANT

A ND:

TOWER INSURANCE (FIJI) LIMITED

RESPONDENT

Coram: Ward, President
Barker, JA
Henry, JA

Hearing: 11 July, 2006

Counsel: V. Mishra for Appellant
P. Knight for Respondent

Date of Judgment: 14 July, 2006

JUDGMENT OF THE COURT

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[1] On 12 September 1987, the appellant, then a girl of 6 years old, and another child, were struck by a car, registration number BG838, driven by a sixteen year old youth who held no driving licence. The other child was killed and the appellant was seriously injured. She was taken to hospital where she remained unconscious for two weeks.

[2] Proceedings were instituted in August 1990 against the owner of the vehicle the driver and the parents of the driver. Since then, the tragedy of this case has been multiplied by the inordinate delays that have occurred since.

[3] The case was not heard until December 1998 and February 1999. Counsel has advised the court that the delay was partly the result of the coup in 1987 and also of a shortage of judges in Lautoka. Neither reason would appear to give a reasonable explanation for a delay of eight years before the first hearing. Following the hearing, the judgment was not delivered until July 2000, a delay contributed to by the illness of the trial judge.

[4] In that action he found the driver and owner of the car and the mother of the driver (the father having died) liable and gave judgment to the appellant against all three in the sum of $110,011.00 and costs of $1700.00.

[5] The owner of the vehicle was insured by the respondent company against third party risks and, by originating summons dated 10 August 2000, the appellant sought payment from the insurer.

[6] The case was heard on 9 November and 15 December 2000 in the Lautoka High Court but the judgment was not delivered until 19 August 2005. No explanation has been advanced for such an inordinate delay. To the hapless appellant it must have seemed the last straw in a case that had, by then, dragged on for fifteen years so that the six year old victim is now a young woman of twenty four or five and still seeking some finality in her claim. No delay of this magnitude can be justified but a final delay of nearly five years after a hearing waiting for judgment is the antithesis of justice and deals a heavy blow to public confidence in the court system as a whole.

[7] The judge found that the respondent was not liable to pay because the policy did not cover a driver who had no driving licence.

[8] By the Motor Vehicles (Third Party Insurance) Act, no vehicle must be used unless there is in force a third party insurance policy which complies with the provisions of the Act. The respondent is an insurance company approved by the Minister for the purposes of the Act.

Section 6 (1) of the Act provides:

> "6. – (1) in order to comply with the provisions of this Act, a policy of insurance must be a policy which –
> *(a)* is issued by an approved insurance company;
> *(b)* insures such person, persons or classes of persons as may be specified in the policy in respect of any liability which may be incurred by him or them I respect of the death of or bodily injury to any person caused by or arising out of the use of the vehicle"

There are then a number of provisos which are not relevant to this appeal.

[9] Section 6(3) makes an approved company which issues a policy under the Act liable to indemnify the persons or classes of persons specified in the policy in respect of any liability which the policy purports to cover in the case of those persons or classes of persons.

[10] There was no dispute that, at the time of the accident, the owner of the vehicle was insured under a policy of third party insurance issued by the respondent.

[11] At the hearing the respondent exhibited a copy of the standard form of policy issued by the respondent (at that time known as The National Insurance Co of Fiji Ltd) and the judge accepted it was in the same form as the policy issued to the owner of the vehicle in this case.

Clause 4 of that policy provides:

> "4. PERSONS OR CLASSES OF PERSONS ENTITLED TO DRIVE AND INSURED UNDER THE POLICY-
> (a) The owner, and

(b) Any person who is driving on the Owner's order or with his permission:

Provided that the person driving holds a licence permitting him to drive a motor vehicle for every purpose for which the use of the above motor vehicle is limited under paragraph 5 below or at any time within the period of thirty days immediately prior to the time of driving has held such a licence and is not disqualified for holding or obtaining such a licence."

[12] Paragraph 5 is headed limitations as to use and contains a blank section in which can be written the various items of use covered taken from a number which are set out in the schedule to the policy.

Paragraph 6 reads:
"AMOUNT OF PREMIUM PAID FOR ISSUE OF POLICY - $....."

The Appeal

[13] The appeal to this Court was on three grounds. The first and third challenged the right of the respondent to exclude liability relying on the interpretation of section 6 (ground 1) and 9 and 10 (ground 2).

[14] The second ground is that the learned judge erred in fact and/or law in holding that the onus of proof of the respondent to show that it was not liable had been adequately satisfied or discharged when:-

(a) The respondent failed to produce the signed policy between itself ad the insured.

(b) The respondent did not prove that there was a restrictive covenant by the actual policy which excluded it from liability where the driver did not hold a driving licence

(c) The respondent did not depose as to the basis of grounds upon which she said that the form annexed by her was the policy between the respondent and its insured.

Grounds 1 and 3

[15] The appellant's case is that the Act is social legislation which aims to protect innocent victims from the consequences of road accidents. Mr Mishra points out that the long title of the Act is, "An Act to make provision for compulsory insurance against third party risks arising out of the use of motor vehicles". The Act gives her a cause of action against the insurance company to recover the damages awarded against the person insured under the policy. He submits that the intent of the legislation is that she is not to be concerned with the terms of the Policy and any contractual matters which arise under it. They are issues between the respondent and the person whom it has insured.

[16] He points to section 10 which prohibits the insurance company from restricting the insurance in respect of certain matters and provides that, if the policy purports to do so, it will be of no effect. Paragraph (a) of that section applies the prohibition to any condition in respect of "the age of (sic) physical or mental condition of persons driving the motor vehicle". In the present case, the driver had no licence because he could not hold one on account of his age. Thus, although the respondent avoids the cover because the driver held no licence, his failure to hold one was a matter arising out of the restriction in section 10(a).

[17] We do not accept that contention. Section 6 allows the insurer to specify the person or classes of persons who are covered by the policy. The persons or classes of persons covered include the driver provided the driver holds a driving licence. Had the policy purported to exclude the driver on account solely of his youth, it would have been ineffective by reason of section 10 (a) but that is not the meaning or effect of paragraph 4 of the policy.

[18] The Act requires, as would be expected, that the policy of insurance should be one which complies with the provisions of the Act: section 4(1). Section 6 allows the insurer to specify the persons who are covered by the policy subject to the restrictions imposed by section 10. Mr Mishra's submission needs, as he had to

agree, section 6 (1) (b) to be read omitting the words "...as may be specified in the policy" However, he can give no reason why that should be done.

[19] The unsatisfactory nature of this provision has been the subject of comment in a line of cases in this jurisdiction. All have pointed out that the inclusion of the terms in paragraph 4 do not satisfy the stated aim of the Act that the policy should cover any liability in respect of death or bodily injury to any third person which was caused by or arose out of a traffic accident.

[20] The trial judge, at paragraph [25], held the same view. Having quoted the comments of Kermode J in *Michael Raman v R*, Crim App 27of 1978, 30 May1978, that there should be a change in the legislation, he continued:

> "As Mr Knight properly says in his submission, "one naturally sympathises with innocent victims of motor vehicle accidents, but this does not allow the courts to interpret the Act in such a way to compensate victims where liability is not covered under the policy. If there is any injustice it is for the legislature to change the law."

He had earlier explained, at paragraph [6]:

> "The Motor Vehicles (Third Party Insurance) Act is a piece of social legislation. It is enacted to protect third parties from the consequences of harm caused to them by motor vehicle accidents. By the Act, users of motor vehicles must take up insurance against third party risks [section 4]. Such policies of insurance must include within them the requirements of the Act [section 6]. A failure to do so will mean the insured in not covered for third party risks. If the insured takes a motor vehicle upon the road in breach of those conditions, it cannot throw a greater obligation upon the underwriter: *Gray v Blakemore* [1933] Lloyds LLR 69.'

[21] At the outset of the hearing, the court drew counsels' attention to the recent judgment of this Court in *Ashok Kumar and Chandra Mati Singh v Sun Insurance Company Limited*, Civ App No ABU 72 of 2004, 11 November 2005, in which the issues raised in the first and third grounds of appeal were considered.

[22] In that case the same submissions were made and, having reviewed the earlier cases in this jurisdiction, the Court found:

> "It appears to us that the proviso [to paragraph 4 in the policy] forms part of the specification or description of the insured and that the clause is punctuated in a way that shows that it is not confined in its application to the driver.
>
> To circumscribe the specification or description of the person or classes of persons incurred would not be inconsistent with section 6(1) (b) of the Act whose purpose is to ensure coverage, if a policy is issued, of any liability which may be incurred in respect of the death or bodily injury caused by or arising out of the use of the vehicle, by the person, persons or classes of persons "specified in the policy". In other words, the section contemplates the entitlement of the authorised insurer to specify or limit the persons covered, leaving it to the insurer to identify or define who they may be. Once identified or specified, then the effect of the section is to ensure that their potential liability, in respect of bodily injury or death connected with the use of the vehicle is fully covered save for the permitted exceptions noted in the proviso (a) and (b) to section 6(1) of the Act.
>
> So understood, clause 4 is properly to be read as a policy wording specifying or defining the persons or classes of persons insured."

[23] Later, in reference to a similar submission to that of Mr Mishra that the provisions of section 6 are contrary to the spirit and intention of the Act, the Court continued:

"This submission depends on the proposition that the policy should be applied in a way that reflects the primary purpose of the Act in requiring compulsory third party insurance. ... This was the purpose to which reference was made in Dharma Nand, yet it must yield to the wording of the Act in so far as it permits the insurer to define the persons or class of persons insured. In the present case, the policy has that effect, in so far as the proviso renders it applicable to the owner and driver but only where the driver is licensed."

[24] Despite Mr Mishra's valiant attempt to distinguish Kumar's case, we do not find any reason to differ from this Court's decision.

Grounds 1 and 3 fail.

Ground 2

[25] In a case such as this, the burden lies on the plaintiff to prove that the vehicle was covered by a policy of insurance and that the liability which had been established in the High Court action was covered by the terms of the policy.

[26] The proceedings by the appellant had been commenced by originating summons seeking judgment against this respondent. The summons did not specify the basis upon which her entitlement was claimed but the affidavit in support, sworn by her father, stated his belief that there was an insurance policy issued by the respondent company in force at the time of the accident. It is clear from correspondence exhibited to that affidavit that the respondent, through its solicitors, had admitted the existence of a policy in 1990 and also denied liability because the driver had no licence. That position was maintained in further correspondence immediately prior to the filing of the originating summons.

[27] The Act imposes an obligation on all users of a motor vehicle on the road to have third party insurance for that vehicle; section 4(1). A victim of an accident caused

by the use of the vehicle is not a party to that policy and any entitlement to recover from the insurer is dependent both on the existence of such a policy and on the terms of the policy, which must comply with the terms and requirements of the Act. As has been stated, the solicitors, at an early stage, admitted there was a policy in force but contended that a term of that policy entitled the insurer to decline cover.

[28] At the hearing, the respondent relied on a standard form of policy that was exhibited to the affidavit of Shangita Devi Ali sworn on 31 August 2000. Paragraphs 4 to 6 state:

> "4. I confirm that on 11th September 1987 there was in force a third party policy issued by the Defendant (then called the National Insurance Company of Fiji Limited) under the provisions of the Motor Vehicles (Third Party Insurance) Act Cap 177 over motor vehicle reg No BG838 in the name of Rahim Buksh f/n Jan Buksh as owner (the Policy)
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> 5. The defendant does not have in its possession a copy of the policy. However, annexed hereto and marked "SDA1" is a copy of the standard third party policy issued by the Defendant at the time. I verily believe that the Policy would have been in an identical form to the annexed policy.
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> 6. At the time of the accident on 11th September 1987 resulting in injuries to the Plaintiff, the insured vehicle reg no BG838 was being driven by Shameem Buksh s/o Salim Buksh who was 16 years of age and did not hold a driving licence."

[29] No other affidavit was filed by the respondent and no application was made to cross-examine the deponent. However, in his submission to the High Court, counsel for the appellant clearly challenged the use of the standard policy and the failure to prove the contents of the actual policy issued to the insured. The affidavit, he suggested, was speculative because it gave no proper basis for the

sources of information or belief in respect of the issuance of a standard form of policy.

The judge rejected that argument:

> "I shall treat the exhibited copy as the contract document. In the circumstances, it is the best evidence and I have no reason to doubt its reliability and accuracy on the evidence."

Section 13 (1) provides;

> "13.- (1) Any person against whom a claim is made in respect of any liability required to be covered by a policy under the provisions of this Act shall, on demand by or on behalf of the person making such a claim, state whether or not he was insured in respect of that liability by any insurance policy having effect for the purposes of this Act ...and, if he were ...so insured, give such particulars with regard to the policy as were specified in the certificate of insurance issued to him in respect thereof."

[30] By regulation 3, the certificate of insurance referred to in that section must be in the form set out in the Schedule to the Regulations. It includes the person or classes of persons entitled to drive and any limitations as to the use of the vehicle.

[31] Counsel's challenge to the standard form was based on the suggestion that there was a burden on the respondent to prove the terms of the policy issued to the owner in this case. Thus, if the judge was not satisfied that the policy had been in that form, he could not find the exemption had been proved.

[32] The appellant's entitlement to call on the respondent to satisfy the judgment arises under section 11(1) of the Act which provides:

"11.- (1) If, after a certificate of insurance has been delivered under the provisions of subsection (4) 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 thereunder 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."

[33] Before there was any burden on the respondent, the appellant needed to prove the judgment she had received was in respect of liability under section 6(1)(b), namely, a liability for bodily injury caused by or arising out of the use of the insured vehicle and that the liability was covered by the terms of the policy.

[34] It must, therefore, be incumbent on the claimant to establish that the judgment relied upon was against a person whose liability was covered by the terms of the policy. Mr Mishra's submission that the terms of the policy had not been properly or adequately proved by the respondent fails to recognise that the appellant needed first to establish that the policy was one which gave rise to liability. The existence of a policy was admitted by the respondent but, until the appellant had proved that the terms of that policy entitled her to have recourse to section 11(1), there was no burden on the respondent. It was not sufficient for the appellant's counsel to "sit on his hands" and rely on the admission of a policy.

[35] The judge showed he was aware of the problem faced by the appellant when he stated:

> "It cannot be denied by the plaintiff that a contract of insurance to cover third party risks had been issued. Indeed the plaintiff must rely on the contract and not simply on the statute, in order to make her claim."

[36] Clearly, the appellant needed to rely on the existence of a policy to establish liability under section 11(1) and the proof of any liability depended on the terms of the policy. Without establishing those terms, she could not establish her case and she was unable to do so.

[37] The appellant chose to bring this claim by way of originating summons. That was understandable if it was considered that the case turned only on the interpretation of the terms of the Act and the policy. If the appellant knew from the outset that there was to be a challenge to the actual policy based on the failure of the respondent to produce the original, the action should have been commenced by writ so the normal procedures of exchange of pleadings and discovery would have taken place.

[38] The appeal is dismissed with costs of $200.00.

[39] We have mentioned that the effect of section 6(1) (b) of the Act has allowed insurance companies to avoid the principal reason for compulsory third part insurance, namely the protection of innocent victims of road accidents. For 28 years since the suggestion was made by Kermode J in *Michael Raman v R*, the Courts have repeatedly called for legislative change to bring the law in Fiji into line with one or other the various systems in other jurisdictions. We, again, repeat that request. Until something is done, cases like the present will continue where the appellant is unlikely ever to be able to recover the damages she had been awarded and clearly needs.

[40] We also repeat our earlier comments that the hardship of this particular case has been unnecessarily magnified by the tardy manner in which the case had progressed through the courts. Had this case proceeded with reasonable expedition, the appellant would have known her position many years ago instead of having to wait twenty years to hear she cannot claim from the insurer.

Order:

Appeal dismissed with costs to the respondent of $200.00.

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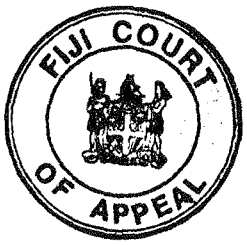
WARD, PRESIDENT



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BARKER, JA

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HENRY, JA

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