IN THE COURT OF APPEAL, FIJI

[On Appeal from the High Court]

CIVIL APPEAL NO. ABU 009 of 2020

[High Court at Lautoka Case No. HBC 248 of 2014]

BETWEEN	**:**	**THE NEW INDIA ASSURANCE CO.**
		Appellant
AND	**:**	**THE GENERAL MACHINERY HIRE LTD**
		Respondent
Coram	**:**	**Jitoko, VP** **Basnayake, JA** **Sharma, JA**
Counsel	**:**	**Mr. R. R. Gordon for the Appellant** **Ms. V. Lidise for the Respondent**
Date of Hearing	**:**	**10 May 2023**
Date of Judgment	**:**	**26 May 2023**

JUDGMENT

Jitoko, VP

[1] This is an appeal by The New India Assurance Company Limited (the defendant in the High Court action) and a cross-appeal by General Machinery Hire Limited, the respondent (the plaintiff in the High Court action) from the judgment of A. M. Mohammed Mackie J of 13 December 2018.

Background Facts

[2] The respondent is a duly incorporated company having its registered office at 63 Vitogo Parade, Lautoka. It is in the business of transporting goods for others by road, known in the business as haulage contractors.

[3] The appellant is a foreign company, duly incorporated under the laws of India, registered in Fiji as a foreign company, having its principal place of business in Fiji at Harifam Centre, Suva. It is in the business as insurance underwriters.

[4] At the material time the appellant was aware that the respondent had entered into a contract with Mobil Oil Australia Pty Ltd (Mobil) in which the respondent had agreed to provide transportation services for the delivery of Bulk and Packaged lubricant products on behalf of Mobil from its Suva and Vuda Point terminals to Mobil's joint venturers and customers.

[5] The transport service contract between the respondent and Mobil required that the respondent maintain comprehensive insurance cover for general liability insurance and automobile liability for the duration of the contract.

[6] Under the said contract, the respondent was liable to indemnify Mobil and its joint venturers for losses and damages to property belonging to Mobil and its joint venturers as well as for consequential loss suffered arising from the respondent's negligence in the discharge of its services under the contract.

[7] At the material time, there were two (2) insurance policies issued by the appellant to the respondent.

[8] The first Policy, the Public & Product Liability Policy ("P&PLP") number 922622/4690/002644/200 was valid from 27 July 2011 to 27 July 2012. Under it, the appellant agreed to insure and indemnify the respondent for legal liability to pay damages for deaths, injury or property damages and consequential losses arising from accidents caused by the respondent. The limit of the liability were $5,000,000.00 on General Liability and $5,000.000.00 on Product Liability. In addition, the respondent had paid a further $10,000.00 annually for extra cover *"in respect of the respondents' contract with Mobil as further consideration for the increase in the limit of indemnity from $2,000,000.00 to $5,000,000.00."*

[9] The second Policy, the Goods In Transit Policy ("GITP") number 922622/2101/10831/100, valid from 27 July 2011 to 27 July 2012. Under it the appellant agreed to insure and indemnify the respondent against all risks causing loss or damage to the goods and merchandise belonging to the respondent or other parties from time the goods have left a warehouse or relevant premises until delivered and unloaded at the final destination. The sum insured under the policy was $200,000.00 and like the P&PLP, a further annual $10,000 was required by the appellant *"owing to the contract the respondent had entered with Mobil."*

[10] On 28 April, 2012, one Abdul Ahad (PW-1), a driver in the employment of the respondent, drove a fuel tanker, registration EQ 363, full of fuel from Mobil's Suva Terminal, to Carpenters Motor Service Station at Samabula, to discharge its load of some 26,300 litres of fuel into the Service Station's storage tanks.

[11] The bulk fuel were in two (2) categories, the Auto Diesel Oil (ADO) and the Unleaded Petrol (ULP) and were carried in the respondent's fuel tanker in its five (5) compartments as follows:

(a) Compartment 1 – 6,600 litres of ADO
(b) Compartment 2 – 4,900 litres of ADO
(c) Compartment 3 – 4,950 litres of ULP
(d) Compartment 4 – 4,850 litres of ULP
(e) Compartment 5 – 5,000 litres of ULP

There were a total of 11,500 litres of ADO and 14,800 litres of ULP in the 5 tanks respectively.

[12] The underground storage tanks at the Service Station before the fuel tanker discharge had already, in storage at its ULP Tank 1, 15,800 litres of ULP and at its ADO Tank 2, 22,600 litres of ADO.

[13] On 28 April 2012, the respondents employer driver, in the process of discharging the fuels into the Service Station's underground tanks mistakenly discharged ADO from one of fuel tank's ADO compartment to ULP Service Station tank (Tank 1) and discharged the ULP fuel from one of the fuel tankers ULP Compartments, to an ADO Service Station tank (Tank 2). This is normally referred to in the business as a *"crossover accident".*

[14] The crossover resulted in the contamination by the mixing of the ADO into the ULP service station Tank No 1, and the contamination by mixing of the ULP into the ADO Service Station Tank No. 2.

[15] As a result of the accident, the respondent paid Mobil $239,838.93 as damages for the contaminated ULP and APO and consequential damages plus $6,500.00 to a third party for cleaning the storage tanks of the Service Station.

[16] In turn, the respondent duly advised the appellant of the losses and damages. The advise was by way of a written claim to the appellant on 18 July, 2012.

[17] According to the respondent, the appellant initially accepted that the driver of the fuel tanker and employee of the respondent had acted negligently, the discharge of the fuel and

made an offer of $50,000.00 as settlement but it later withdrew the offer and denied any liability.

[18] In its Writ of Summons with its Statement of Claim filed on 25 August, 2014, the respondent (as plaintiff) sought the following reliefs:

> *"1. A declaration that the Defendant is liable to indemnify and insure that the Plaintiff for all the losses and damages suffered by virtue of the provisions of the Public and Product Liability insurance policy.*
>
> *2. A declaration that the Defendant is liable to indemnify and insure the Plaintiff for all the losses and damages suffered up to the sum of $200,00.00 by virtue of the provisions of the Goods in Transit insurance policy.*
>
> *3. Judgment in the sum of $246,338.93 or for so much thereof as is found due by the Defendant.*
>
> *4. Interest at 10% per annum on the judgment sum from 6th August 2012 to the date of judgement pursuant to Insurance Law Reform Act 1996.*
>
> *5. Cost on the solicitor-client basis."*

[19] Within the ambit of its Statement of Claim, the plaintiff/respondent, had pleaded two (2) causes of action.

1. The first cause of action is based on paragraph 1 of its Statement of Claim relying on its P&PLP indemnity provisions that would cover the damages for death, injury or property damages plus consequential losses arising from the accidents caused by the plaintiff. These losses were to include in this instance, the contamination of the ULP and APO storage tanks, the cleaning of the contaminated tanks and other losses to third parties.

2. The second cause of action, based on paragraph 2 of the Statement of Claim, relies on the GITP indemnity provisions that is intended to cover all risks to the plaintiff for loss

or damage to goods belonging to the plaintiff and other, from the time the goods left the warehouses until delivered or unloaded at their final destination.

[20] In its Statement of Defence filed on 24th September, 2014 the appellant (as the defendant) denied any liability stating that:

> *"A. The losses alleged by the Plaintiff were not caused by the negligence or accident.*
>
> *B. The actions and omissions of the Plaintiff's employee driver, namely, Abdul Ahad were willful and deliberate acts for which the Defendant is not liable to indemnify the Plaintiff.*
>
> *C. The actions and omissions of the Plaintiff's employee, Abdul Ahad, were criminal and mischievous acts for which the Defendant is not liable to indemnify the Plaintiff.*
>
> *D. The actions and omissions of the Mobil Service Station Manager contributed for and caused the alleged losses and damages for which the Defendant is not liable to indemnify the plaintiff or by implication pay to cover losses sustained by Mobil.*
>
> *E. The Plaintiff has a good cause of action against Mobil for the contributing and sole actions of the Mobil Service Station Manager, however due to the commercial relationship between the Mobil and the Plaintiff, the plaintiff is seeking to recoup these losses from the Defendant.*
>
> *F. Accordingly, the Defendant moved for the dismissal of the Plaintiff's claim with cost."*

[21] At the four-day hearing in the High Court at Lautoka before A. M. Mohammed Mackie J, including site inspection for the Court to familiarize itself with the technical and mechanical aspects of fuel discharges, the Court was able to settle the following, he termed *"Pivotal Issues"*, in addressing the dispute (at p.8 para 30 of the judgment)

> *"a. Whether the crossover incident was the result of an accident/negligence on the Part of the fuel tank drive PW-1?*
>
> *b. Whether the crossover incident was the result of deliberate and mischievous act with criminal intention on the part of the fuel tanker driver PW-1?*

c. Whether the defendant is liable in terms of both contract of insurance to indemnify the plaintiff? if not,
d. Under which policy the plaintiff is entitled to be indemnify for the losses suffered?
e. If the liability is established, what is the amount the plaintiff is entitled to be indemnified?
f. What is the amount of cost and interest recoverable, if the plaintiff is entitled thereto?"

[22] Having thoroughly analysed the facts of the case from all the evidence before it, alongside the provisions of the two (2) policies and the interpretation to be accorded to each, the Court concluded that:

1. *In respect of its first cause of action under the "P&PLP" policy, the plaintiff's action is unsuccessful.*

2. *In respect of its second cause of action under the GITP policy, the plaintiff's partially succeeds.*

3. *Assessment of damages in respect of the second cause of action will be at the costs to the defendant.*

4. *Interest rate at 5% on the assessed sum from 1 September 2014.*

5. *Costs to be determined at the assessment of damages hearing, if not agreed.*

Appeals and Grounds of Appeal

[23] On 4 March, 2020 the defendant filed its appeal for the Orders above to be *"partly and/or wholly set aside and revoked and quashed"* setting out twenty six (26) grounds in support.

[24] On 18 March 2020, the plaintiff filed its Notice under Rule 19 of the Court of Appeal Rules seeking to set aside and/or vary the Orders and/or findings of the High Court.

[25] The appellant's filed twenty six (26) grounds of appeal, and although most of them overlap and raised both issues of facts and law, the Court will set them out in full for the record. The grounds (see pages 2-5 of the Record Vol.1) are as follows:

1. *The Learned Trial Judge erred in law and/or in fact when he allowed the Respondent to file/make its written closing speech/submissions after the Appellant made/filed its written closing speech/submissions and further erred in law and/or in fact when he ordered the Appellant to serve its written closing speech/submissions on the Respondent when the Respondent had failed to file its written closing speech/submissions simultaneously within the time limited for the Appellant to file its written closing speech/submissions and for the Respondent to file its written closing speech/submissions thereafter and further erred in law and/or in fact when he directed and/or ordered that if the Appellant did not serve its written closing speech/submissions on the Respondent then the Appellant's written closing speech/submissions would not be considered by the Honourable Judge and/or the Respondent would be entitled to file its written closing speech/submissions after the Appellant's written closing speech/submission;*

2. *The Learned Trial Judge erred in law and/or in fact when he found that the Respondent succeeded, partly, on its second cause of action;*

3. *The Learned Trial Judge erred in law and/or in fact when he found that the Appellant was estopped from advancing that the Goods in Transit Policy did not cover fuel crossovers;*

4. *The Learned Trial Judge erred in law and/or in fact when he found that the Goods in Transit Policy did cover fuel crossovers; when it did not;*

5. *The Learned Trial Judge erred in law and/or in fact when he found that the Goods in Transit Policy covered damages to goods that were not originally being carried in the fuel tanker;*

6. *The Learned Trial Judge erred in law and/or in fact when he found that the driver being an employee of the Respondent was negligent and not deliberate and/or reckless in his actions when earlier in his judgment he found that the "incident" was not an accident as accidents are unexpected and unintentional and/or further when he found that the actions of the tanker driver were imprudent;*

7. *The Learned Trial Judge erred in law and/or in fact when he 'overreached" and found that because the receiver of the fuel, who was not a party to the proceedings and/or (and/or the service station attendant) not called as a witness by the Respondent, condoned and/or did not object to the method of delivery and/or question the fuel tanker, driver, this was evidence of a practice of double hose delivery when in fact there was no and/or no credible evidence of the same;*

8. *The Learned Trial Judge erred in law and/or in fact when he reversed the onus of proof onto the Appellant to prove that the rule of one hose delivery was practiced to the very letter;*
9. *The Learned Trial Judge erred in law and/or in fact when he ignored the more credible evidence of DW1, Jalallu Dean, and independent witness, that the practice of one hose delivery was observed and adhered to by all competent fuel tanker drivers;*

10. *The Learned Trial Judge erred in law and/or in fact when he fund that his attention was not drawn to any specific rules or document containing relevant procedures to be adopted in the discharging process when there was ample other evidence before him of the same especially during the two site visits;*

11. *The Learned Trial Judge erred in law and/or in fact when he found that despite the fuel tanker driver not following the accepted unloading procedure it would be "unfair" to disentitle him to a plea of negligence;*

12. *The Learned Trial Judge erred in law and/or in fact when he found that proof of criminal liability in civil trials is proof beyond reasonable doubt;*

13. *The Learned Trial Judge erred in law and/or in fact when he found that the dispatch officer was not an employee of the employer of the fuel tanker driver;*

14. *The Learned Trial Judge erred in law and/or in fact when he found that the issue of the fuel tanker driver being unlicensed was an issue raised by the Appellant for the first time in its written closing speech and ought to have been raised earlier and that the Appellant could not raise it as an issue after the close of evidence and/or it was an issue not purely on law and/or was an issue that the Appellant was silent about at trial;*

15. *The Learned Trial Judge erred in law and/or in fact when he misconstrued the relevance of the fuel tanker driver being unlicensed and its applicability to the insurance policy;*

16. *The Learned Trial Judge erred in law and/or in fact when he failed to give a judgment on whether the goods were still in transit or delivered and whether the Respondent could claim damages for the contaminated fuel in the underground tanks and/or whether the Goods in Transit Policy covered damages to the fuel once it had left the fuel tanker or the fuel that was already in the underground tanks;*

17. *The Learned Trial Judge erred in law and/or in fact when he ruled and/or gave judgment on liability only and did not proceed to rule and/or given judgment on liability and damages together and/or jointly and/or singularly when there was no order or agreement as to a split trial on liability and damages separately;*

18. *The Learned Trial Judge erred in law and/or in fact when he ruled and/or gave judgment refusing an adjournment for the Respondent to call witnesses relating to its alleged loss and/or damages suffered but yet reserved the right of the Respondent for a hearing on assessment of damages in the event it succeeded and/or to call and/or adduce further evidence at such a hearing on assessment of damages when there was no order or agreement as to a split trial on liability and damages separately;*

19. *The Learned Trial Judge erred in law and/or in fact when he ruled and/or gave judgment that the parties should be heard and/or allowed to adduce and/or call evidence on assessment of damages before an assessment of damages was done by the Honourable Learned Trial Judge when both parties had closed their respective cases and no further evidence was going to be called or intended to be called or ought to be called by the parties;*

20. *The Learned Trial Judge erred in law and/or in fact when he failed and/or refused and/or declined to dismiss the Respondent's claim for damages when the Respondent closed its case and did not call any evidence or witnesses or tender any evidence or documents pertaining to its purported loss and/or damages suffered;*

21. *The Learned Trial Judge erred in law and/or in fact when he, despite finding that the Goods in Transit Policy covered only the goods and/or merchandise and does not make provisions for consequential losses and damages, ruled and/or ordered that the charges for tank/line flushing and cleaning would also be subjected (sic) to the assessment of damages;*

22. *The Learned Trial Judge erred in law and/or in fact when he took into account a without prejudice settlement offer in assessing interest;*

23. *The Learned Trial Judge erred in law and/or in fact when he awarded the Respondent interest and/or interest at the rate of 5% and/or interest from 1 September 2016;*

24. *The Learned Trial Judge erred in law and/or in fact when he failed to assess and/or order costs to the Appellant for being more and/or substantially more successful that the Respondent and/or failed to order that the Respondent pay the Appellant costs on an indemnity basis given that it was a commercial transaction;*

25. *The Learned Trial Judge erred in law and/or in fact by relying on irrelevant facts and/or evidence and/or by not relying on relevant facts and/or evidence;*

26. The Learned Trial Judge erred in law and/or in fact by not assessing and/or weighing all the relevant and admissible evidence in totality individually and cumulatively.

[26] The respondent in its Notice, filed (see pages 8-9 of the Record Vol 1), eight grounds in support of its cross appeal as follows:

a. That the learned Judge erred in law and in fact when he concluded that for the crossover incident to be considered an accident under the Public and Products Liability policy, there had to be evidence 'of an external force/s beyond the control and the absence of any fault on the part of the plaintiff's drivers."

b. That the learned Judge erred in law and in fact when he failed to apprehend and conclude that the term 'accident' within the meaning of the Public and Products Liability policy was capable of being established or satisfied through proof of negligence and irrespective of who the negligent party was and that having found that the driver was negligent, he ought to have found the Defendant liable under the policy.

c. That the learned Judge erred in law and in fact when he failed to conclude that there was sufficient evidence to establish that the crossover incident was the result of or amounted to an accident within the terms of the Public and Products Liability Policy and that the Defendant was therefore liable to indemnify the Plaintiff for the losses suffered thereof.

d. That the learned Judge erred in law and in fact when he found that the driver's discharge of the fuel from compartments 2, 4, 5 and the remainder in 1 (hereinafter referred to as "the remaining compartment") no longer contained the element of negligence and therefore disentitled the Plaintiff from indemnification for losses to the fuel discharged from these compartments under the Goods in Transit policy.

e. That the learned Judge erred in law and in fact when he failed to consider that even if the driver's actions had become deliberate and willful, it did not rule out the element of negligence or alternatively, recklessness.

f. That the learned Judge erred in law and in fact when he failed to consider the driver's evidence as to why he continued to discharge the fuel from the remaining compartments, in particular, that the driver believed that the fuel that had been incorrectly discharged initially, would blend or mix the volume of the fuel in the storage tanks.

g. That the learned Judge erred in law and in fact when he failed to find that the Defendant was liable also to indemnify the Plaintiff for the losses of the fuel discharged from the remaining compartments, that is, compartments 2, 4, 5 and the remainder in compartment 1.

h. That the learned Judge erred in law when he decided to award interest in the sum of 5% of the sum to be assessed, which sum is contrary to section 34 of the Insurance Law Reform Act and Regulation 2 of Law Reform (interest Rates Regulations) 2004 which prescribes interest at 10% per annum and that it should be applied from the 28 April 2012.

Analysis

[27] Let me first address ground 1 of the appellant's appeal. Counsel contended that the Court, by directing that there be written submissions at the end of the hearing, had overreached and acted beyond his powers as permitted under the High Court Rules. In his view, the High Court is limited in its proceedings by Order 35 Rule 5 that stipulates the procedures and the order of closing addresses by the parties. There is no place in his view, for written submissions to be made, and that the Court in the process of making the orders as to submissions, had acted somewhat with some bias towards his client.

[28] I have read the transcripts of the High Court record, and I do not see or sense any action of bias behaviour on the part of the Court in its direction of how and when submissions should be filed.

[29] In fact when the court first raised the matter of submissions, Counsel neither objected to it nor sought clarifications as to the order of filing. I refer to the relevant passages of the transcript (at pages 661,662 of the Record of Vol II) as follow:

"Mr Gordon: *My Lord, we have now made a decision not to call any further witnesses and the defence now also closes its case.*

Judge: *Yes, I will be giving the written ruling of the orders given today, that on the 7th of December, and on the day you can collect the proceedings, the transcripts.*

Mr Gordon: *Yes Sir.*

Judge: *And you can file written submissions*

Mr Gordon: *Please you Sir. 7th December, is that a Thursday Sir? The reason why I want to clarify is that the way I hear, there'll be Attorney-General's Conference on Friday, so Thursday is suitable for us.*

Judge: *7th is Ruling, and on that day you can also obtain or ask for dates for written submissions.*

Ms Lidise: *Very well, Sir*

Mr Gordon: *Please you Sir."*

[30] In any event, the fact that the High Court Rules specifically refers to the closing address or speeches of counsel at the conclusion of a trial or hearing, does not limit the exercise of the court under its inherent jurisdiction to make directions or orders including the filing of submissions that have the overall objective of securing a fair trial and justice.

[31] I do not find any merit on this ground 1 of the appeal.

[32] I turn to the appellant's grounds 17, 18, 19 and 20 questions on the procedural correctness or otherwise of the order issued by the Court for the assessment of the damages to be adjourned to a later date. This was after the application for an adjournment of the hearing was made by the respondent Counsel because of the unavailability of her last two (2) witnesses, was refused by the Court.

[33] Counsel for the appellant argued that the trial judge by splitting the hearing to the hearing of the evidence first, then adjourning to a later date for the assessment of damages, had made an error in law.

[34] The hearing before the court was for the consideration of whether the appellant was liable under the indemnity provisions of the two (2) policies, and then to assess damages, if any. It was never the intension of the parties to the hearing that it be a *"split trial on liability first and quantum later".* Furthermore, Counsel added, the facts that the Court was willing to call the same plaintiff's witnesses that were not available, when it refused further adjournment in the hearing, and thereby reversing his oral ruling, was *"not permissible in common law jurisdictions".*

[35] Nowhere in the transcripts of the High Court proceedings does this Court find Mohammed Mackie J has specifically instructed that the witnesses who had failed to appear for the plaintiff, would be excluded at the assessment of damages hearing. It is not for the Counsel to freely infer any intention on the Court, in such instance.

[36] The Court is within its inherent powers at any stage of a hearing, to amend, change or alter, the proceedings before it, so long as it is permissible under the rules and in the interest of justice so to do. In fact, contrary to the appellant's submissions, the Court is competent to, under Order 37 upon judgment, defer the assessment of damages, if not to itself, but to the Master or even to a Special Referee, if it deemed it necessary and in the interest of justice to do so.

[37] This view is supported by the decision in **Goldwest Enterprise Ltd v Pautogo** [2008] FJCA (3 March 2008) at paragraph 28:

> *"It is a principle universally applied, that the power to adjourn or refuse to adjourn a proceeding is within the discretion of the court hearing the matter. It is further universally accepted that the appeals court should be loath to overturn the trial court's exercise of discretion as to the grant of an adjournment or its refusal, except upon good principle…"*

[38] The assessment of damages before the same court at a later date is only a continuation of the same proceedings, and does not amount to a separate case hearing. And to suggest that the finding of damages properly made by the court on the evidence already presented before it to be dismissed or declined, because of the failure of the plaintiff to call additional witnesses to quantify and estimate those damages, is preposterous.

[39] At the hearing of assessment of damages, the parties are at liberty to call any witness they wish, subject to the normal rules of evidence.

[40] This Court finds no merit on the grounds of appeal 17, 18, 19 and 20.

[41] Counsel for the appellant also argued that at the close of the case, the respondent had not called any evidence on the quantum stating that, *"the respondent failed to produce any credible evidence on quantum of loss of damages suffered,"* adding that special damages must be proved with evidence, and therefore the court cannot simply rely on mere speculation.

[42] With respect, this line of argument by the appellant is putting the cart before the horse. In this case, there is a finding of liability, but the quantum of damages, is still to be assessed at the hearing at a later date, and it is at that hearing that the evidence will be adduced. To argue that the details that gives rise to the quantum of damages, have not been made out, is illogical.

Relevance of Validity of the Driving Licence

[43] Grounds 14 and 15 of the appeal raises the issue of the employee of the respondent, the driver of the fuel tanker, not in possession of a valid driving licence, at the time when the *"crossover incident"* occurred.

[44] It is the appellant's contention that this issue is vital to the success or failure of the indemnity claim. At the time of the crossover incident, the driver of the fuel tanker, did not hold a valid driving licence, the licence having expired some six (6) months earlier.

[45] The issue, according to the appellant, was a factually relevant and *"went to the heart of the issues to be decided by the Learned Trial Judge."* Counsel submitted that the respondent was not entitled to claim indemnity under any of the policies.

[46] The Court first referred to the fact that Counsel for the appellant had not raised the issue at the hearing, but only done so much later after re-examining the agreed bundle of documents submitted into Court, and finding the details of the driver's (PW-1) licence.

[47] This Court notes in addition, that PW-1's driving licence, had been tendered in evidence into Court and the appellant's counsel should have examined and questioned PW-1 on the status of his licence. That he had failed to do, and merely relied on the oral evidence adduced through examination of PW-1 by Counsel for the respondent, is not for this court to infer, as suggested by the appellant, some mischievous attempt by the respondent to try to mislead the Court.

[48] In any case, the High Court had concluded, on whether the validity of PW-1 driving licence, at the *"crossover incident"* was relevant, as follows: (paragraph 81 & 82 of the judgment):

> *"81. However, this not an incident or accident occurred when the vehicle was being driven by PW-1. It was on complete halt when the discharging of fuel was in progress. The driver was performing another part of his assigned job for which, I don't think he needs to have a driving license. If he had sufficient experience training for discharging of fuel, the expiry or absence of a tanker driving licence, need not have precluded him from engaging in fuel discharge. PW-1 had a long term experience in driving fuel tanker and discharging fuel having done around 1,750 deliveries in 5 years' time. He had undergone relevant trainings and even now he has said to be engaged in a similar job in a different company for last 5 years. I find that his proficiency in the job cannot be easily impeached.*
>
> *82. Even if he had a valid driving licence at the time of the crossover incident, it would not have made any difference in the discharging process, if it was to occur due to his negligence. Therefore, I disregard this argument raised by the learned defence counsel."*

[49] This court totally shares the reasonings of Mackie J as expressed above and likewise, in dismissing this ground of appeal.

Interest and Interest Rate

[50] Grounds 22 and 23 of the appeal are on the award of interest and interest rate. Counsel for the appellant argued that the settlement sum was a *"without prejudice settlement offer"* and also the 5% interest awarded was without merit.

[51] However, as correctly pointed out by the respondent, the settlement offer had been admitted into evidence by consent of both parties, and the Court is perfectly entitled to refer to it.

[52] As to the award of interest, this is governed by statute. Section 34 of the Insurance Law Reform Act 1996, states:

(1) "Where an insurer is liable to pay to a person an amount under a contract of insurance or under this Act in relation to a contract of insurance, the insurer is also liable to pay interest on the amount to that person in accordance with this section.

(2) The period in respect of which interest is payable is the period commencing on the day from which it was unreasonable for the insurer to have withheld payment of the amount and ending on whichever is earlier of the following days –

a. the day on which the payment is made;
b. the day on which the payment is sent by post to the person to whom it is payable.

(3) The rate at which the interest is payable in respect of a day included in the period referred to in sub-section (2) is the rate that is prescribed by regulation."

[53] Pursuant to sub-section (3) above, the Insurance Law Reform (Interest Rate) Regulations 2004 regulation 2 (1) states:

"2. (i) For the purpose of section 34 (2) of the Insurance Law Reform Act 1996, the interest rate payable in respect of each day included in a period referred to in that section is 10% per annum."

[54] This court dismisses grounds 22 and 23 of the appeal as misconceived.

[55] It also finds that the Court's award of 5% interest in error, and the award is hereby set aside.

Was the Crossover Incident An Accident

[56] Ultimately, whether the respondent can be indemnified under the P&PL Policy depends on the answer to this issue.

[57] The conclusion drawn by the Court of the crossover incident is the subject of both the appellant's appeal and the respondent's cross-appeals.

[58] It is agreed that for the respondent to succeed in its claim for indemnity for damages and losses under the P&PLP, it has to prove that the *"crossover incident"* was an accident.

[59] The relevant clauses in the P&PL Policy is reproduced below.

> *"Placing Slip*[1]
>
> | | |
> |---|---|
> | *Insured:* | *General Machinery Hire Ltd ….* |
> | *Other Interests:* | *i) Total (Fiji) Ltd, Mobil Oil and Ports Terminal Ltd are included as additional insured's* |
> | *Interest insured:* | *Legal liability to pay damage for death, injury or property damage caused by accidents, together with indemnity for legal costs incurred with the insurance company's consent.* |
> | *Limits of* | *General Liability - $5,000.000 any one accident* |
> | *Indemnity:* | *Products Liability - $5,000.000 any one accident in the annual aggregate"* |
>
> *SCHEDULE SPECIFICATION ATTACHING TO AND FORMING PART OF PUBLIC LIABILITY POLICY*[2]
>
> | | |
> |---|---|
> | *"THE INSURED:* | *General Machinery Hire Limited* |
> | *ADDITIONAL INSUREDS:* | *Mobil Fiji Ltd and Ports Terminal Limited Are noted as Additional Insures for their Respective rights and interests.* |
> | … | … |
> | *LIMIT OF INDEMNITY:* | *(any one Accident as more specifically described in the Policy)* |
>
> *1) General Liability: $5,000.000*
> *2) Products Liability: $5,000,000"*

[1] Vol. 2, pg.314
[2] Vol.2, pg. 317

SPECIFICATIONS [3]

"CONSEQUENTIAL LOSS

The exclusion of consequential loss from this insurance does not apply to the Insured's Liability for consequential loss arising out of death or bodily injury or damage to property for which indemnity is provided under the Policy[4]

CONTINUOUS LIABILITY

The Company undertakes to keep the Insured indemnified in terms of this Policy in respect of all business carried on at any time by the Insured in Fiji or elsewhere, provided that the Insured must keep the Company advised of any extension to the Business described in the Schedule.

This insurance will not be prejudiced by the Insured failure to keep the Company so advised through oversight, providing the advice is given as soon as the oversight is discovered.[5]

LOSS OF PEROPERTY

The word "damage" as used in this Policy and its specifications in relation to property is deemed to mean "loss or damage."[6]

PRODUCTS EXTENSION[7]

This Policy is extended to indemnify the Insured against liability arising from Accident occurring anywhere in the world in connection with the Business and caused by or in connection with or arising from Products during the Period of Indemnity as follows:

(a) All sums which the insured becomes legally liable to pay in respect of –
(1) accidental death or bodily injuries, including illness, of any person.
(2) accidental loss of or damage to property

(b) In respect of a claim against the Insured to which the indemnity express in this extension applies:-

[3] Vol 2, pg. 319
[4] Vol 2, pg. 320
[5] Vol 2, pg. 321
[6] Vol 2, pg. 322
[7] Vol 2, pg. 323-333

(1) all costs and expenses of litigations recovered by any claimant against the Insured.

(2) all costs and expenses of litigation incurred with the written consent of the Company.

Products includes property and its containers sold, supplied, constructed repairs, altered renovated, serviced or installed by the Insured after the property has passed from the control and actual physical custody of the Insured or of any person in the direct services of the Insured, but does not include goods sold or supplied at or from a canteen provided by the Insured primarily for the use of employees of the Insured.

For the purpose of insurance under this extension, the insuring clauses (a) and (b) of the Policy are deemed to be deleted and replaced by the following:

(a) (i) liability in respect of death or bodily injury, including illness, of any person or loss or loss of or damage to property –

1. Directly or indirectly caused by defective design specification or formula of goods.

2. Caused by or in connection with or arising from error or omission in advice, remedial or other treatment given, administered or prepared by the Insured or by any person acting on behalf of the Insured.

3. Caused by or in connection with or arising from any Products manufactured specifically for and installed in any aircraft or thing or intended to travel through air or space or which the Insured knew would so be installed.

(ii) liability for the cost of repairing or replacing any of the Products, or making any refund of price paid for any of the Products, which have proved defective.

(iii) liability for any sum which the Insured would have been able to recover from any party but for an agreement between the Insured and that party.

(b) Liability in respect of loss of or damage to property –

(i) *belonging to the Insured or held by the Insured under a hire purchase or conditional purchase agreement or hired or rented to the Insured or otherwise in the Insured's charge or under the Insured's control*

(ii) *caused by or resulting from the bursting of a boiler or economizer or other vessel, machine or apparatus wherein internal pressure is due to steam only.*

Provided that

(a) *The liability of the Company under insuring clauses (a) and (b) of the policy in respect of accidental death or bodily injury, including illness, of any person and accidental loss of or damage to property occurring during the Period of Indemnity will not exceed, in the aggregate, the sum of $5,000.000.*

(b) *The Insured must take reasonable precautions to prevent the sale or supply of any Products which are no in good conditions, free from defect or contamination and fit for the purposes required.*

(c) *The Company will not be liable under this Policy in respect of any action for damages brought against the Insured in any country, outside Fiji, in which there is domiciled the company controlling the Insured or any subsidiary company of the Insured or where the Insured is represented by a branch.*

PROPERTY IN PHYSICAL OR LEGAL CONTROL

Notwithstanding anything contained in the Policy to the contrary it is understood and agreed that the indemnity granted by the within policy is extended to include the legal liability of the Insured for damage to property not belonging to, but in the physical or legal control of the Insured, subject otherwise to the terms, conditions and limitations of the Policy.[8]

[8] Vol 2, pg. 325

[60] The appellant submitted that the fuel tanker driver employee of the respondent action that resulted in the *"crossover incident"* was *"deliberate mischievous, disobedient, delinquent, roguish, criminal, intentional and malicious…",* that is, anything but accidental.

[61] Mackie J in his assessment of what constitutes an *"accident"* also came to the conclusion that the crossover incident did not constitute an accident. At paragraphs 44, 45 and 46 of His Lordship's judgment, he states:

> *"44 The fuel tanker was not involved in a road accident and the crossover incident occurred when the tanker was on complete halt and the fuel therein was being unloaded by the driver PW-1, with the participation receiver at the Service Station, whose duties, amongst other things, was said to be take pre- and post-clips including the checking and breaking of the seals and formally accepting the delivery. There was no other external force(s) involved in the process as we saw during the site inspection, is the fixing of the hose (s) into the customer's tank and to the compartments of the tanker before releasing the fuel.*
>
> *45 The evidence led before the court did not approve the occurrence of an accident during the process of unloading or the day in question.*
>
> *46. The ordinary meaning of the word " accident" is an unfortunate incident that happens unexpectedly and unintentionally, typically resulting death, damage or injury, an event that happens by chance with or without apparent or deliberate cause; something bad that happens which was not expected or intended."*

[62] Counsel for the respondent submitted that the High Court in its assessment above has construed the meaning of the word *"accident"* very narrowly and points to the more wider definitions that are applied in other Commonwealth countries. For example, Lord Lindley in the Privy Council decision **Fenton (Pauper) v J. Thorley & Co. Ltd** [1903] AC 443 at p. 453, said:

> *"The word accident" is not a technical term with a clearly defined meaning. Speaking generally, but with reference to legal liabilities, an accident means any unintended and unexpected occurrence which produces hurt or loss. But it is often used to denote any unintended and unexpected loss or hurt apart from its cause; and if the cause is not known, the loss or hurt itself would certainly be called an accident. The word "accident" is also often used to denote both the cause and the*

effect; no attempt being made to discriminate between them. The great majority of what are called accidents are occasioned by carelessness; but for legal purposes it is often important to distinguish carelessness from other unintended and unexpected events."

[63] Thus in this case of a workman, employed to turn the wheel of a machine, by an act of over-exertion raptured himself the court interpreted the word *"accident"* in its popular and ordinary sense to mean a mishap or untoward event not expected or designed and therefore the workman had suffered an *"injury by accident"* within the meaning of the word *"accident"* under the Workman's Compensation Act 1897, and he was entitled to compensation.

[64] In the House of Lords case of **Board of Management of Trim Joint District School v Kelly** the Scottish Law Reporter – Vol.L11, 612, a schoolmaster, while performing his duties was assaulted and killed by two of his pupils, who had conspired for the purpose, and were tried and found guilty of manslaughter. A claim under the Workman's Compensation Act by a dependent of the deceased that the death was due to an accident, was upheld by the House of Lords, even although the death was due to premeditated assault, that is, death caused by intentional act of another. Viscount Haldane, in echoing the earlier views of Lord Macnaughten in **Fenton Case** (supra) said, at p.213:

*"It seems to me important to bear in mind that "accident" is a word the meaning of which may vary according as the context varies. In criminal jurisprudence, crime and accident are sharply divided by the presence or absence of mens rea. But in contracts such as those marine insurance and of carriage by sea this is not so. In such cases the maxim in jura non remota causa sed proxima spectatur is applied. I need only refer your Lordships to what was laid down by Lord Herschell and Lord Bramwell when overruling the notion that a peril or an accident in such cases is what must happen without the fault of anybody in **Wilson v Owners of the "Xantho**,"1887 12 AC 503"*

[65] Lord Loreburn at p.615 explains the word *"accident"* in analogies as follows:

"We say someone met a friend in the street quite by accident as opposed to appointment, or omitted to mention something by accident as opposed to intention or that he is disabled by an accident as opposed to disease, or made a discovery

by accident as opposed to search or reasoned experiment. When people use this word they are usually thinking of some definite event which is unexpected but it is not so always, for you might say of a person that he is foolish as a rule and wise only by accident. Again the same thing when occurring to a man in one kind of employment would not be called an accident, but would be described if it occurred to another not similarly employed. A soldier shot in a battle is not killed by accident in common parlance. An inhabitant trying to escape from the field might be shot by accident. It makes all the difference that the occupation of the two was different. In short the common meaning of this word is ruled neither by logic nor by etymology, but by custom, and no formula will precisely express its usage for all cases."

[66] In the Canadian case of **McCollum (RD) Ltd v Economical Mutual Insurance Company** [1962] OR 850, Landreville LJ said:

" The interpretation of the word "accident" if given its most restrictive meaning, as equivalent to an unforeseeable and unexpected event and one totally unaccountable to any acts of the party might spell devastating results. Policies are written for layman, not for technicians of language or lawyers. And when an insurer uses word or words in a contract destined to a layman, he must be meant to give to those words their ordinary everyday meaning. In common parlance one hears someone relate that there has been an accident it does not forsooth follow that there has been no negligence at all. For the word "accident" has in common-place the significance of being opposed to a wilful and deliberate act or short of this one which is far so obviously gross negligence the obvious and natural result of a most imprudent and unreasonable act."

[67] Again the English Courts in **Mills v Smith** [1963] 2 All ER 1078 have extended the interpretation of *"accident"* in the Workman's Compensation Act to include "damage to property caused by accident" for damages to an adjacent house caused by the root action of a tree in the assured's garden, adding, at p.1079:

"The application of that definition depends almost entirely on the point of view from which the particular matter is approached."

[68] In **British and Foreign Marine Insurance Co v Grant** [1921] All ER 447, a marine insurance cover against "all risks" on a wool transhipment from South America to England, which was damaged in transit, although the exact cause was not known. The House of Lords held that the assured can successfully claim under the policy in discharging the onus

on him by proving that the damage arose from any of the insurable risks or accidental circumstances which were incidental to the journey, not necessarily limited to those expected to occur in the normal course of the business. Lord Birkenhead LC at p. 452 said:

> *"There must be something in the nature of an accident to bring the policy into play. But I can find no justification for the contention which the appellants put forward at the Bar of your Lordships' House that in order to recover upon such policy for damage resulting in the goods getting wet by rain, it would be necessary to establish that there was an extraordinary or unusually heavy fall of rain. It would be quite enough, if owing to some accidental circumstances the goods were left uncovered when rain was falling. This might happen by some want of care to keep the goods covered with tarpaulins which were provided for the purpose. If from any of the accidental circumstances which are incidental to a journey, the goods are damaged by a risk covered by a policy, the element of casualty or accident is supplied. There is nothing in the present case to show that the damage was due to any wilful misconduct on the part of the assured."*

[69] In the case before this court, the crossover is not expected to occur in the normal course of discharging of fuel from a fuel tanker to a storage facility. Nevertheless the crossover error arose from such accidental circumstances that are incidental to the business of fuel tanker conveyance and discharge.

[70] It is quite possible, as the Counsel for the appellant submitted that the driver PW-1, was in a rush to finish his round of fuel discharge, so he could go on to attend to domestic matters. In so doing, he may have been guilty of negligence in not attending to his duties scrupulously, and which resulted in the crossover. His negligence contributed to the accident but was never, in this court's view, intentional nor contrived.

[71] Having had the opportunity to hear the submissions of Counsel, together with relevant authorities from other common law jurisdictions and after carefully reading the reasoning of Mohammed Mackie J, I am persuaded that, contrary to His Lordship's conclusion, the crossover incident cannot be anything but an accident. To give *"accident"* a restrictive meaning is to deny the insured claims for damages that arose from accidental circumstances as in this instance, that are deemed incidental to the operation of discharging fuel from fuel

tankers. It is not intended to be limited to those incidents expected in the normal course of the business.

[72] In all the circumstances, this Court finds that the switch of fuel that constituted the crossover incident at Carpenters Motor Service Station at Samabula, Suva on 28 April 2012, was an accident. The P&PL Policy provisions indemnifying the respondent therefore applies.

Indemnity Under the GIT Policy

[73] Grounds of appeal 2, 3, 4, 5, 16 and 21 by the appellant and grounds (d), (e), (f) and (g) of the respondent's Notice are all related to the process of the discharge of fuel from the fuel tanker to the Service Station underground fuel tanks; the actions of the tanker driver PW-1 as employee of the respondent, the crossover incident and the damages that ensued.

[74] The issue is whether the damages that resulted from the crossover incident are indemnifiable under the GIT Policy.

[75] Mohammed Mackie J in finding the respondent had partially succeeded in its claim for indemnity under the GIT Policy concluded at paragraphs 88 and 89 of the judgment:

> *"88. Thus I decide that the parties should be heard before any assessment and however, must keep the parties informed that 4850 litres of ULP that was in the compartment No.4, 5,000 litres of ULP that was in compartment No.5, the residue of ADO in compartment No.1 (quality to be agreed or assessed) and 4,900 litres of ADO that was in compartment No.2, should be left out from the assessment.*
>
> *89. Since the Goods In Transit Policy covers only the goods and/or merchandise and does not make provisions for consequential losses and damages, the claims of the plaintiff under paragraph 23 (a) (iii), (iv), (v) of the SOC are liable to be dismissed and such claims shall not be subject of assessment. However, the charges for tank/line flushing and cleaning will also be subjected to the assessment.*

[76] The appellant strongly argues that the GIT Policy means exactly what it says, that is, *"goods in transit"* and therefore the policy only applies to a good, including fuel, *"whilst it is in transit and as soon as they are delivered, the insurance cover no longer applies."* Therefore, according to the appellant, the respondent cannot claim damages for contaminated fuel that are already delivered into the Service Station underground fuel tanks. In support of this contention, the appellant referred to the policy provisions and specifically to sub-head *"Perils Insured"* which states:

> *"This insurance attaches from the time the goods hereby insured leave the warehouse or premises anywhere in Fiji for the, commencement of the transit and continued during the normal course of transit until they are delivered to the final destination."*

[77] The appellant submitted that it is the fuel that is in the fuel tanker that is insured and that the Court in failing to declare whether the fuel was in transit or not, had erred in law and in fact. Counsel went into great length to emphasise the time and place of fuel contamination and argued that it was the fuel already stored in the Service Station underground tanks that were contaminated.

[78] In any event, the GIT Policy, the appellant submitted, only applies when the assured is negligent.

[79] Counsel for the respondent first submitted that the Court by specifically excluding its claim under paragraph 23 (a) (iii), (iv) from assessment, has implicitly agreed or approved its claim under paragraph 23 (a) (i), (ii) and (b) in its Statement of Claim.

[80] As to the details of the fuels held or stored in of the fuel tanker's compartments and in the Service Station underground tanks, there is no dispute. So too were the orders which the discharge from the fuel tanker compartments to Service Station underground commenced. In summary, Compartment 3 of the fuel tanker with 4,950 litres of ULP was completely

discharged to the Service Station underground tank 2 which had it in 22,600 litres ADO. Also Compartment 1 of the fuel tanker with its 6,600 litres of diesel was discharged into the Service Station underground tank 1 which had already in it 15,800 litres of ULP, although the entire content of Compartment 1 had not been emptied.

[81] It is very clear from the evidence of PW-1 that when he realised that he had made the mistake of pumping litres of ULP to ADO and vice versa, he panicked and his actions immediately thereafter was one of bewilderment and confusion. He tried to hide the error from the Service Station attendant (Receiver) and in the end he convinced himself that by pumping all the fuel into the Service Station tanks, everything will sort themselves out.

[82] It is conceded by Counsel for the respondent that once PW-1 realised the mistake and the crossover had occurred, his reactions *"were deliberate and intentional"* meaning that the actions he took immediately after discovering the mistake, were to minimise the damages and reduce his culpability.

[83] Mohammed Mackie J was of the opinion after hearing the evidence that PW-1 actions upon discovering the crossover, was neither mischievous nor was there any criminal intent on his part.

[84] The relevant clauses of the Placing Slip of the GIT Policy specifies as follows:

*"**Placing Slip**[9]*

Interest Insured	*All goods and/or merchandise and any other property either the insured's own or others property, including loss or damage to containers".*
……	……

[9] Vol 2, pg. 330

Remarks

Loss or damage to customers goods not owned by the insured is payable only if the insured is negligent.

Schedule & Specification Attaching to and Forming Part of Road Transit[10]

"INTEREST INSURED *All goods and/or merchandise and any other property the insured's owns* ***or others property,*** *of every description including loss or damage to containers.*

PERILS INSURED *As per the Association Clauses – A (All Risks) attached with clauses 9b (i) and (ii) deleted*

Item 1 of the Association Clause is amended to read as follows:

The insurance attaches from the time the goods hereby insured leave the warehouse or premises or anywhere in Fiji for the commencement of the transit and continued during the normal course of transit until they are delivered to the final destination.[11]

Association Clauses Land and Air Transit Risks – A (All Risks)[12]

*"2. This insurance to indemnity the Assured against "**All Risks**" of loss of or damage to the goods hereby insured but shall in no case cover loss, damage or expense proximately due to or caused by wear and tear, delay, inherent vice or nature of the subject matter insured. Claims recoverable hereunder shall be payable irrespective of percentage."*

[85] It is clear from the plain reading of the policy that if damages is claimable, it will include:

> *"All goods and/or merchandise and other property either the insured's own or others' property including loss of damage to containers." These class of damages, "is payable only if the insured is negligent."*

[10] Vol 2, pg. 333
[11] Vol 2, pg. 333
[12] Vol 3, pg. 334

[86] Furthermore the Policy is comprehensive to include *"Risks"* as under its Associated Clauses and it applies or attaches as per under *"Perils Insured"* from the time the goods leave the warehouse, continuing their transit *"until they are delivered to the final destination."*

[87] *"Goods in transit"* ae further refined under the Associated Clauses of the GIT Policy under *"Loading and Unloading"* thus:

> *"This insurance is extended to –*
>
> *(a) attach from the time the subject-matter insured is first moved within any warehouse or place of storage for the purpose of commencing the transit; and*
>
> *(b) terminate on final delivery in any warehouse or place of storage at final destination <u>after all movement directly related to the transit is completed.</u>"*
>
> *(emphasis added)*

[88] It would seem, in my view, that contrary to the position held by the learned counsel for the appellant, arguing that the fuel as *"goods in transit"* are confined to the compartments of the fuel tanker up to time or point of being discharged from the tanker, that they do not in fact, stop being in transit until the fuel hoses are removed and placed back on the tankers. Then and only then can it be said that *"all movement directly related to the transit is complete."* If one were to get very technical, it then means that the fuel already pumped into the Service Station underground tanks, are still in transit, until the fuel tanker's hose(s) are disconnected from them.

[89] It is considered opinion of this Court that the appellant is liable to insure and indemnify the Respondent under the GIT Policy for loss and damages to its goods and since negligence is proved, damages caused to others.

Conclusion

[90] This case turns on the principal issues that Court below had identified in its judgment of 13 December, 2018.

[91] First, on whether the crossover incident was the result of an accident on the part of fuel tanker driver PW-1? This court has, contrary to the High Court decision, found that the crossover was an accident.

[92] Second, whether the crossover accident was the result of deliberate and/or mischievous act with criminal intention on the part of the fuel tanker driver PW-1? This court concurs with the High Court finding, that it was not.

[93] Third, whether the appellant is liable under the terms of both contract of insurance to indemnify the respondent, or under just one of the Policies? This court is of the view that the respondent has proved that it has the right to be indemnified under both the Policies.

[94] Finally, this court is minded to remit the hearing of assessment of damages, costs and interest back to the Lautoka High Court.

Basnayake JA

[95] I agree with the reasons and conclusions of Jitoko V.P.

Sharma JA

[96] I have read the Judgment and the reasons. I agree with the Judgment, the reasons and orders accordingly.

[97] **In the end this Court makes the following Orders:**

1. *The High Court orders of 13 December 2018 are hereby set aside.*

2. *This appeal is dismissed.*

3. *The cross-appeal is allowed with the following:*

    (i) *Declaration that the appellant is liable to indemnify the respondent for all the damages and losses by virtue of the provisions of the P&PL Policy*

    (ii) *Declaration that the appellant is liable to indemnify the respondent for damages and losses by virtue of the provisions of the GIT Policy*

4. *The assessment of damages and interest and costs are hereby remitted back to the Lautoka High Court, to fix a date, within the next 30 days, for hearing.*

5. *Costs of $5,000.00 before this Court is made against the appellant to be paid to the respondent within 21 days.*

.....
Hon. Justice F. Jitoko
VICE PRESIDENT, COURT OF APPEAL

COURT OF APPEAL FIJI

.....
Hon. Justice E. Basnayake
JUSTICE OF APPEAL

.....
Hon. Justice V. D. Sharma
JUSTICE OF APPEAL

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