

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CIVIL JURISDICTION

Civil Action No. HBC 109 of 2014

BETWEEN : **SUN INSURANCE COMPANY LIMITED** a limited liability company duly incorporated under Companies Act (Cap 247, Laws of Fiji) having its registered office at Ground & Level 1 Kaunikuila House, Laucala Bay Road, Suva, Fiji.

Plaintiff

AND : **YU-E-LI** also known as **Li YU-E** also known as **LEI LOK NGO** of Ravouvou Street, Lautoka, Businesswoman as Administratrix of the **ESTATE OF CHO TAT LAM** late of Ravouvou Street, Lautoka, Businessman.

1st Defendant

AND : **MERVIN FAZLEEN ALI** of Vesi Crescent, Lautoka, Student.

2nd Defendant

AND : **VINOD KUMAR MUDALIAR** of Lovu, Lautoka, Businessman.

3rd Defendant

Appearances : Messrs A.K Lawyers for the Plaintiff
Iqbal Khan & Associates for the Defendant

R U L I N G

INTRODUCTION

1. On 01 August 2010, Cho Tat Lam was opening the padlock of the gate to his workshop situated alongside Ravouvou Street in Lautoka when he was mowed down by motor vehicle FC386 driven by the 1st defendant.
2. In **Yu-E-Li v Ali** [2016] FJHC 1029; HBC99.2012 (14 November 2016), Mr. Justice Ajmeer found both the 1st Defendant and the 2nd Defendant liable jointly and severally. The first defendant, notably, had driven the said vehicle without a Driver's license and without any authority (or knowledge) of the second defendant.

[19] I would, therefore, hold that the first defendant is liable for causing the death of the deceased through his negligent driving without a valid driver's licence.

[20] As to the second defendant, he admits that at that time he was the owner of the vehicle and the first defendant drove the vehicle. However, in his statement of defence, he states that he was unaware the first defendant was the driver of the vehicle and that he gave the vehicle to the first defendant's mother for her use.

[21] The second defendant did not give evidence. He did not call witnesses either. This leads to the rejection of the statement he has made in this evidence.

[22] The first defendant drove the vehicle of which the second defendant was the owner. The first defendant should be driving the vehicle with the authority and the permission of the second defendant or he should be driving as an agent of the second defendant. Therefore, the second defendant is vicariously liable for the acts of the first defendant.

Conclusion

[23] The first and the second defendants are jointly and severally liable for causing the death of the deceased. They are liable to pay damages to the plaintiff for causing the death of her husband. The defendants are also liable to pay costs of these proceedings.

[24] Damages and costs are to be assessed before the Master of the High Court.

APPLICATION BEFORE ME

3. Before me is an application by Sun Insurance Company Limited (“SICL”) seeking the following Orders:
 - (i) a declaration that SICL is not obliged to provide an indemnity to satisfy any judgement which Yu-E-Li may obtain against the Mervin Fazleen Ali and Vinod Kumar Mudaliar in respect of the collision involving motor vehicle registration number FC 386 and the late Mr. Cho Tat Lum on Ravouvou Street, Lautoka on 01 August 2010 due to breach of a condition of the compulsory third party motor vehicle insurance policy issued by SICL in respect of the use of motor vehicle registration number FC 386 when at all material times Mervin Fazleen Ali was driving without any driving license or was not driving on the orders or permission of Vinod Kumar Mudaliar.
 - (ii) such other declarations and orders as this Court may deem just and expedient
 - (iii) provision to be made for SICL’s costs to be paid by the defendants.

THE THIRD PARTY POLICY

4. SICL had issued a compulsory Third Party Motor Vehicle insurance policy number Z 695342. The policy was current on the date of the accident (01 August 2010).
5. Clause 6 of the policy provides for the persons or classes of persons entitled to drive and who are insured under the policy as follows:

PERSONS OR CLASSES OF PERSONS ENTITLED TO DRIVE AND INSURED UNDER THE POLICY

- (a) The Owner, and
- (b) Any persons who is driving on the Owner’s order or with his permission

PROVIDED that the person driving holds a license permitting him to drive a motor vehicle for every purpose for which the use of the above motor vehicle is limited under paragraph 5 above or at any time within the period of thirty days immediately prior to the time of driving has held such a license and is not disqualified for holding or obtaining such a license (my emphasis)

WHEREAS the Owner named herein has made a proposal and paid a premium to the above-named insurer for the issue of a Third Party Policy to comply with the Motor Vehicles (Third Party Insurance) Ordinance in relation to the motor vehicle described herein the Insurer agrees subject to the terms limitations exclusions and conditions contained herein or endorsed hereon and to the provisions of the Insurer agrees insurer the persons or class of persons insured under this policy as described under paragraph 6 above against all liability incurred by such persons or classes of persons in respect of the death of or bodily injury to any persons caused by or arising out of the use of such motor vehicle on a road in Fiji during the period aforesaid or during any period for which the insurer may renew this insurance.

SUN INSURANCE CO. LTD v CHANDRA [2012] FJSC 8; CBV0007.2011 (9 May 2012)

6. The relevant law applicable to the question before me is now settled in Fiji by the Supreme Court in the above case. Chandra was a fare paying passenger in a van registration number BU 802. BU 802 was insured with SICL. BU 802 collided with AC 133. AC133 was also insured with SICL. Chandra obtained judgement against both drivers and the owners of the two vehicles. The driver of AC 133 did not have a driving licence and he had been convicted regarding same.
7. The Supreme Court in **Chandra** stated the general issue at paragraph 4 of its ruling and then noted some its earlier decisions on the same issue. It then referred to the Motor Vehicle (Third Party) Insurance Act and the particular following aspects of this Act:
 - (i) the provisions thereof which make it compulsory for vehicle owners to take out a policy of insurance against third party risks (section 4(1) and (2)).
 - (ii) the sections which stipulate the requirements of policies of insurance (section 6(1) and (4)).
 - (iii) persons who would be affected by the use of such vehicles and persons exempted (paragraph 14 of the Ruling and section 6(1)).
 - (iv) liability in respect of third parties (section 6)
 - (v) limits of such liability in respect of specific persons and situations (see paragraph 15 of Ruling)
8. In paragraph 15 of its Ruling, the Supreme Court noted that insurers may further limit liability by contract. To do so, they would have to set out persons covered in

compliance with section 6(1)(b) and then further qualify the coverage in relation to those persons.

15. Therefore it would seem that S.6 while providing for liability to arise in respect of third parties excludes and also limits such liability in respect of specific persons or specific situations. While the Statutory provision has these limitations, insurance companies when setting out the persons who are covered by the policy in compliance with S.6 (1) (b) add on a qualification to such person or persons who would be driving such vehicle. For instance in the policy that was issued in this case after setting out that the owner and any persons who is driving on the owner's order or with his permission goes on to specify thus "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 above 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". Such a provision would narrow down the scope of the protection afforded by the policy.

9. The Supreme Court then went on to note that in the appeal before it, the driver of AC 133 was not the holder of a valid driver's license and had been convicted for dangerous driving occasioning death and driving a motor vehicle without a Drivers License in contravention of the their party policy risk.
10. The Court then noted that section 10 of the Act stipulated that if a third party policy was purporting to create any restriction along any of the eight grounds ((a) to (h)) mentioned therein, the restriction would be of no effect.

19. Section 10 is to the effect that any conditions laid down in the policy by the insurer regarding the matters set out in (a) to (h) would be of no effect to third parties as regards liabilities that are required to be covered under the Act. Where such conditions are laid down by the Insurer, in terms of the proviso to S10 the insurer if he has paid any sum in respect of any liability of a person covered by the policy is entitled to recover such sum from that person (the insured). However, It is a practice among insurance companies to lay down conditions in relation to the matters specified in S.10, as well as other conditions not specified in S10 as has been seen in the present case too where conditions had been laid down regarding safe condition of the vehicle while in use, restriction on the weight of the load it was conveying, carrying passengers for hire or reward or in pursuance of a contract of employment in contravention of the licence issued for the vehicle that was described, not to permit the driving of the vehicle by a person under the influence of intoxicating liquor or is as a result of age or some physical or mental condition rendered incapable of driving such vehicle with safety.

11. The court then noted that section 11 of the Act imposed a duty on an insurer to satisfy judgements. At paragraph 21, the court would reiterate the basic position that an insurance policy is a contract between an insurer and an insured. The parties are free to agree on terms and conditions, so long as these are not prohibited by or restricted under the Act. The Court then said that, as in any other contract, any breach of condition would render the policy invalid.

21. (i) For the use of a motor vehicle, taking out an insurance against third party risks is compulsory under the Motor Vehicles (Third Party Insurance) Act. An insurance policy is a contract between the Insurance Company and the Insured and therefore the parties could agree on terms and conditions when taking an insurance policy provided those conditions are not prohibited or restricted under the said Act. As in any contract any breach of condition would make the policy invalid. In this instance the policy is in relation to the use of the vehicle, therefore any breach of condition in the use of the vehicle would render the policy invalid as long as the breach continues. If a person using a vehicle breaches a condition of a third insurance policy while using the vehicle, he is supposed to be using the vehicle without a third party insurance policy. By such conduct he is not only committing an offence under Section 4(2) of the said Act but he also becomes personally liable for any death or injuries caused to third parties.

(ii) In the above circumstances the Insurance Company would not be liable as the insurance cover provided to the vehicle becomes invalid and the "certificate of insurance" issued in pursuance of the said insurance policy also becomes invalid.

(iii) The Motor Vehicle (Third Party Insurance) Act imposes a liability on the insurer who has issued a Certificate of Insurance of honour a judgment obtained against the insured provided that the certificate of insurance is in force and valid at the time of the occurrence of the event and subject to the procedural safeguards provided in Subsection (2) of section 11. The Certificate of Insurance will not be in force if there is a breach of a condition in the policy other than that stipulated in Section 10 of the Act or if it is cancelled by mutual consent or by virtue of any provision in the policy (S.19). The Certificate of Insurance is invalid if it is obtained by non-disclosure of a material fact or by a representation of fact which was false in a material particular. This exception is subject to the proviso to subsection (3) of section 11.

12. The court then cites various cases to illustrate instances where a term in the policy which avoids liability of the insurer in respect of third party claims would stand against such third party and how the principles in these cases are contrary to the stand taken in **Sun Insurance v Pranish Prakash Chand, Q.B.E. Insurance (Fiji) limited and Ravinesh Prasad** and **Repeka Naba v Tower Insurance (Fiji) Limited**.

13. The Court then said at paragraph 36:

36. In view of the position set out above in paragraph 34 and 35, the reasons set out in paragraph 68 in the judgment of Sun Insurance quoted above cannot be accepted as containing the proper ambit and operation of the law in respect of S.11 of the Act. S.11(1) as stated above does provide a situation where an insurer can avoid liability against a third party which depends on the conditions set out in the policy in terms of S.6(1)(b).

14. Having said the above, the Court then went on to review the judgement and reasoning of the Fiji Court of Appeal and then laid down the following at paragraph 50.

50. In view of the increasing incidents resulting in damages and injuries being caused to third parties it would be important to lay down the statutory position in relation to insurance against third party risks:

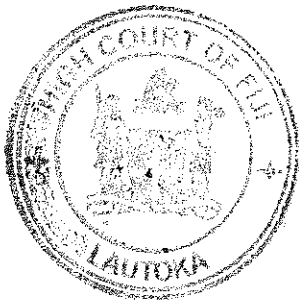
(a) Under the Statute the Insurer can impose certain conditions in the insurance policy. If the conditions stipulated in S.10 are included in the insurance policy and the vehicle is used in contravention of those conditions, and where a third party has suffered death or bodily injuries as a result of same, liability of the insured can be met by the insurer vis-à-vis third party. In such circumstances the insurer has a right to claim the sum paid to the third party from the insured.

(b) A policy stipulating conditions other than those contemplated in S.10 can be included in the policy and the particulars of such conditions should be incorporated in the certificate of insurance issued in conformity with the Schedule set out in Regulation 3 of the Act.

The Certificate of Insurance prescribed in the Schedule gives two categories of conditions namely (a) person or class or persons entitled to drive and (b) limitations as to use. If the vehicle is used in breach of any of the conditions coming under these categories, the insurer is exempted from third party liability.

CONCLUSION

15. Clause 6 of the Third Party Motor Vehicle insurance policy number Z 695342 provides that any persons driving on the owner's order or permission is entitled to drive and is insured under the policy. However, the condition is that such person holds a license permitting him to drive. This condition is not one contemplated in section 10 of the Act. However, it is a condition which SICL is entitled to include in policy Z 695342 because it is not prohibited by, or, is restricted under, the Act. In fact, it is a condition which complies with the provisions of the Land Transport Act. This condition is incorporated in the Certificate of Insurance issued in conformity with the Schedule in Regulation 3 of the Act. The motor vehicle in question (FC 386) was used in breach of Clause 6 of policy Z 695342. SICL therefore is exempted from liability under the policy. Parties to bear their own costs.



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Anare Tuilevuka
JUDGE
Lautoka

31 October 2018.