LAND TRANSPORT AUTHORITY v RAVIND MILAN LAL, ADRIAN AMAM LAL and ARCHNA LAL (CBV0019 of 2008S)

SUPREME COURT — CIVIL JURISDICTION

MARSOOF, SUNDARAM, CALANCHINI JJ

11, 23 October 2012

Tort — breach of statutory duty — statutory authority fails to discharge obligation to confirm whether vehicle insured against third party risks before issuing licence — vehicle involved in car collision — persons injured sue drivers and owners and obtain judgment — no third party insurance policy — injured persons join statutory authority and amend statement of claim to seek damages for breach of statutory duty — joinder and amendment almost 10 years after accident — whether claims against statutory authority time barred — whether statutory authority liable for breach of statutory duty — Administration of Justice Decree ss 7, 8(1) — High Court Rules O 20, r 5 — Land Transport Act s 6(2) — Motor Vehicles (Third Party Insurance) Act ss 11(1), (2), 13(1), (4) — Republic of Fiji the Motor Vehicles (Third Party Insurance) Act ss 4(1), 11(1) — Supreme Court Act s 7(3) — Traffic Act ss 11(1), 11(1)(d).

The respondents were injured in a car collision and commenced proceedings in the High Court of Fiji seeking damages in tort. A trial was conducted where it was determined that the first, second and third defendants (the driver and the two owners of the other car) were liable to the respondents for around $877,270. It was unclear at that trial whether the procedures prescribed by s 11(1)(d) of the Traffic Act 1985 in relation to third party insurance were observed by the petitioner (Land Transport Authority) and whether a third party insurance policy existed in relation to the other car.

Section 11(1)(d) relevantly provided:

> '…the licensing officer[@fffd]shall not issue[@fffd]a licence for a motor vehicle[@fffd]unless he is satisfied that the vehicle is insured against third party risks[@fffd]in accordance with the provision of the *Motor Vehicles (Third Party Insurance) Act* during the currency of such licence.'

In light of that confusion, the petitioner was joined (with its consent) and the respondents were given leave to amend their statement of claim to include claims for damages in tort for breach of statutory duty against the petitioner. The joinder and amendment occurred almost 10 years after the collision and almost 7 years after the commencement of the proceedings. A supplementary trial was conducted where it was determined that there was no third party insurance policy in respect of the other car. It was also held that the petitioner breached its statutory duty and was liable to make good the judgments obtained against the first, second and third defendants. The petitioner's appeal to the Court of Appeal of Fiji was dismissed. The petitioner sought special leave to appeal to the Supreme Court of Fiji. The petitioner submitted that any claims of the respondents' against it were time barred and that it was not liable for breach of statutory duty.

Held –

(1) Special leave to appeal in respect of the limitation argument is refused. The lower courts correctly held that the respondents' claims against the petitioner were not time barred.

(2) The licensing officer's failure to satisfy himself that the other car had third party risk insurance cover for the relevant period was a breach of the statutory duty imposed by s 11(1)(d). That breach was capable of sounding in damages for breach of statutory duty.

(3) The petitioner's breach of statutory duty caused the respondents' damage. The respondents would have been able to enforce their judgments against a third party insurer 'but for' the petitioner's breach of duty.

Appeal dismissed.

Cases referred to

Atkinson v Newcastle and Gateshead Waterworks Co (1877) LR 2 Ex D 441 ; *Barnett v Chelsea & Kensington Hospital Management Committee* [1969] 1 QB 428; *Bulu v Housing Authority* [2005] FJSC 1 CBV0011.2004S (8 April 2005); *Byrne & Frew v Australian Airlines Ltd* (1995) 131 ALR 422; *Chaplin v Hicks* (1911) 2 KB 786; *Cullen v Chief Constable of the Royal Ulster Constabulary* [2003] 1 WLR 1763; *Cutler v Wandsworth Stadium Ltd* [1949] AC 398; *Daily Telegraph Newspaper Co Ltd v McLaughlin* [1904] AC 776; *Dawson & Co v Bingley Urban District Council* [1911] 2 KB 149; *Doe d Bishop of Rochester (Murray) v Bridges* [1824-34] All ER Rep 167; *Dorney v Sunflower Airlines Ltd* [1994] FJHC 176; *Dominion Insurance Ltd v Kay Linette Bamforth and Margerett Annette Wilson & Others* SC Civil Appeal No CBV0005 of 2002S (24th October 2003); *Dr Ganesh Chand v Fiji Times Ltd* , CBV0005 of 2009 (31st March 2011); *Dublin United Tramways Co Ltd v Fitzgerald* [1903] AC 99; *Fiji Development Bank v New India Assurance Co Ltd* [2007] FJHC 19; *Grotherr v Maritime Timbers Pty Ltd* [1991] 2 QdR 128; *H Parsons (Livestock) Ltd v Uttley Ingham & Co Ltd* [1978] QB 791; *Lynch v Keddell* (No 2) [1990] 1 QB 10; *March v E & MH Stramare Pty Ltd* (1991) 171 CLR 506; *Rickless v United Artists Corp (Pink Panther case)* [1988] QB 40; *SS Hontestroom, Owners of v Owners of SS Sagaporack; SS Hontestroom v SS Durham Castle* [1927] AC 37; *Schulz v Schmauser* [2001] 1 Qd R 540; *Stovin v Wise* [1996] 3 All ER 801; *Weldon v Neal* (1887) 19 QBD 394; *X (minors) v Bedfordshire CC; M (a minor) v Newham LBC; E (a minor) v Dorset CC* [1995] 3 All ER 353; *Yorkshire Dale Steamship Co v Minister of War Transport* [1942] AC 691 (HL), cited.

Brice v Brown [1984] 1 All ER 997; *Couch v Steel* (1854) 3 E & B 402; 118 ER 1193; *First Interstate Bank of California v Cohen Arnold & Co* (1996) PNLR 17; *Groves v Lord Wimborne* [1898] 2 QB 402; *Kitchen v Royal Airforce Association* [1958] 2 All ER 241; *Malcolm v Broadhurst* [1970] 3 All ER 508; *McGhee v National Coal Board* [1973] 1 WLR 1; *McWilliams v Sir William Arrol & Co Ltd* [1962] 1 WLR 295; *Morrison Sports Ltd v Scottish Power UK plc* [2010] UKSC 37 (28 July 2010); *Native Land Trust Board v Shanti Lal and Several Others* CBV0009 of 2011 (25th April 2012); *O'Connor v SP Bray Ltd* (1937) 56 CLR 464; *Praveen's BP Service Station Ltd v Fiji Gas Ltd* , CAV0001 OF 2011 (6th April 2011) ; *Pickles v NCB (Intended Action)* [1968] 1 WLR 997; *Roe v Sheffield city Council* [2004] QB 653; [2003] EWCA Civ 1 (17 January 2003); *Smith v Leech Brain & Co Ltd* [1962] 2 QB 405; *Sovar v Henry Lane Pty Ltd* (1967) 116 CLR 397, considered.

K. Quoro for the sixth Defendant-Appellant-Petitioner.

V. Mishra for the Plaintiffs-Respondents-Respondents.

[1] Marsoof, Sundaram, Calanchini JJ. In this application, the 6th Defendant-Appellant-Petitioner, the Land Transport Authority (hereinafter referred to as "the Petitioner"), is seeking special leave to appeal against the decision of the Court of Appeal (Byrne, JA, Pathik, JA, and Lloyd, JA) dated 7th November 2008, which affirmed the decision of the High Court at Lautoka (Connors J) pronounced on 22nd June 2007. In his judgment, Connors J found for the Plaintiffs-Respondents-Respondents (hereinafter referred to as "the Respondents") against the Petitioner in a claim for damages for negligence and breach of statutory duty, and awarded damages aggregating to $ 877,272.00, with costs.

[2] The action which ultimately led to the aforesaid decision of the Court of Appeal was filed in the High Court at Lautoka on 8th August 1994 to recover damages for the loss suffered as a result of an accident that occurred on 17 August

1991. On that fateful day, Ravind Milan Lal and his wife Manju Lal were travelling with their three children in a vehicle on the Queens Road at Tagaqe, Sigatoka when their vehicle came into collision with a vehicle bearing registration number BX400, driven by the original 1st Defendant. Manju Lal was killed in the accident. Ravind Milan Lal and the children, Adrian, Akash and Archana, were all seriously injured.

[3] The 1st Defendant, who was in separate proceedings convicted of the criminal offence of causing death by dangerous driving with respect to his driving, was sued along with the 2nd Defendant, Mohammed Attulah, who was alleged to be the owner of the vehicle BX400, for damages in negligence. It is pertinent to note that since there was little hope that the 1st and 2nd Defendants will be able to satisfy any award that might be made by court, and because there was uncertainty as to whether the vehicle bearing number BX400 had third party insurance cover, and if it did, which insurance company had issued the cover, the Respondents had cited all the three insurance companies operating in the relevant area, namely Dominion Insurance Co Ltd, Queensland Insurance Co Ltd, and National Insurance Co Ltd, as respectively the 3rd, 4th and 5th Defendants.

[4] On 31st July 1996, the Respondents amended their writ of summons withdrawing the claim against Queensland Insurance Co Ltd, and National Insurance Co Ltd, which had by then filed Statements of Defence denying any liability on the basis that no third party insurance had been issued on vehicle BX400 by the said companies. The Respondents also moved to add as 3rd Defendant RB Rahmathullah as another alleged owner of the vehicle in question, so that Dominion Insurance Co Ltd, became the 4th Defendant. The 1st, 2nd and 3rd Defendants took little part in the civil proceedings, and default judgment was entered against them on 30 November 1998 for negligence. By the decision of the High Court (Finnigan J) dated 22nd August 2006, the damages payable by the 1st to 3rd Defendants were quantified to be $128,032.00 payable to Ravind Millan Lal as administer of the estate of Manju Lal, $ 449,600.00 payable to Ravind Millan Lal in his personal capacity, $ 142.160.00 payable to Archana Lal, $ 114,520.00 payable to Adrian Amam Lal and $42,960 payable to Akesh Ravindra Lal, totaling $ 877,272.00 with costs fixed at $ 5,000.00.

[5] By the order of the High Court dated 22nd November 2000 the Attorney General, in his representative capacity, was added as the 5th Defendant to represent the interests of the Republic of Fiji, and more particularly the Department of Road Transport, within which the Principal Licensing Authority functioned. Consequent upon the takeover of the functions of the Department of Road Transport by the Land Transport Authority incorporated under s 6(2) of the Land Transport Act 1998, the said Authority was joined as the 6th Defendant by the order of the High Court dated 22nd February 2001. This is the very same order which has erroneously been described as the order of 9th February 2001 in paragraph 7 and other later paragraphs of the judgment of the Court of Appeal and also in the petition of appeal. There was a hearing in the High Court before the said order was made, which took place on 9th February 2001, but the order of Court was made thereafter by Hon Justice Gates, as he then was, on 22nd February 2001. Learned Counsel for the Petitioner (LTA) rightly conceded that the High Court had an undoubted discretion to order the joinder of the LTA to the proceedings if 'special circumstances' could be made out by the applicant (*see, Lynch v Keddell (No 2)* [1990] 1 Qd R 10 at 14; *Grotherr v Maritime Timbers Pty*

Ltd [1991] 2 Qd R 128 at 132 and 139; *Dorney v Sunflower Airlines Ltd* [1994] FJHC 176 and *Fiji Development Bank v New India Assurance Co Ltd* [2007] FJHC 19).

[6] What gives rise to the present application for special leave to appeal is the subsequent decision of the High Court (Connors J) dated 22nd June 2007, which was made after a supplementary trial for determining whether the Petitioner (LTA) was liable to make good the judgment already entered against the 1st to 3rd Defendants. There was no dispute at this trial that motor vehicle licence bearing number 738525 had been issued by the predecessor to the Petitioner for vehicle number BX400 and that it was valid for the period 21st December 1990 to 28th November 1991. As the learned judge indicated at page 152 of the proceedings, the only issue to be determined was "just whether there was a Third Party Insurance Policy as required by the legislation at the time of the registration or not." At this trial all exhibits and other evidence led at the previous trial against the 1st to 3rd Defendants were considered to be part of the record, but the Respondents Ravind Milan Lal and Adrian Aman Lal testified with respect to the basis on which they claimed that the Petitioner (PTA) should be held liable in lieu of the third party insurer. One official witness, Kesaia Biu, testified on behalf of the Petitioner. At the end of the trial, the High Court held that by reason of the failure of the licensing officer to satisfy himself, as required by s 11(1)(d) of the Traffic Act (Cap. 176 Rev Edition 1985), that vehicle bearing registration number BX400 was insured against third party risks in accordance with the provisions of the Motor Vehicles (Third Party Insurance) Act (Cap 177 Rev Edition 1985), there was a breach of statutory duty on the part of the Department of Road Transport, under which the said officer functioned, the Petitioner Land Transport Authority (LTA) must bear the loss suffered by the Respondents.

Application for Special Leave to Appeal

[7] The Petitioner has in its petition expressly refrained from seeking special leave to appeal with respect to so much of the decision of the Court of Appeal that related to the order of the High Court dated 22nd February 2001 whereby the Petitioner was joined as a party Defendant to the action and permission was granted for the Respondents to file an amend Statements of Claim. The Petitioner seeks special leave to appeal from the decision of the Court of Appeal insofar as it affirmed the decision of the High Court dated 22nd June 2007 on four specific grounds set out in paragraph 2 of its petition, namely that –

> (i) the Court of Appeal erred in law in affirming the decision of the High Court which rejected the limitation defence raised by the Petitioner;
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> (ii) the Court of Appeal erred in law in failing to consider the prejudice caused to the Petitioner due to the relevant card relating to the third party risk insurance for the vehicle bearing number BX400;
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> (iii) the Court of Appeal erred in concluding that damage was caused by the Petitioner's breach of statutory duty; and
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> (iv) in so concluding, the Court of Appeal misapplied or misunderstood the principle of causation.
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> However, in the course of his submissions before Court, learned Counsel for the Petitioner crystallized these grounds into two central points, namely (1) the question of limitation, and (2) the question of breach of statutory duty.

[8] As provided in s 8(1) of the Administration of Justice Decree No 9 of 2009, the Supreme Court has exclusive jurisdiction, subject to such requirements as prescribed by law, to hear and determine appeals from all final judgments of the

Court of Appeal. However, it is trite law that in a civil case such as this, where a Petitioner has not obtained the leave of the Court of Appeal to lodge an appeal to the Supreme Court, the Supreme Court may grant special leave to appeal as provided in s 8(2)(b) of the said Decree only if the Petitioner satisfies one of the several criteria set out in s 7(3) of the Supreme Court Act No 14 of 1998.

[9] Learned Counsel for the Petitioner has submitted that the aforesaid grounds and questions on which special leave to appeal has been sought are all far reaching questions of law of great general and public importance within the meaning of s 7(3) of the Supreme Court Act of 1998, and as such, special leave to appeal ought to be granted with respect to those grounds and questions. Learned Counsel for the Respondent has in this context responded by referring us to a *dictum* of Lord Sumner in *SS Hontestroom, Owners of v Owners of SS Sagaporack; SS Hontestroom v SS Durham Castle* [1927] AC 37 at 47, which stresses that "we must, in order to reverse, not merely entertain doubts whether the decision below is right, but be convinced that it is wrong." That *dictum* was made at the conclusion of a hearing after the grant of special leave to appeal, and would have little relevance at the threshold stage of the grant of special leave to appeal.

[10] It has been repeatedly observed by this Court in several of its judgments that the provisions of s 7(3) of the Supreme Court Act, echo the sentiments expressed by Lord Macnaghten in *Daily Telegraph Newspaper Co Ltd v McLaughlin* [1904] AC 776, which was the first case involving an application for special leave to appeal from a decision of the High Court of Australia to be decided by the Privy Council. Lord Macnaghten, at page 779 of his judgment, after observing that the same principles should apply as they did for an appeal from the Supreme Court of Canada, referred to the case of *Prince v Gagnon* (1882) 8 App Cas 103, in which it was stated that appeals would not be admitted-

> 'save where the case is of gravity involving a matter of public interest, or some important question of law, or affecting property of considerable amount, or where the case is otherwise of some public importance or of a very substantial character.'

[11] The criteria laid down in of s 7(3) of the Supreme Court Act have been examined and applied by the Supreme Court of Fiji in decisions such as *Bulu v Housing Authority* [2005] FJSC 1 CBV0011.2004S (8 April 2005), *Dr Ganesh Chand v Fiji Times Ltd.,* CBV0005 of 2009 (31st March 2011), *Praveen's BP Service Station Ltd., v Fiji Gas Ltd.,* CAV0001 OF 2011 (6th April 2011) and *Native Land Trust Board v Shanti Lal and Several Others* CBV0009 of 2011 (25th April 2012), and it is clear from these decisions that special leave to appeal is not granted as a matter of course, and that for the grant of special leave, the case has to be one of gravity involving a matter of public interest, or some important question of law, or affecting property of considerable amount or where the case is otherwise of some public importance or of a very substantial character. Even so special leave would be refused if the judgment sought to be appealed from was plainly right, or not attended with sufficient doubt to justify the grant of special leave. In our view, that indeed is the case in relation to the question of the limitation defence raised by the Petitioner.

The Limitation Defence

[12] There are two limbs to the limitation defence as formulated by learned Counsel for the Petitioner. The first is that although the collision that caused loss to the Respondents occurred on 17 August 1991 and action was instituted on 8th

August 1994, the Petitioner was not an original party Defendant, and that by the time the Petitioner was joined as the 6th Defendant on 22nd February 2001, the cause of action against it had got time-barred. Learned Counsel for the Petitioner submitted on this basis that the High Court and Court Appeal had erred in relating back the amended Statement of Claim filed consequent to the order of 22nd February 2001 to 8th August 1994 for dismissing its limitation defence. The second limb of the limitation defence raised on behalf of the Petitioner is that the rejection of the Petitioner's limitation defence caused severe prejudice to the Petitioner insofar as it was unable to adduce any evidence regarding the record relating to the third party insurance policy for vehicle bearing number BX400, as such evidence had by then been destroyed through the passing of time.

[13] In our opinion, these aspects of the case have been adequately dealt with in paragraphs 21 to 39 of the impugned judgment of the Court of Appeal. As was observed by the Court of Appeal in paragraph 22 of its judgment, in making his submissions on these matters learned Counsel for the Petitioner Land Transport Authority (LTA) –

> "…totally ignores the history of this matter. Firstly, the joinder was not opposed by counsel for the Attorney General, who had been acting for the predecessor of the LTA, which predecessor carried responsibility for fulfilling the duty under s 11 of the Traffic Act. Secondly, and more importantly, the joinder of the LTA was ordered *with the consent of counsel appearing for the LTA* before the judge who ordered joinder. Also, the claim, as pleaded by the plaintiffs shortly after joinder of the Attorney General was ordered, *averred breach of statutory duty on the part of the predecessor to the LTA*. No objection was taken to the claim by the LTA when it was joined. Also, the limitation period for any action against the LTA was current at the time the respondents first filed their claim." (*italics added*)

[14] Here the Court of Appeal was adverting both to the orders of the High Court dated 22nd November 2000 by which the Attorney General was joined, and the later order of 22nd February 2001 by which the Petitioner LTA was joined, and on both instances the Respondents were allowed to amend their statement of claim as may be necessary. It is noteworthy that in the amended statements of claim filed by the Attorney General and the Petitioner LTA after they were joined as Defendants, two separate causes of action were included, namely, one for negligence in the maintenance of records registration and licensing of motor vehicles and giving out information pertaining to the third party cover to the Police and the Respondents as more fully set out in paragraph 22 of the amended statement of claim, and the other for breach of statutory duty as averred in paragraph 23 of the said statement of claim. It has been submitted on behalf of the Respondents that both these causes of action accrued only when by the decision of the High Court (Finnigan J) dated 22nd August 2006, the damages payable by the 1st to 3rd Defendants to the Respondents were quantified, and the said cause of action was not time-barred at the point of joinder of both the Attorney General and the Petitioner. We do not consider it necessary to rule on this point, as in our opinion the Petitioner is precluded from taking up the defence of limitation having consented to being joined as a defendant in this action on these very same causes of action.

[15] In this context, it is relevant to note that O 20 r 5 of the High Court Rules, 1988 empowered the High Court to permit amendment of a statement of claim "notwithstanding that the effect of the amendment will be to add or substitute a new cause of action if the new cause of action arises out of the same facts or substantially the same facts as a cause of action in respect of which relief has

already been claimed in the action by the party applying for leave to make the amendment". We note that the facts relevant to a claim for breach of statutory duty were included in the pleadings in the very first statement of claim filed in this case to justify the citation of three insurance companies as party defendants in the hope that at least one of them may be the issuer of the third party policy for vehicle number BX400. It is noteworthy that in affirming the decision of the High Court by which the amendments in question were allowed, the Court of Appeal relied on the opinion of Lord Esher in *Weldon v Neal* (1887) 19 QBD 394 at 395, and observed at page24 of its well considered judgment, that "what took place in this case can be regarded as one of those 'very peculiar circumstances'(as stated by Lord Esher in *Weldon v Neal, supra,* which phraseology has been understood in present day parlance to mean 'very special circumstances' as observed by the Supreme Court of Canada in *Basarsky v Quinlan,* [1972] SCR 380 at 385) where a court would allow an amendment to a claim which would enable a plaintiff to rely on cause of action which was statute barred at the time of the application to amend."

[16] In any event, the submission of learned Counsel for the Petitioner that the Petitioner was prejudiced by the lateness of its joinder in so far as the card containing information pertaining to the third party insurance policy for vehicle number BX400 had by then been destroyed does not impress us, as the Petitioner has led very little evidence on the primary issue which had to be decided by court as to whether there was a proper third party insurance cover for the vehicle for the relevant period. As the High Court (Connors J) has very rightly observed at paragraph 27 of its judgment dated 22nd June 2007, neither the vehicle examiner nor the licensing officer or even his clerk who effected registration of the vehicle at the time of issuing the licence for the said vehicle were called to give evidence by the Petitioner (LTA), and Kesaia Biu, the only witness called by the Petitioner, indicated in the course of her testimony that prior to sending the letter dated 5th June 2000 to the lawyers for the Respondents Mishra Prakash Associates, she obtained the information regarding third party cover by "punching" the computer which "threw out" the name of the insurer Dominion Insurance, and the "policy number 10714 of 3/12/90-91". However, she did not know who fed the said information to the computer, or who in fact handled the licensing of the vehicle in question, nor had she been able to verify the accuracy of the information by checking the card or other documentation in the Authority as no such material could be found. This information later turned out to be erroneous.

[17] For all these reasons, we do not consider the limitation question raised by the Petitioner, and in particular grounds (i) and (ii) as set out in paragraph 2 of the petition for special leave to appeal, merit the grant of special leave to appeal as they have been well considered by the lower courts. We are also of the opinion that, in any event, in regard to the limitation question raised by learned Counsel for the Petitioner, the judgment of the Court of Appeal from which special leave to appeal is sought is plainly right and not attended with sufficient doubt to justify the grant of special leave to appeal.

Breach of Statutory Duty

[18] The remaining two grounds (iii) and (iv) on which the Petitioner has sought special leave to appeal relate to the tort of breach of statutory duty. It is important to note that in its petition, the Petitioner does not contest the position that there was a statutory duty owed by the predecessor to the Petitioner (LTA) to all road users in terms of s 11(1) proviso (d) of the Traffic Act (Cap 176) read

with s 11(1) of the Motor Vehicles (Third Party Insurance) Act (Cap 177) to ensure that before it licensed a motor vehicle, the vehicle had attaching to it valid third party insurance cover. However, learned Counsel for the Petitioner contends that the said provisions of law did not confer a private right against the licensing officer or the government department within which it functioned. He further submits that as set out in ground (iii), the Court of Appeal erred in concluding that damage was caused by the Petitioner's breach of statutory duty, and as urged in ground (iv), in so concluding, the Court of Appeal misapplied or misunderstood the principle of causation. Learned Counsel for the Respondents had contended that causation was a question of fact, and did not as such merit the grant of special leave to appeal. However, as Lord Denning MR observed in *Pickles v National Coal Board* [1968] 1 WLR 997 at 100, in the ordinary way, "attributability or causation is regarded as a point of law". We are satisfied that the questions raised by the Petitioner in this regard are all far reaching questions of law of great general and public importance within the meaning of s 7(3) of the Supreme Court Act of 1998, and we grant special leave to appeal on these questions. In accordance with the practice of this Court, we proceed to decide the questions on which special leave to appeal has been granted.

[19] It is significant that the High Court (Connors J) found in its judgment of 22 June 2007 that the predecessor of the Petitioner (LTA), namely the Department of Road Transport of the Republic of Fiji, owed the Respondents a statutory duty of care arising from s 11(1) proviso (d) of the Traffic Act (Cap 176) to ensure that before it licensed motor vehicle bearing number BX400, the vehicle had attaching to it valid third party insurance. The High Court further held that if this duty had been fulfilled, then the Respondents would have recovered their damages from the third party insurer. By reason of the Petitioner's predecessor not fulfilling its said statutory duty, the Respondents were deprived of the opportunity of recovering their damages from a third party insurer as provided in s 11(1) of the Motor Vehicles (Third Party Insurance) Act (Cap 177), and thus the predecessor to the Petitioner (LTA) directly caused the Respondents to lose the opportunity of recovering on the judgments obtained against the driver and owners of the said motor vehicle. It is on this basis that the High Court found that the Petitioner (LTA) is bound in law to indemnify the Respondents for the loss suffered by them.

[20] Section 11(1) of the Traffic Act provides as follows:-

> '(1) Application for a motor vehicle licence shall, on the first application for a licence, be made on the prescribed form and, in every case including an application for the renewal of a licence, shall be made to a licensing authority who shall, on payment of the prescribed fee, issue to the applicant a licence.....
>
> Provided that-
>
> (d) the licensing officer *shall not issue* a licence for a motor vehicle *unless he is satisfied that the vehicle is insured against third party risks* in accordance with the provision of the Motor Vehicles (Third Party Insurance) Act during the currency of such licence."(*italics added*)

[21] Section 11 of the Motor Vehicles (Third Party Insurance) Act provides that -

> "(1) If, after a certificate of insurance has been delivered under the provisions of subsection (4) of s 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 s 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." (*italics added*)

[22] Learned Counsel for the Petitioner (LTA) has submitted that s 11(1) (d) of the Traffic Act only requires a licensing officer to be satisfied that an applicant for a licence has a third party policy before he issues such a license, and there is no provision in the Act that states that if he breaches such a provision there will be civil remedy against him or the government department to which he was attached, nor is there any requirement that he keeps record and produces on demand such record. By way of comparison, he has invited our attention to s 13 (1) of the Motor Vehicle (Third Party Insurance) Act which clearly imposes a duty on a vehicle owner to give information on "whether or not he was insured in respect of that liability". Section 13(4) deals with the so called 'duty to give information' which includes the duty to allow all contracts of insurances and other relevant documents in the possession of the person on whom the duty is imposed to be inspected and copies thereof be taken. He argues that there is no similar provision expanding the duty to be satisfied under s 11(1) (d) of the Traffic Act, and that by rule of exclusion the legislature must have intended that the information concerning insurance must be sourced by the Plaintiffs from the driver and owner of BX400 and not the Principal Traffic Authority of the Department of Road Transport, the predecessor of Petitioner.

[23] As against this, learned Counsel for the Respondent has submitted that the provisions of s 11(1) proviso (d) of the Traffic Act and s 11(1) of the Motor Vehicles (Third Party Insurance) Act should be read together, and that the legislative scheme set up by the two pieces of legislation was for the benefit of those who may suffer personal injuries or even death as a result of road accidents. He submitted that the two pieces of legislation together constituted a fool proof scheme to ensure that all persons who suffer loss as a result of a road accident are compensated through a system of compulsory third party liability insurance. He further submitted that the said statutory scheme was frustrated by the failure of the Petitioner's predecessors to discharge the imperative duty so clearly cast upon it by proviso (d) to s 11 of the Traffic Act of satisfying itself that the vehicle in question was insured against third party risks at the time the licence was issued.

[24] We have no difficulty in acceding to this suggestion of learned Counsel for the Respondent that the two Acts in question must be read together. We also note that the said submission is consistent with the pleadings in the case, and further that there is express reference in s 11(1) proviso (d) of the Traffic Act to the Motor Vehicles (Third Party Insurance) Act, and it is undisputable that these provisions were part of a legislative scheme to protect all road users from personal injury that could occur from a motor vehicle accident. However, the question whether the legislation in question, when read together, were intended to confer a private right of recourse to an affected road user, and whether there is a causal nexus between the breach and the loss suffered has to be carefully examined.

[25] It will be useful to begin with a survey of the common law relating to the tort of breach of statutory duty. Chapter 50 of the second Statute of Westminster in 1285 sets out an early basis for a civil action based on statutory breach. The modern history of the action can, however, be traced to 'Action upon Statute (F)' in Sir John Comyns, *A Digest of the Law of England* (5th Edition, 1822) page

442, an 18th century source for the availability of an action by an individual who suffers damage caused by the breach of a statute:

> "That in every case where a statute enacts or prohibits a thing for the benefit of a person, he shall have a remedy upon the same statute for the thing enacted for his advantage, or for the recompense of a wrong done to him contrary to the said law."

[26] In one of the earliest modern cases applying this principle, Lord Campbell CJ in *Couch v Steel* (1854) 3 E & B 402; 118 ER 1193 granted a remedy to a seaman who had fallen ill on a journey and suffered damage due to the failure of the ship-owner to maintain a list of

> medicines required by statute. The decisions that followed Couch v Steel, supra, such as *Atkinson v Newcastle and Gateshead Waterworks Co.* (1877) LR 2 Ex D 441 and *Dawson & Co v Bingley Urban District Council* [1911] 2 KB 149 did not comfort the common law as they were in apparent conflict with each other, making it difficult to extract general principles. In *Dawson,* where a private right of recourse was held to exist, the court was conscious of *Atkinson* which was a decision to the contrary, but the court focused strongly on the fact that the body involved was a purely public body, and the statute concerned was not a 'legislative bargain' between government and private interests. The court started with the general principles relied on in *Couch*, and noted that this was not a case of nonfeasance, but rather a case where the authority had entered on the performance of its duty and done so carelessly. However, these cases need not detain us any further except to say that the apparent contradictions may be resolved when the provisions of the statute in question are considered in the backdrop of the specific circumstances of each case.

[27] On the issue of whether a civil remedy is available or not, the courts generally consider matters such as: does the statute itself prescribe a penalty, or not (*Cutler v Wandsworth Stadium Ltd* [1949] AC 398, 407); is the statutory provision designed for the benefit of a limited class of persons, or is meant for the benefit of the public at large (*Morrison Sports Ltd v Scottish Power UK plc* [2010] UKSC 37 (28 July 2010) [39]–[40]); is the obligation concerned a specific and confined obligation, or is it more general and ill-defined (R A Buckley, 'Liability in Tort for Breach of Statutory Duty' (1984) 100 *Law Quarterly Review* 204, 221); and has this obligation, or an obligation analogous to this in previous legislation, been already held by the courts to give rise to a civil action (*See*, *dictum* of McMurdo P in *Schulz v Schmauser* [2001] 1 Qd R 540, 546). However, none of these factors, by their very nature, can be conclusive, and the legislation should be examined in its entirety before arriving at a conclusion.

[28] The primary obligation on the court is to endeavour to fulfil its function in accordance with the rule of law, rather than simply making decisions in accordance with personal predilection. As Kitto J observed in the High Court of Australia decision of *Sovar v Henry Lane Pty Ltd* (1967) 116 CLR 397 at 405-

> "The question whether a contravention of a statutory requirement of the kind in question here is actionable at the suit of a person injured thereby is one of statutory interpretation. The intention that such *a private right* shall exist is not, as some observations made in the Supreme Court in this case may be thought to suggest, conjured up by judges to give effect to their own ideas of policy and then 'imputed' to the legislature. The legitimate endeavour of the courts is to determine what inference really arises, on a balance of considerations, from the nature, scope and terms of the statute, including the nature of the evil against which it is directed, the nature of the conduct prescribed, the pre-existing state of the law, and, generally, the whole range of circumstances relevant upon a question of statutory interpretation."(*italics added*)

[29] In the above passage, Kitto J. refers to a 'private right', which should be capable of being discerned from the language of the relevant statute. As he emphasises, each case involves an interpretation of the relevant statute, and where the legislature has not by clear words expressed any intention as to whether such a private right would exist, it is for the courts to infer from the legislation as a whole as to what the intention of the legislature was in its statutory context.

[30] The common law courts have been more ready to recognise a private right of action for breach of statutory duty in the context of industrial safety. Thus, in *Groves v Lord Wimborne* [1898] 2 QB 402, in which the court had to decide whether a breach of the duty to fence dangerous machinery imposed by s 5(4) of the Factory and Workshop Act 1878 gave a cause of action to a workman thereby injured notwithstanding the criminal sanctions also imposed by the statute for breach of the duty. It was in this context that Vaughan Williams LJ observed at pages 415-416

> "It cannot be doubted that, where a statute provides for the performance by certain persons of a particular duty, and some one belonging to a class of persons for whose benefit and protection the statute imposes the duty is injured by failure to perform it, *prima facie*, and, if be nothing to the contrary, an action by the person so injured will lie against the person who has so failed to perform the duty."

[31] A more modern version of this decision is *O'Connor v SP Bray Ltd* (1937) 56 CLR 464, in which a worker had been injured by reason of the breach by the defendant of a statutory duty to provide safety gear for the lift, imposed by the Scaffolding and Lifts Act, 1912. Holding in favor of a private right of action for breach, Dixon J observed at page 478 of the judgment that -

> "In the absence of a contrary legislative intention, a duty imposed by statute to take measures for the safety of others seems to be regarded as involving a correlative private right, although the sanction is penal, because it protects an interest recognized by the general principles of the common law."

[32] This readiness to uphold civil liability is also evident in contexts outside industrial safety, as for instance in the case *Rickless v United Artists Corp* (Pink Panther case) [1988] QB 40, where it was held that a statute making it an offence to use portions of films without consent of the actors involved, gave rise to civil liability. In that case, the family of the actor, Peter Sellers, was able to recover substantial damages where previously discarded clips of his were put together to make a film for which they had refused permission. This seems a good example of a situation where a private right should have been enforced, given the policy evident in the statute.

[33] Of course, there are decisions on the other side of the line, where courts have been more reluctant to find a private right to damages. Most such cases had turned on the construction of the particular statute in the light of the facts of the case. Sometimes, the decision would turn on the interpretation of a particular words used in a statute. For instance, in *Stovin v Wise* [1996] 3 All ER 801, the word "maintain" used in the Highway Act, came in for interpretation in the context of a claim by a plaintiff who was injured when his motor cycle collided with a car driven by the defendant at a junction where the view from his direction of the defendant's car was obscured by an earth bank on railway land adjacent to the road. The plaintiff sued the defendant, who joined the highway authority as third party, alleging that it had failed to have the bank removed in breach of its statutory duty to "maintain" the highway or in breach of its common law duty to

users of the highway to remove dangers which impaired visibility. The House of Lords in a majority decision of 3 to 2 held that the highway authority was not liable for breach of statutory duty or for negligence at common law. Lord Hoffman, who delivered the majority decision, said this at page 827-

> "Whether a statutory duty gives rise to a private cause of action is a question of construction (see *R v Deputy Governor of Parkhurst Prison; Ex parte Hague* [1991] 3 All ER 733, [1992] 1 AC 58). It requires an examination of the policy of the statute to decide whether it was intended to confer a right to compensation for breach**."**
>
> Lord Nicholls, who reached the opposite conclusion in the application of the principles to the facts, in delivering the minority judgment, emphasised at page 812 that leaving "the loss to lie where it falls is not always an acceptable outcome."

[34] In some cases, the courts have considered that the penal sanction imposed by the statute alone was intended by the legislature to be the main means of enforcement of the statutory right, unless good reasons can be offered for believing otherwise. A leading authority for this proposition is the following *dictum* of Lord Tenterden CJ in *Doe d Bishop of Rochester (Murray) v Bridges* [1824-34] All ER Rep 167, 170 –

> "Where an Act creates an obligation, and enforces the performance in a specified manner, we take it to be a general rule that performance cannot be enforced in any other manner."

[35] In other cases, some other factors have been considered sufficient to weigh in favour of imposing a civil duty to compensate despite the existence of penal remedies. For instance, in *Dublin United Tramways Co Ltd v Fitzgerald* [1903] AC 99, the plaintiff sued for injury suffered when his horse fell on the stones. When the case came before the House of Lords, there seems to have been no dispute that the statute created a private right of action. But the company contended that it had no obligation to remedy transient conditions of rain or snow by putting down sand. The House of Lords accepted that the company's only duty was to "maintain" the fabric of the highway in a reasonably safe condition. If the surface were in proper repair, there would be no further obligation to deal with transient weather conditions.

[36] An important authority on the point, through not from the field of road safety, is the decision of the House of Lords in *Cullen v Chief Constable of the Royal Ulster Constabulary* [2003] 1 WLR 1763, a case where a prisoner held under anti-terrorism laws was denied access to legal advice contrary to regulations, and the majority of the House held that a civil action was available for breach of the regulations, although by a different majority the House went on to deny relief on the basis that the prisoner in this case had not suffered appropriate damage.

[37] Another recent decision where a private right to damages was found to exist is *Roe v Sheffield City Council* [2004] QB 653; [2003] EWCA Civ 1 (17 January 2003). In that case, the Court of Appeal of England held that a statutory duty imposed under s 25 of the Tramways Act 1870, which required that tramlines laid into a public road be 'on a level with the surface of the road', gave rise to civil liability. Pill LJ, giving the majority judgment, concluded that the duty was actionable as it seemed reasonable that Parliament, having authorised a positive interference with the public highway, would want to provide for a cause of action where the duties that went along with that interference were breached. The duty was similar to that imposed for the safety of workers, it was limited and quite specific, and there were no other effective means of ensuring the

protection the statute provided. Perhaps the most difficult question was whether the 'class of persons' protected was too wide, but his Lordship relied on the comments of Atkin LJ in *Phillips v Britannia Hygienic Laundry Co* [1923] 2 KB 832 to the effect that 'road-users' were not too broad a class.

[38] The modern view of the criteria for determining whether a statutory obligation creates a civil remedy is usually seen as well summed up in the judgement of Lord Browne-Wilkinson in *X (minors) v Bedfordshire CC; M (a minor) v Newham LBC; E (a minor) v Dorset CC* [1995] 3 All ER 353, 364, wherein it was noted that -

> "....a private law cause of action will arise if it can be shown, as a matter of construction of the statute, that the statutory duty was imposed for the protection of a limited class of the public and that Parliament intended to confer on members of that class a private action for breach of duty."

The High Court of Australia (per Brennan CJ, Dawson & Toohey JJ.) gave expression to the concept in *Byrne & Frew v Australian Airlines Ltd* (1995) 131 ALR 422, at 429 in the following way:-

> "A cause of action for damages for breach of statutory duty arises where a statute which imposes an obligation for the protection or benefit of a particular class of persons is, upon its proper construction, intended to provide a ground of civil liability when the breach of obligation causes injury or damage of a kind against which the statute was designed to afford protection."

[39] The decisions discussed above, largely touch on some of the points that arose for consideration in the course of this decision, and clearly establish that while the intention of the legislature is paramount, in construing the intention of the legislature a court is entitled to look at the statutory scheme as a whole in the light of the malady that was intended to be remedied by the legislation. The common law endeavoured several centuries ago to redress injury caused to persons including 'road users' who were harmed by the actions of impecunious persons while they were in the employ of more affluent masters for whose benefit they acted, and developed the doctrine of vicarious liability. The liability of the 2nd and 3rd Defendants in this case, who are not parties to this appeal, for the negligence of the 1st Defendant in driving vehicle bearing number BX400, arises from this cherished doctrine. Developments in insurance law carried the nexus further in creating a system of third party risk policies, which helped to overcome the anxieties of such masters, who were able to insure against eventualities which may give rise to staggering claims for damages.

[40] The legislature stepped in to enact for the Republic of Fiji the Motor Vehicles (Third Party Insurance) Act, which in s 4(1) provided expressly that "no person shall use, or cause or permit any other person to use, a motor vehicle unless there is in force in relation to that motor vehicle by such person or other person, as the case may be, such a policy of insurance in respect of third party risks as complies with the provisions of this Act". Section 11(1) of the Act made it possible for any judgment in respect of such liability obtained against any person covered by such a third party policy to be directly enforced against the insurer who has undertaken the risk through its policy, "notwithstanding that the insurance company may be able to avoid or cancel or may have avoided or cancelled the policy". By s 11(1) proviso (d) of the Traffic Act, the mechanism of compulsory third party cover so established was made a prerequisite for obtaining a licence to put a vehicle on the road, and the responsibility was shifted to the licensing officer to satisfy himself that the vehicle for which a licence is issued "is insured against third party risks in accordance with the provision of the

Motor Vehicles (Third Party Insurance) Act during the currency of such licence.' It is this duty of the licencing officer, who in fact is the agency through which the Principal Licensing Authority of the Republic of Fiji functioned for the purpose of licensing of motor vehicles, that was breached in this case.

[41] We are convinced that the legislature, when it imposed the a duty on the licensing officer to satisfy himself that there was in place third party insurance cover at the time he issued a motor vehicle licence, intended to confer on any road user who may be affected by a breach of the said duty a private right of action to recover damages for harm caused to him by the said breach. To hold otherwise would be to render the mechanism so carefully established by the legislature nugatory and meaningless, and to frustrate the manifest objective of the legislature. However, that does not mean that the legislature imposed strict liability, and learned Counsel for the Respondents did not venture to suggest that it did. All that he contended for was that the relevant legislation prescribed a standard of conduct, and the failure to measure up to it was actionable.

[42] The licensing officer, who is neither a statutory functionary nor an independent contractor, and functions as an officer of the Principal Licensing Authority of the Department of Road Transport exercising powers in terms of s 11(1) of the Traffic Act, was bound by the statutory duty cast on him by s 11(1) proviso (d) of the Act. The standard of conduct expected of the licensing officer, when discharging his duty under this provision is a subjective one, expressed as a negative command; that he "*shall not issue a licence for a motor vehicle unless he is satisfied that the vehicle is insured against third party risks* in accordance with the provision of the Motor Vehicles (Third Party Insurance) Act during the currency of such licence." Admittedly, motor vehicle licence bearing number 738525 issued for vehicle number BX400 was valid for the period 21st December 1990 to 28th November 1991, within which period, the collision as a result of which the Respondents sustained injury and loss occurred on 17th August 1991. Since the Petitioner (LTA) did not lead any evidence from the relevant licensing officer or any other person who had personal knowledge of what was in fact done by the licensing officer to satisfy himself that the vehicle in question had third party risk insurance cover for the relevant period, the High Court had no alternative but to hold that the licensing officer had failed in his duty, and that the Road Transport Department, whose functions have now been taken over by the Petitioner Land Transport Authority, must indemnify the Respondents on the judgments obtained against the 1st to 3rd Respondents. The Petitioner, has very rightly refrained from seeking leave to appeal on this aspect of the decision of the High Court which was affirmed by the Court of Appeal, and merely confined itself to a challenge of the causal nexus between the wrong and the damage.

The Causal Issue

[43] The alleged causal nexus between the breach of statutory duty by the predecessor to the Petitioner (LTA) and the loss suffered by the Respondents is brought into focus through grounds (iii) and (iv) on which special leave to appeal has been granted by this Court. The question is whether the Court of Appeal erred in concluding that damage was caused by the Petitioner's breach of statutory duty; and whether in so concluding, the Court of Appeal misapplied or misunderstood the principle of causation. It has been stressed by learned Counsel for the Petitioner that the Petitioner did not cause the damage suffered by the Respondents, and learned Counsel for the Respondents agreed with that except

to point out that the judgment obtained by the Respondents against the 1st to 3rd Defendants has become pyrrhic due to the breach of statutory duty by the predecessor of the Petitioner.

[44] Causation is one part of a multi-stage test for legal liability in tort. For a person to be held liable for the common law tort of breach of statutory duty, that person must have (1) owed the plaintiff a statutory duty (2) breached that duty; (3) by so doing caused damage to the plaintiff; and (4) that damage must not have been too remote. There can be exceptions either way to this general rule. For instance, in a case of product liability, the fact that the defendant's product caused the plaintiff harm is the only thing that matters; it is not necessary to show that the defendant was negligent. On the other hand, causation is irrelevant to legal liability altogether in regard to liability under most contracts of indemnity insurance, where the insurer agrees to indemnify the victim for harm not caused by the insurer, but by other parties.

[45] Usually, causation involves two aspects, both equally important for liability. The first is the factual aspect, and it is usually a condition of liability in tort that not only should one have done, or been responsible for, some act which the law regards as wrongful, but that there should be a prescribed causal connection between that act and damage or injury for which one is held liable. Where there is a '*novus actus interveniens*', which means a 'new intervening act' which may 'cut the chain of causation', or where there are concurrent causes for a loss, a plaintiff may only recover against a particular defendant if he is able to show that the cause for which the defendant is responsible caused or materially contributed to his loss. Thus in *McGhee v National Coal Board* [1973] 1 WLR 1, it was held by the House of Lords that it was sufficient for the plaintiff to show that the defendant's breach of duty made the risk of injury more probable, even though it remained uncertain whether it was the actual cause. The second aspect of causation is that the question of what should count as a sufficient causal connection is a question of law. Notwithstanding the fact that causation may be established from the facts, the law often intervenes and says that it will nevertheless not hold the defendant liable because in the circumstances the defendant is not to be understood, in a legal sense, as having caused the loss. This aspect of causation enables a court of law to consider questions of public policy. Both the factual and legal aspects must generally be satisfied for the court to impose legal liability in tort.

[46] In deciding whether in the instant case the wrong committed by the predecessor to the Petitioner (LTA) caused the loss the Respondents would have had to suffer due to the inability to recover on their judgment on the basis of a third party risk insurance policy, it is helpful to invoke the long-accepted basic test of whether the wrong was a necessary condition of the harm, in the sense that the harm would not have occurred but for the wrongful act of the defendant. The courts have generally accepted the "but for" test despite its weaknesses, qualifying it by saying that causation is to be understood "as the man in the street" would: *Yorkshire Dale Steamship Co Ltd v Minister of War Transport* [1942] AC 691 (HL), or by supplementing it with "common sense": (*March v* **E & MH Stramare Pty Ltd** (1991) 171 CLR 506 (High Court of Australia).

[47] In *Barnett v Chelsea & Kensington Hospital Management Committee* [1969] 1 QB 428, the deceased had drunk some tea containing arsenic and went to hospital complaining of vomiting. The casualty doctor did not examine him, but referred him to his own doctor. Five hours later he died. It was held that

although the casualty doctor had been negligent, the deceased would have died anyway before the diagnostic tests could have been completed. Similarly, in *McWilliams v Sir William Arrol & Co Ltd* [1962] 1 WLR 295, the defendants in breach of their statutory duty, failed to provide a safety harness to an experienced workman who was working 70 feet above ground, and fell to his death while so working. Evidence showed that he would not have worn a safety harness even if one was provided, and the House of Lords applying the "but for" test held that the breach of duty did not cause his death. The distinction between this case and *McGhee v National Coal Board, supra,* is that in the latter case there was only one possible cause of the injury, namely the brick dust, and the defendant Board's omission to provide washing facilities, increased the likelihood of injury from that cause, which was sufficient to impose liability. Applying these principles to the case at hand, it is easy to conclude that the Respondents would have been able to execute their judgement against the insurer "but for" the failure on the part of the Petitioner's predecessor to ensure that a third party cover was in place at the time of issuing the motor vehicle license.

[48] In our view, most of the difficulty encountered in this case in regard to the causal nexus between the wrong and the loss could be overcome by simply taking note of the fact that the cause of action based on which the Respondents successfully sued the driver and the owners of the vehicle bearing number BX 400 is not the same cause of action on which the claim for breach of statutory duty is based. Indeed, as it was pointed out by this Court in *Dominion Insurance Ltd v Kay Linette Bamforth and Margerett Annette Wilson & Others* S.C Civil Appeal No CBV0005 of 2002S (24th October 2003), s 11(1) of the Motor Vehicle (Third Party Insurance) Act –

> "…imposes a statutory liability on the Insurer to pay the sum of a relevant judgment against a person insured to the person in whose favour the judgment has been awarded. That liability is extra-contractual although necessarily conditioned upon the existence of a policy of insurance. It is important therefore, when looking to the provisions of s 11(2), to bear in mind that the section is concerned with the imposition and the conditions of the imposition of a special statutory liability. *It is not concerned with the plaintiff's cause of action against the insured person which arises at common law*.(*italics added*)

[49] The *Kay Linette Bamforth and Margerett Annette Wilson* case differs from the instant case as there is here no third party risks insurer who could, subject to s 11(2) of the Motor Vehicle (Third Party Insurance) Act, be held liable to pay the Respondents the amounts of the judgment they obtained against the 1st to 3rd Respondents. Since this state of affairs was brought about by the breach by the predecessor of the Petitioner (LTA) of its statutory duty under s 11(1) proviso (d) of the Traffic Act, the High Court rightly found the Petitioner liable in lieu of the third-party insurer.

[50] The Court of Appeal in the instant case was careful to observe this distinction in paragraph 40 of its judgment, when it noted that-

> As found (in terms) by Connors J in his judgment of 22 June 2007, the 6th defendant owed the plaintiffs a (statutory) duty of care to ensure that before it licensed vehicle BX400 it should have taken proper steps to ensure the vehicle had attaching to it valid third party insurance. If this duty had been fulfilled then the plaintiffs would have recovered their damages from the third party insurer. By reason of the 6th defendant [the Petitioner] not fulfilling its statutory duty the respondents lost the opportunity to recover their damages from a third party insurer and thus the appellant (through the staff

of its predecessor) directly caused the plaintiffs to lose the opportunity to recover their damages and thus recovery of the damages themselves.

[51] This brings us to the question of remoteness of damages, which though not raised by the Petitioner on appeal, needs to be clarified, albeit briefly. It must here be noted that a few 'loss of opportunity' cases, (sometimes described as 'loss of chance' cases) have arisen for decision under the common law in both contractual and tort law contexts. In these cases, the question of remoteness has overshadowed causal issues, and in the early cases the courts have been prepared even to speculate on the quantum of damages. Thus in *Chaplin v Hicks* (1911) 2 KB 786, where the defendant in breach of contract prevented the claimant from taking part in the final stage of a beauty contest, the claimant was awarded damages for the loss of a chance, assessed at 25% of winning the competition. The court seemed to proceed on the claimant's statistical chance of winning (as if she were a lottery player) without any actual assessment of her physical attributes against any particular criteria of beauty.

[52] In torts cases involving injury to the person or property, it is generally accepted that the cause of action is established by showing that that kind of injury was a reasonably foreseeable consequence of the defendant's action. It is now trite law that for imputation of liability, the defendant must reasonably have foreseen that his conduct would inflict a physical injury on some other person but he need not have foreseen the impact that injury would have on that person in relation to his health or his income. *See, Smith v Leech Brain & Co Ltd* [1962] 2 QB 405; *Malcolm v Broadhurst* [1970] 3 All ER 508; *Brice v Brown* [1984] 1 All ER 997. The same principles were extended to apply in *H Parsons (Livestock) Ltd v Uttley Ingham & Co Ltd* [1978] QB 791 (Lord Denning MR dissenting) to cases involving economic loss where no physical injury intervenes. Once the type of loss, of profit or market, or incidental expenses, is reasonably foreseeable, the specific consequences are recoverable even though not foreseeable, however staggering the quantum of the damages may be. In the instant case, the licensing officer ought to have foreseen at the time when he registered the vehicle in question and granted the license, as any reasonable licensing officer would have, that if there was no third party risk cover for the vehicle for the period of the license, loss would be caused to a road user who might be injured by a collision with the vehicle. It is not necessary that he should have foreseen the collision that in fact occurred killing one person and causing severe injury to four others or the extent of actual damage sustained by them.

[53] A case in point is *Kitchen v Royal Air Forces Association* [1958] 2 All ER 241, where a solicitor failed to issue a writ within the period of limitation in respect of a fatal accident. The surviving spouse sued for damages as she was unable to pursue her claim. There was no doubt that the loss was caused by the solicitors' negligence and the only argument related to quantification of her claim. Although it was argued on behalf of the solicitors that the claimant might not have won her case, and may therefore have lost nothing, the court held that she had lost an opportunity and, as this was a valuable right, she should be fully compensated for it. Similarly, in *First Interstate Bank of California v Cohen Arnold & Co.* (1996) PNLR 17 the claimant bank had loaned money to a client of the defendant accountants who negligently overstated the net worth of their clients. The bank then became concerned about the amount of the loan outstanding, but relying on the representations made by the defendant accountants, the bank delayed in calling in the loan. As a result of the delay in

placing the property on the market, the price obtained was:1.45 million whereas the bank contended that it could have realised:3 million in an earlier sale. The Court of Appeal valued the chance at 66.66% on the assumption that "but for" the negligence, the property would actually have been sold for 66.66% of:3 million.

[54] In the light of the foregoing, we have no difficulty in deciding that the Court of Appeal did not err in concluding that damage was caused by the Petitioner's breach of statutory duty, or in so concluding, it misapplied or misunderstood the principle of causation. To our mind, it is self-evident that the Respondents suffered direct loss due to the breach of statutory duty by the Petitioner's predecessor, or to put it in another way, the Respondents would have been able to enforce their judgments against the relevant insurer "but for" the failure of the licensing officer to fulfill his statutory duty.

Conclusions

[55] Accordingly, we make order affirming the decisions of the Count of Appeal and the High Court at Lautoka. The appeal is dismissed with costs fixed at $5,000.00 to be apportioned amongst the Respondents equally.

Appeal dismissed.

Will Bateman
Solicitor