IN THE SUPREME COURT OF FIJI
[CIVIL APPELLATE JURISDICTION]

CIVIL PETITION No: CBV 0009.2016

(On Appeal From Court of Appeal No: ABU 0035.2013)

BETWEEN : **SUN INSURANCE COMPANY LIMITED**

Petitioner

AND : **MOSESE QAQANAQELE**

1st Respondent

ABDUL SAKIL

2nd Respondent

ALI IMDAD

3rd Respondent

Coram : **Hon. Mr. Justice Saleem Marsoof, Judge of the Supreme Court**
Hon. Madam Justice Chandra Ekanayake, Judge of the Supreme
Hon. Mr. Justice William Calanchini, Judge of the Supreme Court

Counsel : **Mr. A.K. Narayan for the Petitioner**
Mr. A. Sen for the 3rd Respondent
The 1st and 2nd Respondents absent and unrepresented.

Date of Hearing: **10 July 2017**

Date of Judgment: **21 July 2017**

JUDGMENT

Marsoof, J

Introduction

[1] This is an application for leave to appeal from a judgment of the Court of Appeal [Guneratne JA, Prematilaka JA, and Wati JA] dated 30th September 2016, which affirmed the judgment of the High Court of Fiji in Labasa [C. Kotigalage J] dated 18th June 2013 by which the 1st Respondent was awarded damages arising from a motor car accident against the 2nd and 3rd Respondents, who were respectively the driver and owner of the motor vehicle which ran over the 4 year old daughter of the 1st Respondent, with an order against the Petitioner to indemnify the said damages as the insurer who had issued a third-party policy to the 3rd Respondent with respect to the said motor vehicle.

[2] The 1st Respondent, in his capacity as the administrator of the estate of his daughter, Varisila Talei Tukoro aka Variskila Talei Qaqanaqele, who died on 18th October 2006 in consequence of the said accident which occurred on that same fateful day, filed Writ of Summons and Statement of Claim against the 2nd and 3rd Respondents in October 2009, alleging that the accident had occurred due to the negligence of the 2nd Respondent, who was at the time in the employment of the 3rd Respondent, who was also the owner of the motor vehicle in question. There was some confusion regarding the exact date of filing of the Writ of Summons and Statement of Claim, which shall be adverted to in some detail, later in this judgment.

[3] While the 2nd Respondent driver did not file any papers or participate in the proceedings in the High Court, the 3rd Respondent filed his Acknowledgement of Service on 3rd December 2009 and his Statement of Defence on 11th February 2010. The 1st Respondent's Reply to the Statement of Defence was filed on 2nd June 2010. It is not necessary for the purposes of this application for leave to appeal to go into matters in dispute between the 1st and 3rd Respondent in any detail or to advert to the contents of the

1st Respondent's Statement of Claim, the 3rd Respondent's Statement of Defence, or to the 1st Respondent's Reply thereto.

[4] What is material for the purposes of this application for leave to appeal, is to note that the Petitioner Sun Insurance Company Limited, was not cited by the 1st Respondent as a defendant in his Writ of Summons or Statement of Claim, and was brought into the case on the initiative of the 3rd Respondent, who filed an *ex parte* Notice of Summons on 6th of July 2011 and applied to add the Petitioner, as the third-party insurer. The said application was considered by the Master who granted the motion on 18th July 2011, and notice was issued against the Petitioner, Sun Insurance Company Limited.

(5) The Petitioner lodged its acknowledgement of service of notice on 17th August 2011, and filed notice of motion seeking the order of the Master be set aside and summons issued on the Petitioner be struck out on the basis that the 1st Respondent did not comply with Section 11(2) of the Motor Vehicle (Third Party Insurance) Act (Cap 177) and as such the Petitioner is not liable to comply with any judgment of this case. In the Ruling of the High Court [Hettiarachchi J] dated 29th June 2012, the said motion was refused and the Petitioner's application to set aside the order of the Master was dismissed.

(6) It is noteworthy that the High Court, in the course of its ruling, referred to the decision of this Court in *Dominion Insurance Ltd., v Bamforth & Ors* [2003] FJSC 3; CBV0005.2002S (24th October 2003)] and made the following pertinent observation in the said Ruling:-

> "Therefore, the failure of the Plaintiff [1st Respondent] to serve the notice of the proceedings pursuant to section 11(2) of the Motor Vehicles (Third Party Insurance) Act to the 3rd party insurer, does not help the insurer [Petitioner] to escape from its obligation to indemnify the insured [3rd Respondent]"

[7] Thereafter, the Petitioner filed its Statement of Defence on 20th July 2012 and pleaded in paragraphs 5 thereof that the Writ of Summons was served on the Third Party on 29th

October 2009 and further pleaded in paragraph 6 thereof that since a Notice in terms of section 11(2) of the Motor Vehicles (Third Party Insurance) Act had not been served on it, the Petitioner was not "liable to satisfy any judgment".

[8] In his Reply to third party Defence, the 3rd Respondent stated that the Policy of Insurance was between him and the Third Party and further any action or inactions by the Plaintiff [1st Respondent] does not affect same and he was entitled to be indemnified under the Policy of Insurance.

The High Court Trial

[9] It appears from the minutes of the Pre-Trial Conference dated 26th January 2013, that the issues in contention as between the 3rd Respondent [2nd Defendant] and the Petitioner [Third Party] were issues 10 to 14, which are reproduced below:-

> (10) In the event it is found that the Defendants are liable for damages is the third party liable to indemnify the 2nd Defendant for the damages?
> (11) Is the claim statute barred by Section 4 of the Limitation Act?
> (12) Is Section 11(2) of the Motor Vehicle (Third Party) Act applicable.
> (13) Was the notice under Section 11(2) of the Motor Vehicle (Third Party) Act given to the Third party within the time required?
> (14) Is the notice under Section 11(2) a condition of liability for the Third Party?

[10] The case was to be taken up for trial on 6th March 2013, but on 4th March 2013, the Petitioner filed summons moving for permission to file an amended Statement of Defence, for the purpose of amending paragraph 6 of its original Statement of Defence to include an additional averment to the effect that the 2nd and 3rd Respondents had "breached sections 16 (1), (2) and (4) of Motor Vehicles (Third Party Insurance) Act in that notice of accident and claim was not given to the Third Party forthwith by the 1st and 2nd Defendants [2nd and 3rd Respondents]".

[11] By its Ruling dated 6th March 2013, the said motion was rejected by the High Court [C. Kotigalage J] on the basis that the application was belated and would cause prejudice since the said application for amendment was being made two days before the date of trial, while the accident had occurred in 2006 and the Petitioner's Statement of Defence was filed in July 2012.

[12] The case was taken up for trial in the High Court of Labasa on 6th March 2013, and several witnesses testified at the trial. On behalf of the 1st Respondent, who was the Plaintiff in the action, his wife Laisani Naseubuli, who was the mother of the deceased child and an eye witness to the accident, testified in regard to how the accident took place on 18th October 2006 and gave particulars of the injuries sustained by her daughter which led to her death. She also testified regarding the damages claimed in the Statement of Claim.

[13] The 3rd Respondent, Ali Imdad, who was the 2nd Defendant in the High Court, stated in his testimony that on the date of the incident, he was the registered owner of the vehicle that was involved in the accident, and the 1st Defendant was the driver. He said that he had obtained a Third Party Policy bearing No. 2426603 from the Petitioner Sun Insurance Company Limited, which he produced marked 2P1. He stated that the Insurance was obtained from Vinod who acted for the Sun Insurance Company in Labasa, and that on the day of the accident he got to know about it from his driver, and immediately went to the deceased child's home by which time she was dead, and inquired as to how he could be of help.

[14] Ali Imdad further stated in evidence that after the accident, the Police came to the place where the accident took place, and he informed on the same day about the accident to Vinod of Sun Insurance Company over the telephone. He added that on the following day he met Vinod personally, and Vinod had told him that if any papers were served on him to hand them over to him. He further testified that accordingly, when he received the summons, on the very same day he handed over the summons to Vinod, who photocopied same and informed him not to worry as the Insurance Company will pay on the Third

Party insurance claim. However, by its letter dated 8th December 2009 marked 2D2 received by him from the insurer, he was informed that the insurer will not indemnify him or provide him with a lawyer to defend his case.

[15] On behalf of the Petitioner Sun Insurance Company Limited, its Claims Manager Thomas Naua gave evidence. He admitted that Vinod was the Insurance Agent of the Company in Labasa and Insurance Policy on DP677 was issued by the company for the period 21st September 2006 to 7th October 2007 (2D1). The company came to know about the accident when the summons was received. He stated that they were not aware of the accident at the time of the accident occurred, and the driver of the insured did not inform the company. According to him, the Writ of Summons should have been served on the insurer within 7 days from the date of issuance, that is on or before 23rd October 2009, but in fact it was received only on 29th October 2009. The Writ of Summons was marked as 3D1.

[16] Thomans Naua further testified that the insurance company wrote a letter on 10th November 2011 to the Solicitor of the 1st Respondent stating that the company does not have a Third-Party Policy for the vehicle that was involved in the accident (3D2). The following day, namely 11th November 2009, the insurance company wrote to the said Solicitor confirming that they held a Third-Party Policy covering the said vehicle at the time of the accident. They however informed the Solicitor for the 1st Respondent that since the Writ of Summons was served after seven days, the Sun Insurance Company Limited is not required to satisfy the Judgment. (3D3). He produced in court marked 3D4, the letter dated 26th November 2009 sent by the Solicitors for the 1st Respondent enclosing the Writ of Summons and stating that unless the company indemnify the 1st Respondent, he will be compelled to join the Third Party to the proceedings. The witness stated that the insurer responded to the said letter appropriately indicating that since the Writ of Summons was not served during the required time period, the company will not be required to satisfy any Judgment obtained thereafter (3D5 and 3D6).

[17] The learned High Court Judge, pronounced judgment on 18th June 2013 and held that the 2nd Respondent driver was negligent and caused the death of the child in the course of his employment with the 3rd Respondent, and accordingly the 2nd and 3rd Respondents are liable in damages as claimed in the 1st Respondent's Statement of Claim as the administrator of the estate of his deceased daughter in terms of the Compensation to Relatives Act (Cap 29). What is important for this application for leave to appeal is that the learned High Court Judge also held that the 2nd and 3rd Respondents were entitled to be indemnified by the Third Party Sun Insurance Company under the Insurance Policy No. 2426603 (2D1).

[18] In arriving at the conclusion that the Petitioner is bound in law to indemnify the 2nd and 3rd Respondents, the learned High Court Judge relied on the testimony of the 3rd Respondent, whom he considered a reliable witness. His Lordship stressed in paragraph 20.2 of his judgment that –

> "The issuance of the insurance was done on the same day and there was no evidence before this Court, that the Policy was issued and delivered from the office of the Sun Insurance Company in Suva. The Third Party witness admitted in his evidence that the insurance was issued by Vinod. The insurance premium was collected by him. The Sun Insurance stamp was affixed in the Policy. It is evident as far as the Labasa customers are concerned, Vinod was acting and carrying full authority for Sun Insurance in all aspects with regard issuance of the insurance.....Although Vinod was the person who acted for Sun Insurance he was not called as a witness to rebut the evidence of the 2nd Defendant [3rd Respondent]. Further, it was observed in the Insurance Policy that it did not state whom to inform with regard to an accident..... I conclude by informing the fully authorized Agent of the Third Party (by telephone and personally) the 2nd Defendant [3rd Respondent] had fulfilled his obligation conferred on him by Section 16(1) of the Motor Vehicle (Third Party Insurance) Act."

[19] It is noteworthy that as already noted in paragraph 9 of this judgment, there was no issue raised at the trial on the question whether there had been compliance with section 16(1)

of the Motor Vehicle (Third Party Insurance) Act in this case, and it appears that the learned High Court Judge went into the question because it does arise on the facts although, as already noted, an application for the amendment of the Petitioner's Statement of Defence to raise a defence based on non-compliance of sections 16(1), (2) and (4) had been disallowed by the High Court by its Ruling dated 6th March 2013.

[20] The learned High Court Judge then went on to deal with the question of compliance or otherwise with section 11(2) of the Motor Vehicle (Third Party) Act, which was put in issue by the Petitioner through issue No. 13. His Lordship observed that it was his considered conclusion that the 2nd Defendant [3rd Respondent] cannot take any responsibility of not serving the Writ of Summons since it was the responsibility of the Plaintiff [1st Respondent] as already decided by the Hon. Justice Hettiarachchi in his Ruling dated 29th June 2012 in this case. He further observed that the 2nd Defendant [3rd Respondent] had explained under cross-examination that he had received the Writ of Summons on 3rd November 2009 and on the very same day had handed over the papers to Mr Adrian Ram, who was the Counsel/Solicitor for the Third Party who had cross examined the witness at the trial) and he kept the papers for 2 weeks and had contacted the Third Party and had informed the 3rd Respondent that the vehicle was not in the system of their Head Office. The 3rd Respondent got the papers back from Mr. Ram only on 17th November 2009. When he collected the 3rd Party papers from Mr Adrian Ram he informed the 3rd Respondent for the first time that he acts for the Sun Insurance Company Limited and he cannot defend the 3rd Respondent in this case. The 3rd Respondent had stated in evidence that he did not know that Mr Ram was the Insurance Company lawyer, and had gone to see him to get advice that was reason which took time. The learned High Court Judge concluded that "even if there was a delay in informing the Insurance Company by the 2nd Defendant it was caused because of Mr Ram. Once he got back the papers from Mr Ram on 17th November 2009 he had consulted another solicitor and letter was sent on 26th November 2009."

[21] The learned High Court Judge then quoted section 11(2) of the Motor Vehicle (Third Party) Act, and stressed that the Third Party Petitioner was added as a defendant on an application made by the 2nd Defendant [3rd Respondent], and observed as follows:-

> "It is my duty to analyse how the section 11(2) Notice is relevant in this case. By letter dated 8th of December 2009 (2D2), the claims consultant had informed the Second Defendant that the Plaintiff's solicitors failed to serve the summons on the Third Party within the required period of timeframe and the Third Party is not required to satisfy any judgment obtained thereafter. Admittedly, Writ of Summons filed on 16th October 2009 (3D1) was received by the Third Party on 29th October 2009. The Third Party's counsel argued that the Writ of Summons was not served within 7 days as required by Section (11) 2 and cited several authorities relation to the issue. *In this case the circumstances are different. Writ of Summons was filed against the 1st and Second Defendants and Claim was made against them. The Third Party denied the claim by its letter dated 8th December 2009. At this stage there was no Writ of Summons filed against the Third Party. In such event there was no requirement by the Plaintiff to comply with Section 11(2) of the Motor Vehicle (Third Party Insurance) Act.* The letter dated 8th December 2009 was issued to the 2nd Defendant. He filed ex-parte Notice of Motion to add the 3rd Party to the proceedings claiming inter alia that 2nd Defendant is entitled to be indemnified by the Third Party."(*Emphasis added*)

Appeal to the Court of Appeal

[22] Being aggrieved by the judgment of the High Court, the Petitioner Sun Insurance Company Limited, appealed to the Court of Appeal, which heard the appeal on 8th September 2016. The Court of Appeal at the outset noted in paragraph [65] of its judgment that on a perusal of the provisions of the Motor Traffic (Third Party Insurance) Act, in so far as the facts and evidence in the instant case are concerned the applicable and relevant provisions are those contained in section 11 (1) and 2(a) and Section 16(1) and (2) of the Act.

[23] Having said that, his Lordship Guneratne JA, (with whom Prematilaka JA, and Wati JA concurred) went on to make the following observations in paragraphs 67 to 69 of its his judgment:-

> "[66] Section 11(1) and 11(2) (a) do not specifically state as to who is imposed with the statutory obligation to give the 7 days notice of the commencement of proceedings to the Insurer.
>
> [67] Although I may have my own views on that matter I am bound by the Supreme Court decision in *Dominion Insurance Limited v Bamforth and Wilson and 3 Others* Civil Appeal No.CBV 005 of 2002S.
>
> [68] According to that decision *it is a plaintiff's obligation to give the said 7 day' notice envisaged in Section 11(2) (a) as a condition precedent for the insurer's statutory liability to have arisen to meet the plaintiff-respondent's claim against it.*
>
> [69] That being the legal position (speaking generally) based as it were on the interpretation to be placed on Section 11(2) (a) which this Court felt obliged, to deal with, in as much as the Appellant's Counsel addressed on that, it is to be however noted that, in the instant case, the plaintiff-respondent never made a claim against the Appellant (Insurance company) and moreover the learned Judge did not make any order either against the Insurance company in favour of the plaintiff." (*Emphasis added*)

[24] His Lordship Guneratne JA, then turned to section 16 of the Motor Vehicles (Third Party Insurance) Act, and after analysing the facts and the statutory provisions, adverted to the distinction sought to be drawn between "an agent" and "an authorized agent" by learned Counsel for the Petitioner. His Lordship then stated as follows in paragraphs 76 to 80 of his judgment:-

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

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

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

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

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

[25] The Court of Appeal proceeded to affirm the judgment of the High Court and the orders made in the High Court, subject to expunging from the said judgment the criticisms made by the learned High Court Judge in regard to the conduct of Mr. Ram.

Application for leave to appeal

[26] In its application for leave to appeal dated 7th November 2016 lodged in terms of section 98(4) of the Constitution of the Republic of Fiji read with section 7(3) of the Supreme Court Act, 1998, the Petitioner has sought leave to appeal against the said judgment of the Court of Appeal on the following principal grounds:-

(1) The Court of Appeal misapplied the findings of this Court in its decision in *Dominion Insurance Limited v Bamforth & Ors*; CBV 005 of 2002S as authority that it was the Plaintiff's obligation to give the 7 days' notice envisaged by Section 11(2) (a) and if that was the correct interpretation then such a finding is contrary to the express words of the section leading the Court of Appeal into the error of not considering the relevance of such failure on the

finding in the High Court (and apparently in the Court of Appeal) that the Petitioner provide an indemnity to the 2nd and 3rd Respondents by virtue of an indemnity under the policy (67 and 78).

(2) The Court of Appeal erred in failing to consider or decide on the issue that that basis of finding of liability by the High Court (and apparently by the Court of Appeal) on the ground of an indemnity being available under the policy as distinct from the right to the 1st Respondent under Section 11(1) was erroneous and the Court of Appeal failed to determine the following issues or if it the Court erred:

(i) As there had been a failure to comply – with Section 11(2(a)) of the Motor Vehicles (Third Party Insurance) Act.

(ii) The Learned Trial Judges and the Court of Appeals findings of liability and/or order-to-pay damages by the Petitioner found against the 2nd and 3rd Respondents was otherwise erroneous and obtains the relief otherwise prevented by the operation of Section 11(2(a)) of the Motor Vehicles (Third Party Insurance Act).

(3) The Court of Appeal [69] stated that it had dealt with Counsels address on Section 11(2) (a) and noted that the 1st Respondent never made a claim against the Petitioner and fell into error in that:

(i) The Court of Appeal did not deal with the arguments by Counsel on Section 11(2)(a) in the judgment which were therefore the Court by way written submissions and as orally supplemented;

(ii) The Court of Appeal failed to appreciate or consider that the references to section 11(2)(a) were made to refute the High Court's holding that the 2nd and 3rd Respondents were entitled to an indemnity

under the policy as distinct from the statutory right under Section 11(1) which would in effect circumvent the effect of Section 11(2)(a) and permit recovery by the back door and promote collusion.

(iii)The Court of Appeal failed to give any or any sufficient or adequate reasons on the issues relating to the Petitioners liability to the 2nd and 3rd Respondents' on the basis of the arguments in respect of Section 11(2)(a).

(4) The Court of Appeal erred in holding that the agent of the Petitioner, Vinod Kumar, was a person to whom a notice of an accident under Section 16(1) of the Motor Vehicles (Third Party Insurance) Act could be given.

(5) The Court of Appeal having found that the established facts at [73] of the Judgment erred in holding that there was such an "interlink" [80] between Section 16(1) and Section 16(2) and the Learned High Court had been referred to or had considered that section when both the Learned Trial Judge and the Court of Appeal failed to distinguish the separate obligations under the two subsections of section 16 and appeared to erroneously hold that if there was compliance with Section 16(1) there was no further requirement to comply with section 16(2).

(6) The Court of Appeal erred in failing to find on the established facts that there had been a breach of section 16(2) of the Motor Vehicles (Third Party Insurance) Act and as a consequence failed to consider the effect and/or the practical effect of section 16(4) on the finding and order that the Petitioner indemnify the damages and costs that the 2nd and 3rd Respondents were obliged as a debt to pay the Petitioner for breach of that subsection.

(7) The Court of Appeal erred in failing to consider or adequately consider or to decide on or provide any or any sufficient reasons for the grounds of appeal

referred to by the Court of Appeal at paragraphs 7,8,9 and 10 of their Judgment.

(8) The Court of Appeal erred in commenting [84-88] on the conduct of insurance companies reliance on notification provisions (sections 11(2)(a), 16(2) and 16(4) of the Motor Vehicles (Third Party Insurance) Act as if to do so is not acting in good faith which is inconsistent with the statutory right of an insurer under the Act.

[27] The exclusive jurisdiction of the Supreme Court of Fiji to hear and determine appeals from all final judgments of the Court of Appeal is derived from section 98(3)(b) of the Constitution of the Republic of Fiji. It is noteworthy that section 98(3)(b) of the Constitution follows the language used in the corresponding provisions of the Administration of Justice Decree of 2009 and the now repealed Constitution (Amendment) Act of 1997. Section 98(4) of the Constitution of the Republic of Fiji provides that an appeal may not be brought to the Supreme Court from a final judgment of the Court of Appeal unless the Supreme Court grants leave to appeal.

[28] It is trite law that in order to succeed in obtaining leave to appeal against a final judgment of the Court of Appeal, the Petitioner should satisfy one or more of the stringent threshold criteria set out in 7(3) of the Supreme Court Act of 1998, which provides that –

> "In relation to a civil matter (including a matter involving a constitutional question), the Supreme Court must not grant special leave to appeal unless the case raises-
>
> (a) a far reaching question of law;
> (b) a matter of great general or public importance;
> (c) a matter that is otherwise of substantial general interest to the administration of civil justice."

[29] It has been observed by this Court in several of its judgments that the provisions of Section 7(3) of the Supreme Court Act, echo the sentiments expressed by Lord Macnaghten in *Daily Telegraph Newspaper Company Limited 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 – 83] 8 AC 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."

[30] The criteria laid down in of Section 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), *Suva City Council v R B Patel Group Ltd* [2014] FJSC 7; CBV0006.2012 (17 April 2014), *Shanaya & Jayesh Holdings Ltd v BP South West Pacific Ltd* [2015] FJSC 10; CBV0007.2014 (24 April 2015), *Chaudhry v Chief Registrar* [2016] FJSC 3; CBV0001.2015 (20 April 2016) and *New World Ltd v Vanualevu Hardware (Fiji) Ltd* [2017] FJSC 10; CBV0004.2016 (21 April 2017).

[31] 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. The grounds formulated by the learned Counsel for the Petitioner for consideration for the grant of special leave to appeal in this case, have therefore to be examined in the light of the criteria set out in section 7(3) of the Supreme Court Act.

[32] As far as this application for leave to appeal is concerned, the only question that arises in this case is whether the Petitioner is entitled to leave to appeal, and in the event leave is granted, to appeal the judgment of the Court of Appeal, on the basis that it had erred in affirming the decision and the order of the High Court that the Petitioner, as the third-party insurer, should indemnify the damages ordered against the 2nd and 3rd Respondents.

[33] The essence of grounds (1), (2) and (3) on the basis of which leave to appeal is sought is that the Court of Appeal misapplied the provisions of section 11(2)(a) of the Motor Vehicles (Third Party Insurance) Act and the findings of this Court in its decision in *Dominion Insurance Limited v Bamforth & Ors* CBV 005 of 2002S as authority that it was the Plaintiff's obligation to give the 7 days' notice envisaged by section 11(2)(a) of the Motor Vehicles (Third Party Insurance) Act.

[34] It is obvious that the provisions of section 11(2)(a) do not explicitly specify as to who should give the statutory notice, but the fact remains that it would be in the interest of a plaintiff to give the said notice, if he intended to have the benefit of the indemnity contemplated by section 11 of the said Act. It would appear from the facts of the instant case that the 1st Respondent primarily looked to the 2nd and 3rd Respondents to pay damages for the negligence of the 2nd Respondent for which the 3rd Respondent was held to be vicariously liable, and had not initiated proceedings against the third party insurer. As the lower courts had taken pains to emphasise, the third party insurer was subsequently brought into the case on the initiative of the 3rd Respondent, who wanted to ensure that he will be indemnified by the insurer in terms of the policy and the applicable law.

[35] The circumstances of the *Dominion Insurance* case were substantially different from those of the instant case in that in that case the lady who suffered personal injuries due to an accident involving a truck, sued the truck driver, his employer, the owner of the truck, and the third party insurer for damages for negligence, but gave the statutory notice only 13 days after the commencement of proceedings. The Court of Appeal had in the *Dominion Insurance* case held against the insurer on the basis that there was substantive compliance of section 11(2) (a) of the Motor Vehicles (Third Party Insurance) Act, but this Court had disagreed characterising the requirement of section 11(2)(a) as a "condition precedent to liability" quoting the words of Kennedy LJ in paragraphs 34 and 38 of his judgment in *Wake v Wylie* (2001) RTR 20 who was there interpreting a similar worded English legislation.

[36] However, it is material to note that in the *Dominion Insurance* case this Court was willing to adopt a purposive approach to the interpretation of the requirements of section 11(2) (a) of the Motor Vehicles (Third Party Insurance) Act as it becomes clear from its discussion of the decision of the English Court of Appeal in *Desouza v. Waterlow* [1999] RTR 71 (C.A.) and that of the Privy Council in *Ceylon Motor Insurance Association Limited v. Thambugala* [1953] A.C. 584. Having discussed these authorities, this Court went on to observe in the *Dominon Insurance* case that-

> "It is possible, *with a purposive approach* to the construction of s.11(2)(a) *to eschew formality in the kind of notice required provided that it meets the substantive object of the provision. That object is to make the insurer aware, one way or the other, of the proceedings which are contemplated or have been commenced against a person covered by the policy.* The term "notice" is sufficiently wide to allow a wide construction to be adopted which serves the purposes of the section. The language of s.11(2)(a) itself supports a wide construction as it matters not how the insurer gets notice of the proceedings as long as it "has notice" within the requisite time." (*Emphasis added*)

[37] As the then Lord Chief Justice of England and Wales, Lord Woolf of Barnes observed in *Nawaz v Crowe Insurance Group* [2003] Lloyd's Rep I.R. 471 observed in paragraph 7 of his judgment, the effect of section of 152(1) of the English Road Traffic Act, 1988, which was couched in the same language as section 11 of the Fijian Motor Vehicles (Third Party Insurance) Act, "is that if there is no proper notice served on an appropriate person for the purposes of the section, then the liability of an insurer comes to an end. The section itself explains the purpose of the notice which is required. This is because, as the provisions of subsection (2) and subsection (4) make clear, there are steps which an insurer can take to protect itself from being faced with liability because a judgment given against an insured where it would be entitled either to avoid the policy under which it provided insurance by seeking a declaration as indicated in subsection (2) or by exercising its right under subsection (4) to be made a party to the action." It is noteworthy that in the instant case the Petitioner had no basis to seek a declaration on the basis of the corresponding sub-sections of the Fijian legislation.

[38] In the instant case, it is in evidence that the Petitioner had notice of the fatal accident, the proceedings in the High Court instituted by the 1st Respondent, as well as notice of the writ of summons. The 3rd Respondent had done all that he could do to keep the insurer informed of the accident on the very day it had occurred through its Labasa representative Vinod, to whom the 3rd Respondent had handed over the writ of summons the day he was served with it.

[39] The Petitioner company had not acted as reasonably as it should. The insurance policy did not set out the manner and form of giving notice of any claim nor did it specify to which address the notice should be sent. Furthermore, it had informed its own Solicitor / Barrister Mr. Aravind Ram, that the vehicle concerned was not insured with the Petitioner company, and by its letter dated 10th November 2011 addressed to the Solicitor of the 1st Respondent indicated that the company does not have a Third-Party Policy for the said vehicle, and then corrected itself by its letter dated 11th November 2009.

[40] It is also in evidence that the Petitioner had early notice of the writ of summons, though it was not cited initially as a party to the proceedings. This appears from the testimony of Thomas Naua, Claims Manager of the Petitioner, who has stated in evidence before the High Court that the writ of summons was filed on 16th October 2009 but was received by the company only on 29th October 2009. It appears that it was brought to his notice that the documents now found on pages 199, 203 and 209 of the High Court Record, which were copies of the writ of summons, had date stamps that show two dates, namely 16th October 2009 and 27th October 2009 with the latter being scored off by pen in these pages, raising some doubt as to the exact date on which the writ of summons was lodged in court and issued. The Statement of Claim at pages 204 to 206 appears to have been signed by the Solicitor for the Plaintiff on 16th October 2009, but is not date stamped and could have been filed a few days later. Unfortunately, these matters are not adverted to in the judgment of the High Court or Court of Appeal, but if the writ of summons was lodged on 27th October 2009, the notice would have been within the 7 day period stipulated in section 11(2)(a) of the Motor Vehicles (Third Party Insurance) Act.

[41] Ultimately, the questions that arise in this application for leave to appeal are all matters of fact, and do not raise any matter that fall within the threshold criteria set out in section 7(3) of the Supreme Court Act. As Cazalet J noted at page 81 of his judgment in *Desouza v Waterlow* [1999] RTR 71:-

> "In my view, notice in any particular case is *a matter of fact and degree* and will turn on the extent to which the insurer has been made aware of the background circumstances and of the position of the claimant in regard to the taking of proceedings. Such notice can be given orally or in writing. The essential purpose of the requirement of notice is that the insurer is not met with information, out of the blue, that his insured has had a judgment obtained against him..... it seems to me that by stating his position as he did in those communications the plaintiff made wholly clear the course which he was proposing to take."(*Emphesis added*)

[42] For these reasons, I am of the opinion that grounds (1), (2) and (3) on which leave to appeal has been sought do not justify the grant of leave to appeal in terms of section 7(3) of the Supreme Court Act, and leave should be refused.

[43] In my opinion, Grounds (4), (5), (6) on the basis of which leave to appeal has been sought deal exclusively with section 16 of the Motor Vehicles (Third Party Insurance) Act, which had not been pleaded in the Statement of Defence of the Petitioner, and no issue was raised in this regard, although the learned High Court Judge did deal with the issue and had satisfied himself as well as the Court of Appeal that the said provision has been complied with in this case. It is trite law that "insurers who wish to rely upon absence of notice should plead the point" (*Baker v Provident Accident and White Cross Insurance Co* [1939] 2 All ER 690, 697). For the same reason, the reference to section 16 in ground (8) urged by the Petitioner will not be of any avail to him, and the matters falling within section 11 have already been dealt with in this judgment. Hence, in my opinion, these grounds too do not merit further consideration in this Court. Ground (7) raised by the Petitioner in its petition is altogether baseless and need no further consideration.

[44] For the above reasons, I am firmly of the opinion that leave to appeal should be refused and the application filed by the Petitioner should be dismissed. In all the circumstances of this case, I would grand costs in a sum of $ 5000.00 each payable by the Petitioner to the 1st and 3rd Respondents.

Ekanayake J.

[45] I have read in draft the judgment of Marsoof J. and agree with his reasoning and conclusions.

Calanchini J.

[46] I agree with the orders proposed by Marsoof J.

Orders:

1. Leave to appeal is refused.
2. Petitioner to pay costs of $5,000.00 to the First Respondent and $5,000.00 to the Third Respondent

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Hon. Mr. Justice Saleem Marsoof
Judge of the Supreme Court

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Hon. Madam Justice Chandra Ekanayake
Judge of the Supreme Court

.....

Hon. Mr. Justice William Calanchini
Judge of the Supreme Court

Solicitors:

T.L. Lawyers Solicitors for Petitioner

Maqbool & Company, Barrister & Solicitor for 3rd Responden