IN THE SUPREME COURT OF WESTERN SAMOA

HELD AT APIA

C.P 65/93

BETWEEN: NATIONAL PACIFIC INSURANCE LIMITED a duly incorporated company having its registered office at Apia

First Plaintiff

SIMON POTOI of Toomatagi, Cabinet Secretary

Second Plaintiff

A N D: CARDINAL PIO TAOFINUU, Bishop for the time being of the Roman Catholic Diocese in Western Samoa

First Defendant

A N D: ONOSAI FILIPO of Leauvaa, Driver

Second Defendant

Counsel: R. Drake for first and second plaintiffs
P.A. Fepuleai for first defendant
T. Malifa for second defendant

Hearing: 29, 30, 31 August 1994

Judgment: 5 September 1994

JUDGMENT OF SAPOLU, CJ

I must say at the outset that the manner in which the case has been presented is in part misconceived as it will shortly appear in

the part of this judgment dealing with the action by the first plaintiff. There are two separate actions tried together in this case; the first is by the insurer, National Pacific Insurance Ltd, as first plaintiff; and the second is by the assured, the owner of the insured and damaged vehicle, as second plaintiff.

I will deal first with the action by the first plaintiff where the misconception has arisen, and then with the action by the second plaintiff. The action by the first plaintiff is against the first defendant as the owner of the truck, the other vehicle involved in the accident from which this case has arisen, and against the second defendant as the driver of that truck at the time of the accident. The claim by the first plaintiff is for the total amount paid by way of full indemnity to the second plaintiff under the insurance policy for his vehicle, less the amount realised on the sale of the salvage by tender which had already been received by the first plaintiff as insurer. The amount claimed thus comes to $21,130.

The first plaintiff's action against the first defendant as owner of the truck involved in this accident was non-suited as there was no evidence of vicarious liability. That is, there was no evidence to show that the second defendant was driving the first defendant's truck either on behalf of or under the express or

implied authority of the second defendant at the time of the accident which occurred about 1.00am in the morning at Lelata bridge, the onus proof being on the first plaintiff alleging vicarious liability to prove it : see for instance Tunoa Tanoai v Tagaloa Mika Ah Kam [1993] an unreported decision of this Court. So that puts aside the first defendant leaving only the second defendant.

Now there is no dispute in this case that the motor vehicle insurance policy for the second plaintiff forms the contract of insurance between the second plaintiff and the first plaintiff, and is a contract of indemnity to which the doctrine of subrogation applies. Under the doctrine of subrogation, once the insurer has admitted its liability under the insurance policy and has paid the amount of the loss payable under the insurance policy to the assured, the insurer is placed in the position of the assured against third parties in respect of the subject matter of the insurance policy. In other words, the insurer is subrogated to the rights and remedies of the assured in respect of the subject matter of the insurance policy. See generally Hardy Ivamy: General Principles of Insurance Law, 5th edn, pp 468-474 which is the latest edition of this work available to the Court, and 25 Halsbury's Laws of England, 4th edn, paras 523, 524.

Up to this point there is no problem with the first plaintiff's action against the second defendant. It is the next stage of the inquiry which reveals the misconception in the manner in which the first plaintiff's action has been brought. While the insurer, under the doctrine of subrogation, may enforce the rights of the assured after it has admitted liability under the insurance policy and has paid the amount of the loss payable under the insurance policy to the assured, those rights and remedies must be enforced in the name of the assured and not that of the insurer, unless there is some statutory authority for the insurer to enforce those rights in its own name or there has been a valid assignment of those rights from the assured to the insurer, then the insurer can enforce those rights in its own name. In the case of an assignment, compliance with the requirements of the Property Law Act 1952 (NZ) as to assignments of choses in action is required : see for instance **Compania Colombriana de Sequros v Pacific Steam Navigation Co [1964] 1 All E.R 216, 230**. Although that is a case of marine insurance, in my opinion, what Roskill J (as he then was) says in that case about the requirements of a valid assignment of an assured's rights to an insurer, also applies to an assignment in the case of a non-marine insurance such as the motor vehicle insurance policy in this case.

In **Hardy Ivamy : General Principles of Insurance Law, 5th edn, pp 474-475**, the learned author says :

"The rights to which the insurers are subrogated, must, "as a general rule, be enforced in the name of the assured. "The mere fact of subrogation does not entitle them to "enforce such rights in their own names. To enable them "to do so, it is necessary either that a statute should "confer upon them a right of action, or that the assured "should make a formal assignment to them of his right of "action in respect of the subject matter".

And in 25 Halsbury's Laws of England, 4th edn, para 527 it is stated :

"In the absence of a formal assignment of the right of "action, the insurers cannot sue the third party in their "own names, they must bring the action in the name of the "assured".

With those authorities in mind, I turn now to the evidence. There is no statutory authority, and counsel did not refer to any, which enables the first plaintiff as insurer in this case, to bring the present action in its own name. Likewise there has been no assignment, let alone an assignment in compliance with the provisions of the Property Law Act 1952 (NZ) as to assignments of choses in action, of the rights and remedies of the second plaintiff as assured to the first plaintiff as insurer, so as to enable the

first plaintiff to bring the present action in its own name. In other words the first plaintiff has no locus standi to bring the present action. The action should have been brought in the name of the second plaintiff as assured. This was clearly contemplated by both plaintiffs in the document dated 30 October 1992 signed by the second plaintiff and addressed to the first plaintiff. In that document, the second plaintiff acknowledged receipt of payment of the amount payable to him under the motor vehicle insurance policy. The second plaintiff in the same document also authorised the first plaintiff to use the second plaintiff's name for the purpose of exercising and enforcing his rights and remedies. Certainly this is not an assignment by the second plaintiff of his rights and remedies so as to enable the first plaintiff as insurer to bring the present action in its own name. The result of all this is that the action by the first plaintiff is not competent and must be struck out.

Before proceeding further to deal with the action by the second plaintiff, I will now deal with an argument raised on behalf of the second plaintiff. This argument is based on the clause of the insurance policy which provides that the assured is not covered for any loss or damage while the insured vehicle is let out on hire or is used for the business of carrying fare paying passengers. Counsel for the second defendant seems to say that this clause

excludes liability on the part of the second defendant if the circumstances referred to in that clause exist. I am only referring to this argument because of the emphasis placed on it for the second defendant, but I must say the argument does not assist the second defendant at all.

In the first place, the insurance policy in this case represents the contract of insurance between the first plaintiff as insurer and the second plaintiff as assured. It has nothing to do with the second defendant who is not a party to that contract. The exclusion of liability referred to in the clause in point refers not to the liability of the second defendant who is not a party to the contract of insurance, but to that of the first plaintiff which is a party to the contract in its capacity as the insurer. Secondly, the clause in point provides that the insurer will have no liability for any loss or damage which may arise while the insured vehicle was let out on hire or used for the business of carrying fare paying passengers. However when the accident that damaged the second plaintiff's van occurred, the van was not being let out on hire or used for carrying fare paying passengers. So the clause does not apply in this case and naturally the first plaintiff is not relying on that clause. The argument for the second defendant is therefore rejected.

This brings me to the action by the second plaintiff. As with the action by the first plaintiff against the first defendant, the action by the second plaintiff against the first defendant was also non-suited on the basis that there was no evidence of vicarious liability against the first defendant. That puts aside the first defendant from the second plaintiff's action leaving only the second defendant. The action by the second plaintiff is founded in negligence claiming damages but excluding the amount which the second plaintiff has already recovered from the first plaintiff under the motor vehicle insurance policy.

After careful consideration of the evidence relating to this part of the case and having observed the demeanour of the witnesses called for both sides, I must say that I believe and accept the evidence for the second plaintiff as to how the accident in this case occurred, and disbelieve and reject the evidence by the second defendant.

According to the evidence of the second plaintiff and his wife, after they closed their shop at Pesega at about 1.00am early Saturday morning on 17 October 1992, they travelled in their new 15 seater Toyota Hiace van to their home at Fagalii-uta. When they were approaching the Lelata bridge, they noticed a vehicle with high beam lights approaching the same bridge from the opposite direction at high speed and in a zig-zag fashion. The second

plaintiff then pulled his van as far as it was possible to do towards the kerb on the right side of the road and stopped about 20 feet from the bridge. However the truck driven by the second defendant from the opposite side of the bridge kept coming and hit the second plaintiff's van without stopping along the left side from the front rear vision mirror to the rear. As a result the left side of the second plaintiff's van was wrecked from the front to the rear with the rim of the left wheel being bent and the tube busted. The second plaintiff who was at the steering wheel on the left side of the van says he had to move right to the right side of the van to avoid any injury to himself from the accident. After the impact, the truck driven by the second defendant carried on for another 50 metres until it ended up in a ditch on the opposite side of the road with its front part facing the sky. The Police arrived shortly afterwards on the scene but the second defendant could not be found. Two empty bottles of beer were found inside the truck.

According to the second defendant's evidence, he went in the truck to take some people to Magiagi. When he returned from Magiagi to go back to his home at Leauvaa, he approached the bridge at Lelata at slow speed. His truck was travelling at the same slow speed while crossing the bridge when all of a sudden he saw a vehicle at close range on the opposite side of the bridge. While most of that vehicle was on the left side of the centre of the road, part of it was on the right side of the centre of the road.

So he swerved his truck to the right in order to avoid the other vehicle but it was too late and his truck scratched along the left side of the other vehicle. As to the presence of two empty beer bottles inside his truck, the second defendant says that even though he did drink two bottles of beer after work, he did not drink any more beer when he took the people he drove to Magiagi, and the empty beer bottles found inside the truck belonged to those people he drove to Magiagi.

Standing back and looking at this evidence, I must say that the very substantial damage to the left side of the second plaintiff's new van together with the bent rim and busted tube of the left front wheel clearly show that the second plaintiff's van was hit by the second defendant's truck at very great speed, there being no evidence that it was the second plaintiff's van that hit the second defendant's truck. This view of the evidence is reinforced by the fact that the second defendant's truck did not immediately or almost immediately stop after the impact but continued on for another 50 metres until it ended up in a ditch on the opposite side of the road with its front part facing the sky This is totally inconsistent with the second defendant's evidence that he was driving at slow speed. The clear inference to me is that if it was not for the ditch, the truck driver by the second defendant would have continued on without stopping for a much greater distance than 50 metres. That clearly suggests that the second

defendant's truck was not travelling at a slow speed as the second defendant says but at very high speed. I was also impressed with the quality of the evidence given by the second plaintiff and his wife and not impressed at all with the quality of the second defendant's evidence. It was also pointed out during the evidence that the second defendant was charged in relation to this incident with dangerous driving and was convicted by the Magistrates Court on that charge. His appeal against that conviction to the Supreme Court was also dismissed. In all, I find the second defendant to have been negligent and his negligence caused the accident in this case.

Now the second plaintiff's van was purchased brand new on 15 May 1992 at the price of $39,000. So it was barely five months old when the present accident occurred. On 18 May 1992 the van was insured for $41,000 with the first plaintiff for a period of one year at the premium of $2,693.90. The van was used principally as a family vehicle and for the second plaintiff to go to his job as Secretary to Cabinet as well as to attend to his shop. There was also mention in the evidence that at times the van was used to do the odd errands for the shop as well as to carry passengers on an ad hoc basis. But these were insignificant user of the van as it appears from the evidence and there is no claim for loss of earnings for the ad hoc user of the van to carry passengers. I

accept that the van was used principally by the second plaintiff for family use, to go to his work, and to go to his shop.

After the van was purchased and insured the second plaintiff made some improvements to it. Those improvements were not covered under the insurance policy as stated by the second plaintiff and confirmed by the first plaintiff. The improvements were a new floor carpet for $100 which was a special price obtained by the plaintiff, new seat covers for all 15 seats at the total cost of $500 which was also a special price obtained by the second plaintiff, and protective bars at the front and rear of the van. The van was clearly well kept and maintained according to the second plaintiff's evidence. This was confirmed by the panelbeater who had been servicing the second plaintiff's van. He says that the last time he serviced this van was on 16 October 1992 which was the day before the night of the accident. He also says that this was a well maintained van and was as good as new when he last serviced it. He also mentioned that there was a no smoking sign inside the van as an indication of the condition in which the van was maintained.

After the accident, the cost of repairs which included spare parts, labour and painting was assessed at $32,655. Given this amount, the first plaintiff decided it was uneconomical to repair the van. In the opinion of the panelbeater who inspected the van

after the accident, even if the van was repaired, it would never be quite the same vehicle again because of the damage it had sustained. The van was assessed as a wreck at the scrap value of $15,000 to $20,000; and the first plaintiff decided to write off the van. It was tendered for sale and was sold to the highest bidder at $18,700.

Now the total amount paid to the second plaintiff under the insurance policy was $39,830 after deduction of insurance excess costs of $1,170 from the insured value of the van of $41,000. With the insurance pay-out, the second plaintiff looked for another vehicle to buy. Apparently he has always had a private car since 1974; and between the time his van was damaged and the time he purchased another vehicle, he hired his brother's pick-up vehicle for 15 days at the daily rate of $60. The reason for hiring his brother's pick-up vehicle was because it was at a cheaper rate than a rental car for which the normal current daily rate was $100.

When the second plaintiff finally purchased another car, it was another brand new 15 seater Toyota Hiace van very much like his former van. The price was $44,000. He again insured this new van at the same premium of $2,693.90 and paid a registration fee of $206. He also put in a new floor carpet for $150 and new seat covers at $650 for all 15 seats as the floor carpet and seat covers of the former van were all damaged at the accident. As for the

protective front and rear bars, these were removed from the damaged van and installed on the new van; the cost of installation was $200.

Turning now to the claim for damages, it must be made clear that the second plaintiff is not claiming damages for the value of the damaged vehicle; that was the subject of the first plaintiff's claim which has been struck out.

Taking each item for which damages are claimed, the first is the claim for the difference of $4,170 between the value of the new replacement van of $44,000 and the insurance proceeds of $39,830. The former van was wrecked and written off, so the proper measure of damages cannot be the costs of repairs. The next measure of damages to be considered then is the market value or price of a van comparable to or in reasonably the same condition as the second plaintiff's van was in before the accident occurred. As already mentioned, the second plaintiff's van was barely five months old and was a well maintained vehicle when the accident occurred. It was as good as new the day before the night of the accident. The difficulty as I see it with this second measure of damages is that experience shows that people do not buy vehicles with the intention of selling them after five months usage; so people do not normally sell their vehicles after five months usage. It must be very rare that such a thing happens. I therefore take the view that there is

no available market where one buys such a vehicle. It follows that it will not be practical to expect to find the market value or price for a van comparable to or in reasonably the same condition as the second plaintiff's van was in before the accident occurred. This then brings me to the third measure of damages which is the replacement value of the van.

I have given much thought to this part of the claim for damages, as on one view, it would appear that to allow the second plaintiff the full replacement value of the new van would seem to give him an advantage because his former van was five months old. On the other hand, one cannot expect to find the market value of a van comparable to or reasonably in the same condition as the second plaintiff's former van was in, unless one were to force the owners of such vans to sell their vans in order to find out what sort of prices they will fetch on the market. But it will be unrealistic to expect that to happen. What will happen if the second measure of damages is applied is that consequential losses like hiring a rental car and possibly others not claimed by the second plaintiff will continue to accumulate as fruitless efforts are made to find the market value of a comparable vehicle; and the second defendant will be liable for those losses except for losses which can be reasonably avoided. In the meantime, the second plaintiff who has always owned a car since 1974 would have to wait in need of another van for use in his work, shop, and family affairs.

In my judgment it was in the best interests of both the second plaintiff and the second defendant for the second plaintiff to buy a replacement van as promptly as he did. As there is no other five months old van in reasonably the same condition available in the market, the circumstances of this case in my judgment justified the purchase by the second plaintiff of another brand new van to replace his former van which was as good as new before the accident occurred. I would therefore allow the claim for $4,170 as a fair award in the circumstances of this case.

As to the second item of the claim for damages, which is the insurance premium paid on the insurance policy for the new replacement van, I do not accept what counsel for the second plaintiff says that damages which are a direct result of the accident are recoverable. This seems to suggest that all such damages are recoverable; but not all damages which result from an accident are recoverable. Questions of remoteness of damages are also to be considered. The same applies to the damages claim for registration fees for the new replacement van. Counsel are required to file proper legal submissions on those matters within seven days before the Court will make a decision on those matters.

The amounts of $650 for fifteen replacement new seat covers and $150 for a replacement new floor carpet are also allowed. It is to be noted here that the former van was well maintained and as

good as new. The prices of $500 and $100 paid for the fifteen seat covers and floor carpet of that van were not the actual but special prices given to the second plaintiff. The costs of $200 for the installation on the new replacement van of the front and rear protection bars removed from the former van are also allowed. Likewise the claim of $900 for renting a pick-up vehicle for 15 days at the daily rate of $60, before the second plaintiff purchased the new replacement van, is allowed. This is consequential damages arising from the loss of use of the second plaintiff's van as a result of the accident.

So the judgment the Court is about to give on the second plaintiff's claim for damages, will necessarily be an interim judgment as there are outstanding matters to be attended to by counsel. When those matters have been dealt with, an addendum will be added to this judgment.

Judgment is given for the second plaintiff in the sum of $6,070 plus costs and any disbursements to be fixed by the Registrar. Those costs are not to extend to any proceedings following this judgment.

Costs of $350 are also allowed to the second defendant against the first plaintiff whose action has been struck out.

CHIEF JUSTICE