IN THE COURT OF APPEAL, FIJI ISLANDS
ON APPEAL FROM THE HIGH COURT OF FIJI

CIVIL APPEAL NO. ABU0102 OF 2006S
(High Court Civil Action No. HBC036 of 2003L)
CIVIL APPEAL NO. ABU0104 OF 2006S
(High Court Civil Action No. HBC 356 of 2003L)

BETWEEN:	LAUTOKA GENERAL TRANSPORT COMPANY LIMITED	*Appellant*
AND:	EMI VOSA	*First Respondent*
AND:	SEMELI RANATORA	*Second Respondent*
AND:	NEW INDIA ASSURANCE COMPANY LIMITED	*Third Respondent*

Coram: Powell, JA
Pathik, JA
Hickie, JA

Hearing: Friday, 24th October 2008, Suva

Counsel: R. Gordon for the Appellant
R. P. Chaudhary for the First Respondent
No appearance for the Second Respondent
A.K. Narayan for the Third Respondent

Date of Judgment: Thursday, 6th November 2008, Suva

JUDGMENT OF THE COURT

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[1] These appeals are from a judgment of Connors J, who on 15 September 2006, ordered verdict and judgment for Emi Vosa ("the plaintiff") against Lautoka General

Transport Company Limited ('the bus company"), Simeli Ramatora ("Mr Ramatora") and The New India Assurance Company Limited ("the Insurer"). The trial judge also ordered verdict and judgment for the bus company as against the Insurer.

[2] The plaintiff's damages were not assessed by the trial judge and would not be until the determination of these appeals. The Court was told that the plaintiff's case was a test case because depending on the outcome of these appeals a further twenty five or so fellow bus passengers may bring proceedings, or perhaps pursue them, because the bus accident occurred on 23 August 2001 and new proceedings would presumably be out of time.

The Accident

[3] Mr Ramatora was employed by the bus company as a mechanic. In August 2001 his daughter died and he asked the bus company for a bus to transport mourners from the funeral service at his house to the cemetery. The bus company's general manager agreed to this provided that the bus be driven by its regular driver, Tevita Buto ("Mr Buto").

[4] The plaintiff was a mourner at the funeral and, on 23 August 2001, she and fellow mourners boarded the bus which was parked on a hilly road near Mr Ramatora's house, facing downhill. The plaintiff and at least one other passenger gave evidence that when they boarded the bus Mr Buto was in the driver's seat but that he then called out to Mr Ramatora, who was about 20 metres away, to come and drive the bus. The evidence was that Mr Ramatora was reluctant to do this, that Mr Buto kept calling to him to do so, that Mr Ramatora then sat in the driver's seat, that Mr Buto went and sat at the back of the bus that Mr Ramatora took the bus out of gear, lost control of it and that the bus ended up in a ditch. A number of persons were injured and Mr Buto was killed.

[5] Neither the bus nor its brakes were defective.

[6] The plaintiff pleaded that Mr Ramatora was the driver of the bus, driving it at the request and on the instruction of Mr Buto, the servant or agent of the bus company and that it was argued before the trial judge that in these circumstances the bus company was vicariously liable for the negligence of Mr Ramatora.

The Trial Judge's Findings

[7] The trial judge held that in order for the plaintiff to succeed against the bus company she had to prove that Mr Ramatora was driving the bus as the servant and/or agent of the bus company: ***Rambarran v Gurrucharran*** [1970] 1 All ER 749.

[8] The trial judge was satisfied on the evidence that the accident occurred as a result of the negligence of Mr Ramatora, and that Mr Ramatora drove with the authority and at the direction of Mr Buto the agent and servant of the bus company, *"and accordingly"* found the bus company liable.

Appeal ABU 102 of 2006

[9] The bus company appealed on the ground that the trial judge erred in finding it vicariously liable for the negligence of Mr Ramatora. The submission was that Mr Ramatora was not driving the bus in the course of his employment, he had been told by the bus company's general manager that only Mr Buto was to drive and the trial judge misapplied the decisions that he referred to, namely ***Ilkiw v Samuels & Ors*** [1963] 2 All E.R. 879 and in ***New South Wales v Lepore*** [2003] 212 CLR 511

[10] This submission seems unanswerable. The general principle as stated in ***Salmond on Tort*** 1963 edition is:

> *"A master is not responsible for the wrongful act done by his servant unless it is done in the course of his employment. It is deemed to be done so if it is either (i) a wrongful act authorised by the master, or (ii) a wrongful and unauthorised mode of doing some act authorised by the master."*

[11] In ***Ilkiw*** the authorised lorry driver Waines had instructions from his employer British Sugar not to allow the lorry to be driven by anyone else. In breach of those instructions he allowed a workman Samuels, who was not an employee of British Sugar and who had never driven a lorry before, to drive the lorry and the plaintiff was injured.

[12] Willmer LJ held that British Sugar could not be made vicariously liable for the negligence of Samuels who was not their servant. However the trial judge had found that Waines was negligent in allowing Samuels to drive and that British Sugar was vicariously liable for Waines' negligence, and the Court of Appeal agreed holding that an employer could only escape liability:

> *"if, but only if, at the time of the negligent act, the vehicle was being used by the driver for the purpose of what has been called a "frolic" of his own. That is not this case."*

[13] Of course in the present case the driver Mr Ramatora, unlike the driver in ***Ilkiw*** was a co-employee of the authorised driver. However that is not a relevant distinction. The bus company authorised the use of the bus at the funeral provided it was driven by Mr Buto, and the bus company could no more be liable for negligent use of the bus that day than if another passenger or even a thief had taken the wheel.

[14] There is nothing in ***Lepore*** that would lead to any different conclusion. Gleeson CJ at 535ff deals discusses the development of vicarious liability law. He refers to ***Salmond Law of Torts*** 1907 & 1936 editions where it was held that an employer is

not responsible if the unauthorised act is no so connected with the authorised act as to be a mode of doing it, but is an independent act, and observes that all subsequent Australian authority turn upon application of the ***Salmond*** test. Then, noting that the test has its limitations particularly in sexual abuse cases, Gleeson CJ referred to more recent Canadian and English cases including ***Lister v Hesley Hall Ltd*** [2002] 1 AC 215 where the Court held that the employers of a school warden who sexually abused some of the pupils were vicariously liable for his assaults.

[15] However the case before this Court does not concern vicarious liability for the crimes of miscreant priests. It is in 1907 omnibus territory and the application of the ***Salmond*** test is quite straightforward.

[16] Thus the trial judge has erred in finding the bus company vicariously liable for the negligence of Mr Ramatora.

[17] It is however evident that the late Mr Buto was negligent in permitting, indeed on the evidence, demanding that Mr Ramatora drive the bus. Mr Buto knew or ought to have known that his co-employee was a mechanic not a bus driver and Mr Buto knew that his employer had given specific instructions that only he, Mr Buto, was to drive. In his use of the bus that day Mr Buto was not on a frolic of Ihis own, and if the plaintiff had pleaded this negligence against Mr Buto then the trial judge would have been bound to find negligence and further bound to find the bus company vicariously liable.

[18] The plaintiff sought leave during the appeal to amend her pleadings to allege that Mr Buto was negligent in permitting and/or instructing Mr Ramatora to drive the bus, that the plaintiff suffered injury loss and damage as a result, that the bus company was vicariously liable for Mr Buto's negligence and thus for her injury loss and damage.

[19] The general principle is that parties are bound by the way they conduct the proceedings and consequently are disallowed from raising new matters on appeal: ***Coulton v Holcombe*** (1986) 162 CLR 1. This is because public policy favours the finality of litigation and because of broad principles requiring the just and efficient conduct of proceedings. On the other hand appeal courts have a discretion to allow new points of law to be raised, particularly where the new matter sought asserts a material error of law in the disposition of the proceedings below and especially where the alleged error of law relates to a point that is unanswerable: ***Hampton Court Ltd v Crooks*** (1957) 97 CLR 367.

[20] However the Court in exercising its discretion whether or not to allow an amendment raising a new point of law, the court's task is to give effect to the demands of justice by balancing, on the one hand, the entitlement of a party to have the case determined according to law and, on the other, the public and private interest in the proper conduct of the first instance proceedings: ***Burston v Melbourne & Metropolitan Tramways*** (1948) 78 CLR 143

[21] In these proceedings that balancing act requires the Court to allow the plaintiff's proposed amendment. All relevant factual matters were before the trial judge and were determined by the trial judge. The witnesses who gave evidence of Mr Buto's instructions to Mr Ramatora were cross-examined. Mr Buto was killed in the accident, and this is not a case where if the plaintiff's case had been pleaded as now amended, other evidence would have been called below.

[22] In saying this the Court notes that Mr Ramatora did not give evidence. He was a co-defendant with and, so the Court was told, is still an employee of the bus company and there is no suggestion that he was not called to give evidence because of the way liability was pleaded against the bus company. There can be no prejudice in the relevant sense to the other parties in allowing the amendment.

[23] Accordingly the amendment was allowed.

Appeal ABU 104 of 2006

[24] The bus company had taken out a Public Liability Policy ("the Policy") with the insurer. The insurer however disclaimed liability relying on the following warranty ("the Warranty"):

> *"The Insured warrants that during the currency of this policy, there will be maintained in full force and effect motor vehicle liability insurance covering both Bodily Injury and Property Damage in respect of vehicles owned by or leased or rented to the insured for which registration is required by reason of Road with a limit of liability any one accident of at least $100,000.*
>
> *The warranty shall not apply to error or accidental omission by the Insured, his agent or employees.*
>
> *In the event of a breach of this warranty, this policy shall not be voided but shall only apply to the extent as if the Insured had complied herewith."*

[25] *"Road"* is not defined but presumably means *"public road use"* or something similar.

[26] The bus company had taken out a third party insurance policy covering *Bodily Injury* but that policy did not cover *"Property Damage"*.

[27] It is not clear to the Court why the bus company did not join its third party injury insurer in the proceedings below, because the plaintiff's claim, and the potential claims, are likely to be for the most part personal injury claims.

[28] The bus company's evidence was that its insurance cover was at all relevant times effected on its behalf with an employee of the Insurer ("the employee") who at no

time advised the bus company of the requirement to effect any policies of insurance other than the Policy and the compulsory third party insurance policy.

[29] The trial judge, citing ***Pacific Insurance Company Limited v Dip Narayan*** FCA ABU 0026 of 1999, found that the Insurer bore the burden of satisfying the Court that the bus company had failed to effect motor vehicle liability insurance covering property damage and that the failure was not an error or accidental omission by the bus company.

[30] The Insurer called no evidence apart from tendering the Policy and other policies and the judge, making a ***Jones v Dunkel*** assumption that if the Insurer had called the employee his evidence would not have contradicted the evidence of the bus company, found that the Insurer had *"not satisfied the Court in accordance with the burden of proof cast upon it."*

[31] The trial judge noted that in any event even if the Warranty was breached the effect is that *"the Insurer would become liable only for an amount exceeding $100,000 for any one accident."*

[32] The Insurer contends that, there being no issue that the bus company failed to obtain property damage insurance for the bus with a limit of liability any one accident of at least $100,000 ("the failure"), then the trial judge should have made the following findings:

- That the failure was not error or accidental omission by the bus company and therefore was a breach of the Warranty
- That even if the failure was an error or accidental omission by the bus company it was a breach of the Warranty
- That, where there was a breach of the Warranty, there could only be a claim under the Policy when the bus company had paid sums in excess of $100,000 in respect of any one accident

- That *"accident"* means any injury to each individual person on the bus

[33] The Insurer, as befits an insurer, has retained one of the Commonwealth's most able and persuasive counsel and the above is a reformulation of the Insurer's position put with elegance and force in the written and oral submissions.

Was the failure an error or accidental omission by the bus company ?

[34] The answer to this question is Yes.

[35] The bus company failed to maintain motor vehicle liability insurance covering property damage but the trial judge finds that the Insurer bore the burden of satisfying the Court that the failure was not an error or accidental omission *"in accordance with the burden of proof cast upon it."*

[36] The bus company relied on ***Pacific Insurance Company Limited v Dip Narayan*** [1999] FCA ABU 26 of 1999 firstly for the proposition that the burden of proof of breach of a provision such as the Warranty lies on the insurer and secondly for the proposition that any ambiguity in the expressions used in or the construction of insurance policies but be construed in favour of the insured.

[37] It is true that an Insurer bears the overall onus for establishing breach of a warranty by an insured but once compliance with a term such as the Warranty is put in issue the onus shifts to the insured, because the insurer can't be expected to prove a negative.

[38] So here the Insurer may have had the initial burden of proving that a primary motor vehicle property damage had not been effected with it, but the onus then shifted to the bus company to prove, if it was able, that it had effected such a policy with another insurer.

[39] In relation to proving accident or omission, once it was established that the primary policy hadn't been effected, the onus was on the bus company to prove that this was due to error or accidental omission. And that is what it did. The onus of rebutting this, or establishing that the failure was reckless or deliberate, then shifted back to the Insurer.

[40] The onuses don't always shift in a lineal way and in most cases analysing the evidence on the basis of onus of proof is not helpful.

[41] The Insurer contends that failing to comply with the Warranty (by not effecting the primary property damage insurance) was either deliberate or reckless and that the bus company through its Mr Singh, whose evidence was that he simply signed all the policies sent to him by the Insurer and did not read the terms and conditions of the policies, was also reckless.

[42] The Court disagrees. Very few insured read their policies from cover to cover and if they did they could not expect to understand much of what they did read. So it can hardly have been reckless of Mr Singh not to have read the Policy unless it was proved that he did so to avoid having to comply with its provisions. And there was no evidence that failure to comply with the Warranty was deliberate, for example that he knew of the requirement in the Warranty but decided not to comply with it.

Even if the failure was an error or accidental omission by the bus company, was it a breach of the Warranty ?

[43] The answer to this question is No.

[44] The Insurer says that even if the failure to effect the primary motor insurance policy was *accidental* then the Insurer is still not obliged to indemnify the bus company

until the bus company becomes liable for amounts exceeding $100,000 for any one accident.

[45] That interpretation involves giving no effect to the sentence *"This warranty shall not apply to error or accidental omission by the Insured, his agent or employees"*.

[46] The only way to interpret the Warranty while giving meaning to each of its three sentences is that if the failure to obtain primary motor insurance is due to an error or accidental omission then there is either no warranty or no breach of the warranty and therefore there can be no consequence for breach.

[47] The Insurer's construction, with respect, ignores, or gives no practical effect to, the Warranty's middle sentence.

Where there is a breach of the Warranty, can there only be a claim under the Policy when the bus company had paid sums in excess of $100,000 in respect of any one accident ?

[48] The answer to this question is Yes and follows from the third sentence of the warranty and from the Policy jacket *Condition* namely:

> *"PROVIDED FURTHER THAT the due observance and fulfilment of the terms, conditions and endorsement of this policy by the insured in so far as they relate to anything to be done or complied with by the insured shall be conditions precedent to any liability of the Company to make any payment under this Policy. No waiver of any of the terms, provisions, conditions and endorsements of this Policy or the renewal thereof shall be valid unless made in writing signed by an authorised official of the Company."*

Does "accident" means injury to each individual person on the bus ?

[49] The answer to this question is Yes.

[50] The question was considered in ***Queensland Insurance (Fiji) Ltd v Shore Buses Ltd*** [2005] ABU0070 of 2004S where the respondent's bus overturned and a number of passengers brought claims against it. The insurer's liability was limited to $100,000 *"in relation to any one accident or series of accidents arising from the one event"*.

[51] The Court of Appeal found that the insurer was liable to indemnify the bus company for all the claims, finding that a bus crash involved a series of accidents arising from the one event.

[52] Although the nine words following *"any one accident"* impelled such a finding in that case, there is nothing in context of the Warranty or the Policy that leads to a different conclusion here.

Orders of the Court

[53] The orders of the Court are:

1. Appeal No. ABU 102 of 2006 dismissed
2. Appeal No. ABU 104 of 2006 dismissed
3. The appellant in ABU0102 of 2006S to pay the first respondent's costs as taxed or otherwise agreed.
4. The appellant in ABU0104 of 2006S to pay the first and second respondents' cost.

Powell, JA

Pathik, JA

Hickie, JA

Solicitors:

Gordon and Company, Lautoka for the Appellant
Chaudhary and Associates, Lautoka for the First Respondent
No appearance for the Second Respondent
A K Lawyers, Ba for the Third Respondent