IN THE SUPREME COURT OF FIJI
[CIVIL APPELLATE JURISDICTION]

CIVIL PETITION No: CBV 0007 of 2017
(On Appeal from Court of Appeal No: ABU 0049 of 2012)

BETWEEN : 1. **TEBARA TRANSPORT LIMITED**
2. **MOTOIULA NEMANI**

Petitioners

AND : 1. **DOMINION INSURANCE LIMITED**
2. **RAVINDRA KISHORE**

Respondents

Coram : **Hon. Mr. Justice Suresh Chandra, Judge of the Supreme Court**
Hon. Mr. Justice Brian Keith, Judge of the Supreme Court
Hon. Mr. Justice Kankani Chitrasiri, Judge of the Supreme Court

Counsel : **Mr. R. K. Naidu for the Petitioners**
Mr. D. Prasad for the 1st Respondent
Mr. D. Singh for the 2nd Respondent

Date of Hearing: **12 April 2018**

Date of Judgment: **27 April 2018**

JUDGMENT

Chandra J:

1. I agree with the conclusion in the judgment of Justice Chitrasiri.

Keith, J:

2. I have read a draft of the judgment of Chitrasiri J, and I agree with his conclusion about the outcome of this appeal and the orders which he proposes. I take the liberty to express my own reasons in my own words.

3. The relevant facts can be stated shortly. Mr Kishore was a passenger in a bus which was involved in a collision. He was on his way to work. He was badly injured in the accident. The bus was owned by his employers, Tebara Transport Ltd ("the employers"), and was being driven by Mr Nemani who was one of their employees. Mr Kishore issued proceedings against his employers and Mr Nemani claiming damages for negligence or compensation under the Workmen's Compensation Act (Cap 94). The trial judge, Brito-Mutunayagam J, found that the accident had occurred as a result of Mr Nemani's negligence, for which the employers were vicariously liable. He assessed damages at $172,485.35 including interest up to the date of judgment.

4. The employers had a policy of insurance with Dominion Insurance Ltd ("the insurers") which covered its employees. Under it, the insurers were obliged to indemnify the employers for any liability to pay compensation to their employees under the Workmen's Compensation Act. The existence of that policy was one of the reasons why the employers issued a third party notice against the insurers. The trial judge held that the employers were not liable to pay compensation to Mr Kishore under the Workmen's Compensation Act as he had not been acting in the course of his employment at the time. Mr Kishore had not been required to use the bus to get to work, nor had the employers been required to provide him with transport to work. Taking the bus to and from work was just something which the employers allowed Mr Kishore to do. The trial judge followed what Lord Denning MR had said in ***Vandyke v Fender (Sun Insurance Office Ltd (Third Party)*** [1970] 2 WLR 929 at p938 F-H:

> "The two leading cases … show, to my mind, quite conclusively, that when a man is going to or coming from work, along a public road, as a passenger in a

vehicle provided by his employer, he is not then in the course of his employment – unless he is *obliged* by the terms of his employment to travel in that vehicle, or be permitted to travel in it. He must have an *obligation* to travel in it. Else he is not in the course of his employment."

Since the employers were not liable to Mr Kishore under the Workmen's Compensation Act, there was no liability for the insurers to compensate the employers for under the Workmen's Compensation Policy. An appeal against the trial judge's finding that Mr Kishore had not been acting in the course of his employment when he sustained his injuries was dismissed by the Court of Appeal, and there has been no further appeal against that finding.

5. There was another policy of insurance which the employers had with the insurers. The bus was insured under a motor vehicle compulsory third party policy. That policy was, of course, to enable the employers to comply with their obligation under the Motor Vehicles (Third Party Insurance) Act (Cap 177) ("the Motor Vehicles Act") to insure against third party risks in connection with the use of motor vehicles. The existence of that policy was the other reason why the employers issued a third party notice against the insurers. The issue which this appeal raises is whether, and to what extent, the insurers were obliged under this policy to indemnify Mr Nemani and the employers for their liability to Mr Kishore.

6. The part of the policy which covered the employers for legal liability was Section 2: it covered them if, amongst other things, they became "legally liable for … personal injury to passengers (who are not fare paying passengers) arising out of the use of" the bus. It also covered Mr Nemani: the policy was "extended to indemnify any employee of the insured, as if he or she were the Insured, against liability arising in connection with the use of [the bus] in charge of that employee". The critical provision in the policy is a clause in that part of the policy which set out what the employers would not be insured for. Three of those clauses applied to Section 2 of the policy only. One of them was clause 22. Clause 22(b) excluded liability for "death or bodily injury sustained by … any

employee of yours." So although the policy covered the employers' liability to passengers in the bus who were not fare-paying passengers, the insurers' liability to indemnify the employers against a claim made by a non-fare-paying passenger was excluded in the case of those non-fare-paying passengers who were the employers' employees.

7. The trial judge concluded that this exclusion did not apply to the present case because Mr Kishore had not been acting in the course of his employment at the time. He therefore declared that the employers were entitled to be indemnified by the insurers for the damages it had been ordered to pay to Mr Kishore. The correctness of this conclusion turns on the proper construction of the words "[a]ny employee of yours". Do those words mean *all* of the employers' employees, whether or not they were acting in the course of their employment at the time they died or sustained their injuries? In that event, the insurers' obligation to indemnify the employers for their liability for Mr Kishore's injuries would have been excluded by clause 22(b). Or do they mean only those of the employers' employees who were acting in the course of their employment at the time they died or sustained their injuries? In that event, the insurers' obligation to indemnify the employers for their liability for Mr Kishore's injuries would not have been excluded by clause 22(b).

8. The trial judge must be treated as having found that the words "[a]ny employee of yours" in clause 22(b) meant only those of the employers' employees who were acting in the course of their employment at the relevant time. Since Mr Kishore had not been, the insurers' liability to indemnify the employers against Mr Kishore's claim had not been excluded. The Court of Appeal took a different view. They thought that clause 22(b) excluded the insurers' liability to indemnify the employers against Mr Kishore's claim. The principal judgment was given by Basnayake JA. At para 29 of his judgment, he said:

> "While the worker is away from his work one cannot say that he is within the course of employment. However, just because a worker is away from work,

he does not cease to be an employee. As long as the worker is in the pay sheet, he is an employee."

For the exclusion to have applied on that basis, the Court of Appeal must have found that the words "[a]ny employee of yours" in clause 22(b) meant *all* of the employers' employees, whether or not they were acting in the course of their employment at the relevant time. Since Mr Kishore was an employee of the employers, albeit off-duty at the time, the Court of Appeal set aside the declaration that the employers were entitled to be indemnified by the insurers for the damages it had been ordered to pay to Mr Kishore, save only in the sum of $4,000.00. I shall return to that $4,000.00 later on. It is from that declaration that the employers and Mr Nemani now apply for leave to appeal to the Supreme Court. Mr Kishore supports the appeal – no doubt because he thinks that he has a better chance of being paid if the employers are indemnified by the insurers for the whole of his damages.

9. With respect to the Court of Appeal, its reasoning for coming to the view which it did about the proper construction of the words "any employee of yours" was based on a misunderstanding of one of the provisions in the policy. Clause 22 excluded the insurers' liability to indemnify the employers, not merely against claims by any employees of theirs, but also against claims by anyone driving the bus at the time of the accident. That is the effect of clause 22(c). In other words, clause 22(c) excluded the insurers' obligation to indemnify the employers for any claim the driver of the bus may have had for any injuries which *he* sustained. Basnayake JA thought that this exclusion had been removed by the clause in the policy under which the policy was "extended to indemnify any employee of the insured, as if he or she were the Insured against liability arising in connection with the use of [the bus] in charge of that employee". He therefore thought that section 22 excluded the insurers' liability to indemnify the employers against claims by "employees other than drivers". That led him to say in para 28 of his judgment:

"I am of the view that there is no ambiguity with regard to the employees mentioned under clause 22(b) of the policy. The insurer has removed the

drivers employed by the insured from the exclusion. In the same way the insurer could have removed other employees too from the exclusion. This was not done."

10. The error into which Basnayake JA fell was in thinking that the clause in the policy extending cover had the effect of removing the exclusion for drivers in section 22(c) of the policy. It did no such thing. It did not *reduce the ambit of the exclusions* in section 22 at all. Instead, it *extended the cover* under the policy to require the insurers to indemnify, not just the employers but their employees as well, against claims made against them.

11. In the light of all this, I turn to the proper construction of the words "[a]ny employee of yours" in clause 22(b) of the policy. The insurers contend that to say that they refer only to those employees who are injured in the course of their employment is an impermissible gloss on the language of clause 22(b). It does not say that the liability is to be excluded only if the employee is acting in the course of his employment at the relevant time. It excludes liability for injuries to "any employee", i.e. all employees.

12. In my view, that is far too simplistic an approach. An employee who is a passenger in a vehicle driven by one of the employers' drivers and is injured as a result of the driver's negligent driving (but who was not in the course of his employment at the time) is in no different position from any other passenger in the same vehicle who was injured at the same time (but who was not an employee of the employers). In other words, an off-duty employee is no different from any other passenger in the vehicle. Why should clause 22(b) be construed in a way which makes him worse off than any other passenger? That anomaly would be avoided if clause 22(b) were construed as excluding the insurers' liability to indemnify the employers only in respect of claims by employees who are injured in the course of their employment.

13. The other argument in favour of the alternative construction of clause 22(b) contended for by the insurers is, as I understand it, along these lines. The policy was entered into by the

employers to comply with their obligations under the Motor Vehicles Act for users of motor vehicles to insure third parties against injury. Such cover did not have to extend to passengers in motor vehicles, except in certain cases. One of those cases was where the passenger is being carried "for hire or reward". The other case – and the one which is relevant to this litigation – is where the passenger is being "carried by reason of or in pursuance of a contract of employment": see proviso (a)(ii) to section 6(1) of the Act. The words "by reason of … a contract employment" have to be read in conjunction with the words "in pursuance of", and they refer to the situation where the passenger's contract of employment expressly or impliedly required him, or gave him the right, to travel in the vehicle as a passenger: see ***Tan Keng Hong v New India Assurance Co Ltd*** [1978] 1 WLR 297. Accordingly, since the employers were not required to have cover for their employees when they were passengers in one of the employers' vehicles otherwise than in the course of their employment, clause 22(b) should be construed as excluding the insurers' liability to indemnify the employers against claims arising in such a situation.

14. I cannot go along with this argument. The Motor Vehicles Act is all about the minimum cover which has to be provided. It says nothing about what additional cover may be agreed. What the minimum requirement of the law may be is hardly a reliable guide to the extent of the cover which was intended to be given. Indeed, as we shall see shortly, although the minimum cover which a policy of this kind was required by law to provide for passengers was $4,000.00, the cover in this case had been increased to $250,000.00 – a good example of why the minimum requirement of the law is not a reliable guide to the extent of the cover which was intended to be given.

15. Moreover, if it had been intended to limit the cover to the minimum required by the MotorVehicles Act, one might have expected the policy to track the provisions of the Act. That could have been done by providing that the policy *did not cover* the employers' liability to any passengers, with the exception of passengers being "carried for hire or reward" and those being carried "by reason of or in pursuance of a contract of employment". Instead, the policy *covered* all passengers with certain exceptions. And

when it came to the employee exception, it did not track the statutory language but simply referred to the employers' employees without saying which employees were being referred to. In the circumstances, I do not think that the requirements of the Motor Vehicles Act are a helpful aid to the construction of this particular policy of insurance.

16. In my opinion, the proper construction of clause 22(b) is the one which avoids the anomaly to which I have already referred. It should therefore be construed as excluding the insurers' liability to indemnify the employers against claims made by its employees arising only when the employee was acting in the course of his employment at the relevant time. Since Mr Kishore was not acting in the course of his employment when he was injured, it follows that the insurers' liability to indemnify his employers (and Mr Nemani for that matter) against Mr Kishore's claim was not excluded by the policy.

17. I return to the $4,000.00 which the Court of Appeal substituted for the damages of $172,458.35. It did so on the basis of a concession by the insurers' counsel. That concession was based on proviso (b) to section 6(1) of the Act. That provided that a policy insuring users of motor vehicles against third party risks was not "required to cover liability in excess of $4,000 for *any* claim made by or in respect of any passenger ... or in excess of $40,000 for *all* claims made by or in respect of such passengers" (emphasis supplied). However, this proviso simply relates to the minimum cover which must be provided. It is open to insurers and the insured to exceed that cover if they wish. The policy in this case provided for cover for passengers up to $250,000.00. In any event, once the Court of Appeal had decided that Mr Kishore was not covered by the policy because of its construction of clause 22(b), there was no basis for the insurers to be ordered to indemnify the employers in any sum at all.

18. In the interests of completeness, I should add three other things. First, counsel for the employers and Mr Nemani forcefully relied on the decision of the Court of Appeal in England in ***Richards v Cox*** [1942] 2 All ER 624. It is unnecessary for me to set out either the facts of that case or the effect of the Court of Appeal's decision. It might have been necessary to do that if the Court of Appeal in the present case had been right to

regard, as relevant to the issue of construction which it had to decide, the fact that the policy had been extended to indemnify Mr Nemani against liability for his driving of the bus. For the reasons set out in paras 9 and 10 above, I do not think that the Court of Appeal was right to do that.

19. Secondly, counsel for the insurers relied on a series of cases as authority for the proposition that insurers will be discharged from their liability to indemnify the insured against claims by third parties if the vehicle was being used in breach of any of the conditions of the policy. I do not doubt the correctness of that statement of the law, but I have not discerned its relevance to the present case. No term of the policy was breached by Mr Nemani driving the bus or by Mr Kishore being a passenger in it.

20. Finally, the issue which this appeal has raised is a legacy of the past. The Motor Vehicles Act was based on similar legislation in England. Before 1972, it was not compulsory in England to insure against liability for death or bodily injury sustained by passengers carried in the insured vehicle unless they were carried for hire or reward or by reason of or in pursuance of a contract of employment. The law in England changed in 1972, and since then motor insurance policies must cover passengers on the same footing as any other injured third parties. The law in Fiji did not keep abreast of that development. Indeed, now that no fault liability has come into force in Fiji, litigation like the present one may also become a thing of the past.

21. For these reasons, I agree entirely with Chitrasiri J that special leave to appeal should be granted to the employers and Mr Nemani, that the order of the Court of Appeal should be set aside, and that the order of the trial judge should be restored. I also agree with the order for costs which Chitrasiri J proposes.

Chitrasiri, J:

Introduction

22. The two petitioners are seeking leave to appeal from the judgment of the Court of Appeal dated 26th May 2017 and then to have the said judgment set aside. While praying for the said reliefs, they also have sought to reinstate the judgment dated 01.06.2012 of the trial judge in the High Court. Decision of the learned High Court Judge was to award the plaintiff a sum of $172,458.35 as damages together with costs in the sum of $3000.00 against the two petitioners. He also ordered that the 1st petitioner is entitled to be indemnified the total amount of the said damages together with costs awarded to the plaintiff by the 1st respondent (Dominion Insurance limited) under a Motor Vehicle Compulsory Third Party Policy Certificate.

23. Court of Appeal set aside the judgment of the High Court and held that the 1st respondent, Dominion Insurance limited is not liable to pay the amount as decided by the High Court but is liable to pay the 1st petitioner only a sum of $4000.00 and it was under proviso (b) to Section 6(1) of the Motor Vehicles (Third Party Insurance) Act 1948. (CAP177) Indeed which liability had been admitted by the insurance company. The Court of appeal thereafter held that the Insurance Company is not liable to make indemnity payment to pay the plaintiff as general and special damages awarded to him as a result of the injuries he sustained. Court of Appeal relied on the exclusion clause found in the insurance policy i.e. clause 22(b) in Section 2 of the insurance policy when deciding so. The said clause 22(b) purports to exclude the extended liability of the insurance company when it comes to the employees of the 1st petitioner Tebara Transport Limited. The decision of the Court of Appeal was that the plaintiff being an employee of the 1st petitioner company is excluded from obtaining the cover under the insurance policy put in suit.

24. Exemptions from the liabilities of the Dominion Insurance Limited is found in Clause 22 in Section 2 of the insurance policy and the said exemption clause reads as follows:

"22. In respect of death or bodily injury sustained by:
(a)Any relative or friend who permanently resides with you
(b)Any employee of yours
(c)Any person driving the vehicle at the time of the accident".

Background

25. Ravindra Kishore, the plaintiff in the High Court action bearing No.22 of 2005, [2nd respondent in this appeal] claimed general and special damages from the petitioners, namely Tebara Transport Limited and Motoiula Nemani who were the defendants in that action. The said claim of the plaintiff had been made consequent upon the injuries sustained by him in an accident involving the vehicle bearing the registration No. DA 737 in which he was travelling on the 03rd of August 2002 in order to arrive at his work place.

26. In the writ of summons filed in the said High Court, the plaintiff alleged that the first defendant, [2nd Petitioner] Motoiula Nemani being the driver of the vehicle is liable to pay him damages for the injuries that he sustained due to the negligent driving of the driver [1st defendant] while the second defendant [1st Petitioner] is vicariously liable as the master of the first defendant. Consequently, the 1st respondent namely Dominion Insurance Limited was added as a party to the action in the High Court as the 3rd defendant on the basis of the terms and conditions found in the Motor Vehicle (Third Party) Insurance Policy (Pg. 248 - 253 of the High Court Record) entered between the 1stpetitioner and the 1st respondent. In that Policy, 1st respondent being the insurer of the policy had undertaken to indemnify the 1st petitioner of the liability for the personal injuries caused to passengers while travelling in the bus involved in this accident which is the subject matter of the aforesaid insurance policy.

27. Admittedly, the 2nd respondent was employed in the petitioner company for about 15 years as a labourer [Tyre repairman] at its motor garage in Walu Bay. On 03rd of August 2002, he was travelling in the bus belonging to the petitioner company and it collided with another vehicle on its way to Suva from Nausori. As a result, 2nd respondent

sustained multiple injuries. The bus was driven by Motoiula Nemani, the 2nd petitioner. Court found that the accident was due to the negligence of the driver and was convicted for dangerous driving.

28. Learned High Court Judge held that the 1st respondent insurer shall indemnify the 1st Petitioner in terms of the aforesaid third-party Motor Vehicle insurance policy. His reasoning was that the aforesaid exclusion clause 22(b) which excluded the liability of the claims made on behalf of the employees of the 1st petitioner is contrary to Section 6(1) (a) (ii) of the Motor Vehicles (Third Party Insurance) Act and therefore such an exclusionary clause cannot be contained in a third-party insurance policy. In his judgement, learned High Court Judge mentioned this position in the following manner:

> *"More importantly, in my view, the exclusion in section 2, 22(b) of the policy is contrary to the requirement in proviso (a) (ii) of Section 6(1) of the Motor Vehicles Act, which mandates compulsory insurance "where persons are carried by reason of or in pursuance of a contract of employment".*

29. However, as mentioned before, the Court of Appeal reversed the decision of the High Court and held that the Insurer namely the Dominion Insurance Limited (1st respondent) is not liable to indemnify damages awarded to the 2nd respondent in view of the exemption found in the aforesaid Section 2, clause 22(b) in the Insurance Policy which is put in suit.

The grounds of appeal

30. Petitioners in their petition of appeal have put forward 7 grounds to support the appeal but, in their submissions, they have dropped the last two grounds and pursued only the first five grounds. Those five grounds of appeal are as follows:

(1) Learned Judges of appeal erred in law by failing to hold that on the proper construction of the policy, the policy covered liability of the owner Tebara Transport Limited for injuries the second respondent suffered which arose out of the use of the motor vehicle by another authorized employee who was the driver Motoiula Nemani as "the policy had been extended to indemnify any employee of the insured, as if he or she were the insured, against any liability arising in connection with the use of the insured vehicle in charge of that employee" and therefore the petitioners were entitled to indemnity under the Additional Provisions and benefits applicable to Section 2 – Legal liability provision of the policy.

(2) The learned Judges of Appeal erred and / or misdirected themselves in law in holding that proviso (a) (ii) of section 6(1) of the Motor Vehicles (Third Party Insurance) Act had no application when their Lordships said:

> *"[32] The Learned Judge also erred by stating that Section 2, clause 22 (b) of the policy was contrary to proviso (a) (ii) of section 6(1) of the Motor Vehicles [Third Party Insurance] Act which mandates compulsory insurance "where persons are carried by reason of or in pursuance of a contract of employment" The transport that the plaintiff got was not by reason of or in pursuance of a contract of employment. It was only an ex-gratia facility. Therefore proviso (a) (ii) of section 6(1) has no application."*

When the exclusion in Section 2, 22(b) of the policy is contrary to the requirement in proviso (a) (ii) of Section 6(1) of the Motor vehicles (Third Party Insurance) Act which mandates compulsory insurance where persons are carried by reason of or in pursuance of a contract of employment.

(3) The learned Judge of Appeal erred in law by misinterpreting the policy and in holding that being an employee of Tebara Transport Limited, the second respondent was excluded by Section 2, clause 22(b) of the policy;

(4) The learned Judges of appeal erred in law in not holding that the insurance policy was a comprehensive motor vehicle policy increasing passenger risk liability for passengers who are not fare paying passengers from $4,000.00 imposed under Section 6 of the Motor Vehicles (Third Party Insurance) Act to $250,000.00 and that the policy covered Tebara Transport Limited against liability up to a sum of $250,000.00 in the present situation

(5) The learned Judges of Appeal erred in law by proceeding to determine the effect of the exclusion clause under Section 22(C) of the policy when their Lordships said:

> "[27] *The area of cover given by section 2 has been narrowed down by clause 22. However the exclusion under Section 22 (c) above has been removed. This is under a separate heading which states "ADDITIONAL PROVISIONS AND BENEFITS APPLICABLE TO SECTION 2 – LEGAL LIABILITY." Only a single item appears under this heading which states, "Employees Indemnity: This policy is extended to indemnify any employee of the insured, as if he or she were the insured, against liability arising in connection with the use of any insured vehicle in charge of that employee." The exclusion of any driver mentioned under the clause 22 (c) has been removed for drivers who are employees.*
>
> *[28] Section 22(b) therefore applies other than drivers. The policy gives cover to passengers and those who travel without a payment. The question is whether an employee can be considered under the category of "not fare paying passengers". I am of the view that there is no ambiguity with regard to the employees mentioned under*

clause 22 (b) of the policy. The insurer has removed the drivers employed by the insured from the exclusion. In the same way the insurer could have removed other employees too from the exclusion. This was not done."

31. Appeal grounds 1,3 and 5 are directed towards the interpretation of the exclusionary clause No.22 in the insurance policy in question and grounds 2 & 4 are on the question of applicability of statutory provisions which prevail in Fiji when interpreting the terms & conditions of the insurance policy.

32. As mentioned above, clause 22 in Section 2 of the insurance policy excludes the liability of the insurer if the extended liability is to cover the losses caused to the employees of the insured. Then the important question that arises is to ascertain whether the 2nd petitioner Motoiula Nemani falls within the category of an employee of the 1st petitioner company at all material times. If so, the 1st respondent insurance company will not be liable to indemnify the petitioner company for its liability towards the 2nd respondent Ravindra Kishore. On the other hand, if the circumstances show that the particular journey towards the work-place does not fall within the course of duties of the plaintiff then the 1st respondent insurance company is liable to indemnify the petitioners in view of the extended liability referred to in Section 2 of the policy.

Authorities

33. Somewhat similar circumstances had been considered in **Vandyke v Fender and another (Sun Insurance Office Ltd. (Third Party)** in the Court of appeal in England [1970] 2 W L R 929 at page 936. In that decision Lord Denning has stated:

"5. "Arising out of and in the Course of his Employment"

The words of injury "arising out of and in the course of his employment" were used in the old Workmen's Compensation Acts from 1987 to 1945. The same words have been used in the Road Traffic Acts, 1930 and 1960. They have also been used in

employers' liability policies. In my opinion they should receive the same interpretation in all three places: for they are all closely connected that they ought, as a matter of common sense, to receive the same interpretation in each. The words were construed and applied in thousands of cases under the Workmen's Compensation Acts: and I think we should follow these cases. The two leading cases, most apposite for present purposes, are St. Helens Colliery Co. Ltd v. Hewitson [1924] A.C. 59; and Weaver v. Tredegar Iron and Coal Co. Ltd [1940] A.C. 955. They show, to my mind quite conclusively, that when a man is going to or coming from work, along a public road, as a passenger in a vehicle provided by his employer, he is not then in the course of his employment – unless he is obliged by the terms of his employment to travel in that vehicle. It is not enough that he should have the right to travel in the vehicle or be permitted to travel in it. He must have an obligation to travel in it. Else he is not in the course of his employment that distinction must be maintained: for otherwise there would be no certainty on this branch of the law.

34. In the case of **Baker v Provident Accident and White cross insurance Co. Ltd.** 1939 K B D 690 it was held thus:

"At the time of the accident, the plaintiff was not riding in the laundry van with the permission or by the authority of her employers, and, unless she had permission to ride in the van at the place of the accident, she could not be held to be a passenger by reason of or in pursuance of her employment. Further, the driver of the van at the time of the accident was not driving the plaintiff with the permission of her employers. Therefore, the driver, Cordery, did not come within the course of the policy under which the defendants agreed to treat a driver who was driving with permission of the insured as if he were the insured. Further, it was part of

the course of action of the plaintiff, and not merely a condition precedent, that the defendants should have notice of the accident, pursuant to the Road Traffic Act, 1934, s.10(2). The plaintiff has failed to prove that the defendants had such notice. This notice was the gist of an action on a bill of exchange, when notice of dishonor is of the essence of the course of action".

35. Similar circumstances had been discussed in **Izzard v Universal Insurance Co. Ltd.** [1937] 3 All E R 79. In that decision Lord Wright said:

"I cannot accept the respondent company's contention that "contract of employment" should be construed in the Act as subject to the implied limitation "with the person insured by the policy". Such a departure from the clear language used cannot, I think, be justified. I think the Act is dealing with persons who are on the insured vehicle for sufficient practical or business reasons and has taken a contract of employment in pursuance of which they are on the vehicle as an adequate criterion of such reasons. But there is no sufficient ground for holding that this criterion should be limited to employees of the insured person. Such employees, if injured or killed, would ordinarily fall under exception (i), though I am not prepared to say that there might not be, in certain events, an employee of the assured who could claim as a passenger. But such cases must be rare. The most probable case is where the man killed or injured was on the vehicle in pursuance of a contract, not with the owner of the vehicle, but with someone else, for instance, with the person whose goods were being carried on the vehicle: thus, a commercial vehicle, carrying a contractor's or merchant's goods, would frequently, and, perhaps, even normally, have on its an employee of the goods' owner, to see to loading or unloading or delivering the goods, or caring for them in transit. For these purposes, such a man may be carried as a passenger. The insured person may come under third party liability to such a man, who may be described as being in the position of an invitee in the legal sense, vis-à-vis the

insured person. A further illustration, which comes under the same category, is that of an employee or employees of the owner of the goods which are being carried, who go out on the lorry with the goods and return home in the lorry after the goods are delivered. Such employees may properly be regarded as passengers carried in pursuance of a contract with someone other than the insured person."

36. In **Richards v Cox** (1942) 2 All ER 624, it was held that the policy in issue excludes the case of injury to an employee of the insured, but it was further held that, when the authorized driver is substituted for the insured, then the exception applies only to an employee of the authorized driver and does not apply to an employee of the person taking out the insurance.

Authorities referred to above, show the manner in which exemption clauses in third-party insurance policies are applicable when a claim for extended liability is made by an employee.

37. Learned Counsel for the 1st respondent heavily relied on the decision in **Sun Insurance Company Limited v Mukesh Chandra** [Fiji S.C. No.CBV0007 of 2011]. In that decision Anthony Gates C.J. has extensively dealt with the issues relating to the provisions for compulsory insurance against third party risks arising out of the use of motor vehicles and on the exemptions found in an insurance policy. However, the issue in that case was to decide on the third-party liability when the driver was convicted for driving the vehicle without a valid driving license. Hence, the facts in that case are totally different to the facts of the case at hand.

Analysis

38. As mentioned hereinbefore, the only issue here is to ascertain whether or not the plaintiff was acting within his course of employment when he was travelling in the bus that met with the accident injuring him. Court of Appeal in paragraphs 29 and 30 of its judgment has stated:

"However, just because a worker is away from work, he does not cease to be an employee. As long as the worker is in the pay sheet, he is an employee. Being an employee, he comes under clause 22(b) of the policy and excludes the insurer from extended liability."

39. With respect, I am not inclined to accept such a phenomenon. Merely because one person's name is in the pay sheet of an employee, such person cannot be considered as working within the course of his employment for each and every act the employee does. To ascertain whether a particular act comes within the course of employment of an employee, all the facts and circumstances relating to that act has to be looked at carefully.

40. In this instance, learned High Court Judge has decided that the plaintiff is not entitled to obtain compensation under the workmen's compensation Policy since the plaintiff's travel to his work-place does not come within the terms of employment and that decision had not being appealed against. Therefore, it is a decision that had been accepted as correct by the parties to the action. Under such circumstances, it is difficult to understand, why the Court of Appeal in paragraph 31 of its judgment has stated that plaintiff's travelling in the bus must be considered as within the course of employment of the employee of the 1st petitioner company.

41. Admittedly, the plaintiff was on his way to his work-place and not yet reported for work. He is designated as a tyre repairman which position does not require to provide him with transport, to and from his work-place, though he is given the opportunity to travel making use of the buses owned by his employer namely the 1st petitioner company without a payment being made. No evidence is forthcoming to establish that all the employees of the petitioner company enjoy such a facility. Therefore, the facility extended to the 2nd respondent to travel free must have been a concession given to him due to some other reasons; probably the reasons such as his longstanding service and the physical disability that he has or may be for practical or business reasons.

42. More importantly, he is not duty bound too, to travel in a bus belonging to the employer. Decision of selecting the mode of transport had been with him. In other words, Terms of Employment do not facilitate the plaintiff to travel in a vehicle provided by his employer. It is also important to note that the business of the employer company is to deploy buses for the transport of passengers from one place to another and it is not a vehicle that was provided solely for the purpose of transporting the employees of the 1st petitioner company. Therefore, it is my opinion that the plaintiff's travelling in the bus which met with the accident does not come within the course of his employment.

43. Accordingly, my considered opinion is that merely because the 2nd respondent was not a fee-paying passenger or because his name appears in the pay sheet of the 1st petitioner company, court should not take away the third party extended liability of the insurer on the basis that his travelling to work-place falls within his course of employment.

44. In the circumstances, the insurer is liable to indemnify the 1st petitioner, for the losses caused to the 2nd respondent, under section 2 of the insurance policy since he was not acting within his course of employment of the 1st petitioner company to become an employee of that company.

Aforesaid Section 2 of the policy is as follows:

> *"The Dominion will pay any amount subject to the limitation contained below for which you shall become legally liable to pay for accidental physical loss or damage to property of others or personal injury to passengers."*

45. Moreover, for the reasons set out above, the 2nd respondent cannot be considered as an employee of the 1st petitioner in order to fall within the exemption referred to in clause 22(b) of that Section 2 of the insurance policy. Accordingly, the 1st respondent insurer is to indemnify the extended liability of the 2nd respondent, he being the 3rd party as far as the insurance policy is concerned.

Consideration of Grounds of Appeal 2 & 4

46. The Motor Vehicles (Third Party Insurance) Act 1948 stipulates that a policy of insurance should be in accordance with section 6(1) of the Act. It stipulates thus:

"6(1) In order to comply with the provisions of this Act, a policy of insurance must be a policy which –

(a) Is used by an approved insurance company;

(b) Insures such person, persons or classes of persons as may be specified in the policy in respect of any liability which may be incurred by him or her or them in respect of the death of or bodily injury to any person caused by or arising out of the use of the vehicle.

Provided that –

(a) **Such policy shall not be required to cover-**

(i) liability solely arising by virtue of the provisions of the Workmen's Compensation Act 1964; or

(ii) Save **in the case of a passenger** carried for hire or reward in a passenger vehicle or **where persons are carried by reason of or in pursuance of a contract of employment**, liability in respect of the death of or bodily injury to persons being carried in or upon or entering or getting on to a alighting from the motor vehicle at the time of the occurrence of the event out of which the claims arise; or

(iii) liability in respect of the death of or injury to a relative of the person using the vehicle at the time of the occurrence of the event out of which the claim arises, or to a person living with the person so using the vehicle as a member of his or her family in this paragraph

"relative" means a relative whose degree of relationship is not more remote than the fourth;

(iv) any contractual liability;

(b) Such policy shall not be required to cover liability in excess of $4,000 for any claim made by or in respect of any passenger in the motor vehicle to which the policy relates or in excess of $40,000 for all claims made by or in respect of such passengers. The amount herein specified shall be inclusive of all costs incidental to any such claim or claims."

47. Employer of the 2nd Respondent who is the 1st petitioner has accepted that the policy was obtained in compliance with Section 6 of the Motor Vehicles (Third Party Insurance) Act 1948. In view of such an acceptance, it cannot be said that there is violation of the said Section 6 of the Act. Furthermore, as decided before in this judgment, the 2nd respondent was allowed to travel free because he was an employee of the 1st petitioner company though such a concession does not fall within the terms of his employment. Therefore, it is clear that the 2nd respondent does not fall into the category of 'employee' for whom the extended liability is exempted under the proviso to Section 2 of the policy. Therefore, the 1st respondent insurer is liable to indemnify the 1st petitioner of the damages awarded to the 2nd respondent in terms of Section 2 of the Policy. In the circumstances, it is not necessary to consider the 2nd and the 4th grounds of appeal raised by the petitioners.

Requirements under Section 7(3) of the Supreme Court Act 1988

48. In this matter, the meaning/interpretation of the exclusion clause i.e. Clause 22 in section 2 of the insurance policy is to be ascertained. Such an issue is an important point of law concerning insurance claims. Also, the grounds of appeal raised in this instance give rise to serious questions of law involving matters of public interest in the field of insurance claims. Therefore, it is clear that in this appeal there exists

- a far-reaching question of law; and/or
- a matter of great general or public importance; and/or
- a matter that is otherwise of substantial general interest to the administration of civil justice.

49. The presence of the matters mentioned in the foregoing paragraph, it being the requirements to grant leave to proceed in an appeal filed in the Supreme Court, under Section 7(3) of the Supreme Court Act 1998, necessitates this Court to grant leave to proceed with this appeal.

Orders of the Court:

1. *The petition for special leave to appeal is granted and the appeal of the two petitioners is allowed.*
2. *The judgment dated 26.05.2017 of the Court of Appeal is set aside.*
3. *The judgment dated 01.06.2012 of the High Court is reinstated.*
4. *Each petitioner is entitled to the costs amounting to $3000.00 as the costs in this Court as well as the Court of Appeal.*

.....
Hon. Mr. Justice Suresh Chandra
Judge of the Supreme Court

.....
Hon.Mr. Justice Brian Keith
Judge of the Supreme Court

.....
Hon. Mr. Justice Kankani Chitrasiri
Judge of the Supreme Court