IN THE SUPREME COURT OF TONGA
CIVIL JURISDICTION
NUKU'ALOFA REGISTRY

NO.C.746/98

BETWEEN : FISILAU VALIKOULA - ***Plaintiff***

AND : 1. LEONAITASI TOA - ***Defendants***
2. NATIONAL PACIFIC INSURANCE

Counsel : Fifita for Plaintiff
First Defendant in person
'Etika for second defendant

Hearing: 17 and 18 June 1999
Judgment: 21 June 1999

JUDGMENT

On 31 January 1998 at 9.00am, the plaintiff was driving his van, L3752, along the Hihifo road towards Nukunuku. He saw the first defendant's car, T2886, coming towards him driving fast and swerving right across the road from one side to the other. That happened more than once and the plaintiff took the sensible course of pulling in on his side of the road and stopping. Notwithstanding, the defendant drove into the front of the plaintiff's vehicle causing a considerable amount of damage to the cab and to his own vehicle.

The plaintiff had ~~the~~ his vehicle repaired at a total cost of $3,114.00. He sued the plaintiff for that sum and additional expenses of $1,500.00 for transport whilst he was waiting for the repair to be completed.

The first defendant was convicted of careless driving at the magistrates' court on 21 May 1998 and fined $100.00.. He does not dispute the conviction nor does he contest his liability for the repair to the plaintiff's van. The plaintiff has not proceeded with the claim for the additional $1,500.00 and seeks only the $3,114.00, interest and costs.

I have no difficulty with that part of the case and give judgment to the plaintiff against the first defendant in those terms.

The first defendant was insured under a policy issued by the second defendant company and so the plaintiff also sued the insurers. Mr Fifita for the plaintiff suggests this is

possible because the rights under the policy have been subrogated to the insurance company. He cites the authority of an earlier case in this Court, Lalahi v Douglas Downs and Insurance Corporation of Tonga, Number 302/97. The facts in that case were similar to the present case and the learned Judge accepted the insurance company was joined under subrogated rights arising out of the contract of insurance and found against both defendants jointly and severally.

With great respect to the Judge in that case, I do not think this is a case of subrogation. In cases of indemnity insurance such as a motor policy, the insurance company is entitled to be put in the position of the insured by subrogation in order to succeed to all the rights and remedies of the insured in respect of the subject matter of the policy. It only arises once the insurance company has admitted the insured's claim and paid the sum that thereby becomes payable. I can see no way in which subrogation can put the insurance company in the position of the insured in respect of the right of action of a third party claiming against the insured.

The first defendant should have been sued alone. He could then have joined the insurance company as a third party in order to be indemnified and that is precisely what the first defendant sought to do in this case. Unfortunately, the application was not considered by the Judge who was then seised of this action because the company was already a party.

Had that been allowed then, the whole matter could have been settled in these proceedings. As it is, the second defendant is disputing its liability to indemnify the first defendant for the damage to the plaintiff's vehicle even though, curiously, it appears to have accepted liability in relation to the first defendant's own vehicle under the selfsame policy.

In the present action, the second defendant contests the right of the plaintiff to sue them over this policy of insurance and they must succeed. The plaintiff's claim against the second defendant is dismissed with costs.

The sad result is that the first defendant must now bring fresh proceedings against the insurance company on exactly the same facts. As the result of the elementary mistake of his counsel, the plaintiff, the totally innocent victim of this whole episode, is left having to wait even longer for the money that is undoubtedly his - already reduced by $1,500.00 because no evidence was led to support that part of the claim - and is now liable for costs he should never have had to pay.

I therefore Order:

1. Judgment to the plaintiff in the sum of $3,114.00 against the first defendant with interest of 10% from the date of judgment until paid. He seeks his costs. He has already caused the first defendant to incur extra costs by causing him to have to bring fresh proceedings against the third party that would have been unnecessary had the first action been correctly brought in the first place. I note that the first

defendant has never denied his responsibility for the accident and the repair. In those circumstances, I shall make no order for costs between the plaintiff and the first defendant.

2. The plaintiff's claim against the second defendant is dismissed with costs to the second defendant to be taxed if not agreed.

NUKU'ALOFA, 21 June, 1999.

CHIEF JUSTICE