Singapore Journal of Legal Studies
[1998] 172 – 181

MOTOR INSURANCE: DISTINGUISHING CONTRACTUAL RIGHTS FROM STATUTORY RIGHTS

Sim Jin Hwee v *Nippon Fire & Marine Insurance Co Ltd*

I. INTRODUCTION

MANY Singapore cars drive in and out of Malaysia on a regular basis. Often they take turns at the wheel. This all presents an interesting question – what happens if, due to the negligence of the driver, the driver and the passengers in the car are injured in the resulting accident. Insofar as first party injuries and damage are concerned, it is not much of a problem since most motor insurance policies have an extended geographical limit on its application, and almost invariably includes use of the motor vehicle whilst in Peninsular Malaysia. That much is clear – if the claims are first party claims, *ie*, claims by the insured or his permitted drivers for personal injuries or damage to the car, they are covered by the express terms of the policy. No real difficulties arise.

With regards to third party claims, a slightly more difficult question may arise. It all depends on how the claim is made. If the claim is made by the insured or permitted driver, in order that they should be able to pay the injured party, then it all turns on the terms of the cover – if the geographical limits placed by the policy is not qualified to distinguish between first and third party claims, then ostensibly there should not be any difference in analysis whether the claims relate to first party or third party claims.[1] Difficulties arise, however, if the claim made by the third party is successfully pursued and culminates in judgment against the insured

[1] See, however, the approach in *Revell* v *London General Insurance Co Ltd* [1934] All ER 744, where the English court took the view that if the action was in essence one brought on behalf of the third party victim, then the court will apply all the relevant statutory protection offered to the third party, which of course would not have been available to the insured, on the case before it. The decision does beg the question of whether it is relevant to such a holding that the insured driver should be unable to compensate the third party without resort to the insurance monies claimed under the policy.

driver, but the judgment debt is not satisfied. If the insured driver is unwilling or unable to satisfy the judgment debt, the judgment which the third party obtains is only worth the paper it is written on. There is no way in which the third party victim is able to claim against the insurers at common law because there is no privity between them. However, statute law has made inroads into this area by providing that if certain criteria are met, the third party has the right to sue the insurers directly, subject to certain restrictions on the rights of the insurers. Although such statutory alteration of the common law position works fine and is fairly straightforward where the parties are from one country and the accident happens within its municipal limits, questions arise when the accident occurs outside the territorial limits of the country. This is where there is an obvious divergence between the two situations.

II. Sim Jin Hwee v Nippon Fire & Marine Insurance[2]

This case was one recent decision which raised the question of how such statutory rights are to be applied where the accident occurs outside Singapore. The facts of this case are a little complicated as there were many disputes as to the facts themselves. What is relevant to us is that on 5 December 1991, an accident occurred on the Malaysian side of the Causeway while the car in question was travelling in the direction of Singapore. The car was a Singapore-registered vehicle owned by one Madam Leong Suet Wun. The driver of the car, at the time of the accident, was one Lim Heng Nam. Lim was apparently driving the car as the permitted driver of one Wong Teo Hin, who had possession and use of the car until full payment was made by him to Leong for the car, whereupon it would belong to him. The plaintiff, Sim, had been sent by the finance company to repossess the car as the hire-purchase instalments had been defaulted on. Sim suffered personal injuries in this accident. He then sued Leong, who was by then an undischarged bankrupt, and obtained final judgment. The judgment sum was not satisfied, whereupon the plaintiff commenced proceedings against the insurers of the car under section 9 of the Motor Vehicles (Third Party Risks and Compensation) Act.[3]

The insurers defended the action on five main grounds:

i. Under sections 4(1) and 9(1) of the MVA, an insurer is only liable for any liability as is required by the Act, *ie*, death or

[2] Suit No 1128 of 1996 (judgment delivered on 20 October 1997).

[3] Cap 189 (1985, Rev Ed). Hereafter, the Act will be referred to as the "MVA".

any personal injury to any person caused by or arising out of the "use" of a motor vehicle. Although the word "use" is only defined as "use on any road" under the Act, it was submitted that such use has to be on Singapore roads. Since the accident occurred in Malaysia, there was no such use, as contemplated by the Act, out of which the insurers would be under any liability.

ii. Since the policyholder was a bankrupt, the appropriate avenue for the plaintiff would have been to commence proceedings against the insurers under the Third Party (Rights Against Insurers) Act. Hence, the proceedings under the MVA were misconceived.

iii. Since the car in question had been sold by the policyholder to Wong, the policy lapsed upon such sale, and the insurer ceased to be liable under the policy.

iv. The policy only covered the policyholder and any authorised driver, and since the car was being driven by Lim, who was not authorised by the policyholder, at the time of the accident, the insurer were not liable under the terms of the policy.

v. Notice had not been given within 7 days of the commencement of the underlying proceedings against Lim as required under section 9(3)(a) of the MVA.

Rubin J dismissed all the grounds raised by the insurers and decided the case in favour of the plaintiff. Briefly, the reasons were for the defences failing were as follows:

i. The argument that "use" as contemplated by the MVA had to be confined to Singapore roads was rejected by the court on the basis that such an argument ignores the fact that the terms of the policy themselves contemplated cover for the use of the car on Malaysian roads as well. The policy had provided that the insurers would not be liable under the policy if the car was used "outside the Geographical Area", which, *inter alia*, included West Malaysia.

ii. It was pointed out by Rubin J that the words used in both the MVA and the Third Party (Rights Against Insurers) Act were largely similar. In any event, since the plaintiff had satisfied the pre-conditions laid down in both Acts, this argument was really pointless.

iii. It was found as a fact that although the car was sold by the policyholder to Wong, she had retained title to the car, and as such, she still had an insurable interest in the car and the policy had not lapsed.

iv. Since the car had been handed over to Wong with no express limitations as to its use, the policyholder had to be taken to authorise all uses of the car, including allowing someone else to drive the car. As such, Lim would be an "authorised driver" covered by the policy.

v. The court found that there was sufficient notice under the Act when the plaintiffs had written to the insurers, prior to the commencement of the proceedings against the insured driver, setting out the facts and asking if they would admit liability, failing which they would commence proceedings.

It is noteworthy that the defendant insurers successfully appealed to the Court of Appeal.[4] The primary ground of appeal was that Rubin J had erred in holding that the Act should apply to an accident which occurred outside the territorial limits of Singapore. Karthigesu JA, in delivering the decision of the Court of Appeal, agreed with the arguments of the insurers[5] that the Act had to be read subject to the principle of territoriality and, as such, it would not apply to accidents which occurred outside Singapore.[6]

III. Application of the MVA

The rest of the grounds relied on by the insurers as well as the reasons for rejecting them need not detain us any further. The argument raised by the defendant insurers is premised upon the construction of the rights conferred upon victims of traffic accidents by the MVA. Although section 9(1) provides for the liability of the insurer to the victim of the accident, such liability is only in respect of such liability as is required by the MVA

4 Civil Appeal No 200 of 1997 (judgment delivered on 20 April 1998).

5 Which was exactly the same one which they had made at first instance, namely that the applicability of the Act and the rights arising therefrom had to be construed as being limited to Singapore only.

6 *Supra*, note 4, at paras 19-20.

to be covered under a policy.[7] The requirement of such compulsory insurance is found in section 4(1)(b).[8]

The argument raised was that since section 9(1) only gives the direct right of action against the insurer in respect of policies which are compulsory by virtue of section 4(1)(b), it must accordingly be limited by the requirements of the latter provision. As such, the right as against the insurer would only arise if the personal injury was caused by or arose out of the "use" of the motor vehicle. The word "use" has been defined in section 2 as "use on any road", and the word "road" is further defined as "any public road and any other road to which the public has access, and includes bridges over which a road passes". However, it is not stated in the definition in section 2 as to any territorial limits when reference is made to "road". It was therefore submitted that the Act must be implicitly understood as referring only to roads in Singapore since statutes are normally not interpreted as having extra-territorial effect in the absence of express words to the contrary. Taken to its logical conclusion, the argument went, unless the word was limited to Singapore roads, the Act would apply where ever in the world such death or personal injury occurred.

Rubin J was not at all persuaded by this argument. The court chose to ignore the presumption against extra-territoriality of Acts of Parliament and decided in favour of the terms of the policy. Under the heading of "General Exceptions", the policy had provided that:

> The Company shall not be liable in respect of
>
> 1. any accident loss damage or liability caused sustained or incurred
>
> (a) outside the Geographical Area

[7] S 9(1) reads as follows:

> If after a certificate of insurance has been issued under s 4(5) to the person by whom a policy has been effected judgment for a sum exceeding $5,000 in respect of any liability as is required to be covered by a policy under s 4(1)(b) (being a liability covered by the terms of the policy) is obtained against any person insured by the policy then, notwithstanding that the insurer may be entitled to avoid or cancel or may have avoided or cancelled the policy, the insurer shall, subject to this section, pay to the Public Trustee as trustee for the persons entitled thereto any sum payable thereunder in respect of the liability including any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any written law relating to interest on judgments.

[8] S 4(1)(b) provides that:

> (1) In order to comply with the requirements of this Act, a policy of insurance must, subject to subsec (2), be a policy which –
>
> ...
>
> (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 them in respect of the death of or bodily injury to any person caused by or arising out of the use of the motor vehicle.

This "Geographical Area" was defined in the policy as covering:

> West Malaysia, the Republic of Singapore and that part of Thailand within 50 miles of the border between Thailand and West Malaysia.

Well, it is clear what this clause meant – the insurer had extended the cover of the policy beyond the territorial limits of Singapore. However, the learned judge took this one step further by holding that this contractual extension of cover to roads outside Singapore would also mean that the argument of the insurers would be undermining the express agreement that they had entered into. The argument was thus dismissed most emphatically:

> In my opinion, the construction spoken for by counsel for the first defendant, if acceded to, would clearly make the said express terms to stand on their heads. If what was espoused by counsel for the first defendant were to be accepted, then the multitude of policy holders as well as their authorised drivers, driving on Malaysian roads, issued with policies such as the one under reference, would be at risk without their realising that they are without any cover whilst driving on Malaysian roads. In my opinion, the interpretation called for by counsel is totally out of sync with the express terms of the policy and if what the insurer is contending for presently is their hope and intention, then they ought to communicate this to their policy holders forthwith and include an express disclaimer in all their printed policy terms.[9]

The decision of the High Court in holding that the Act applies even where the accident occurs in Malaysia brings to the fore the intriguing question of the relationship between the policy terms and the Act. It is obvious that Rubin J took the view that the contractual terms could influence the ambit of the rights of the third party against the insurers. However, the Court of Appeal took pains to point out the distinction between a contractual action by an insured against an insurer and a statutory action by a third party against the same insurer.[10] The reason why there seems to be this divergence of judicial opinion on the issue is because the High Court failed to "appreciate this vital difference".[11]

9 *Supra*, note 2, at para 22.
10 *Supra*, note 4, at paras 19-20.
11 *Per* Karthigesu JA, *supra*, note 4, at para 19.

IV. Relationship between Policy Terms and the MVA

A logical place to begin considering this point would be to determine what is the legislative intent behind the MVA, in particular section 9.[12] What section 9 of the MVA does is to give the third party rights to sue the insurer directly in the event that he has successfully obtained judgment against the insured driver and he has not been able to obtain satisfaction on that judgment. This is a statutory assignment of contractual rights. It can also be characterised as a statutory extension or conferment of contractual rights to the third party who has been successful in his action against the insured driver.[13] Of course, under the MVA, the third party victim is afforded additional protection against the insurer who is unable to use all the contractual defences which he would otherwise have been able to use against the insured. This is provided for in sections 7 and 8 of the Act.

At common law, the third party victim of a traffic accident has no direct right of recourse against the tortfeasor's insurer in respect of the wrong done to him. This is due to the operation of the doctrine of privity of contract.[14] All this was changed in 1960 when the Motor Vehicles (Third Party Risks and Compensation) Ordinance[15] was enacted. This Ordinance was in turn superseded by the present Motor Vehicles (Third Party Risks and Compensation) Act. As the preamble to the Act points out, the object of the Act was

> to provide against third-party risks arising out of the use of motor vehicles and for the payment of compensation in respect of death or bodily injury arising out of the use of motor vehicles and for matters incidental thereto.[16]

This, of course, has been achieved by two primary thrusts of the Act. Firstly, it became compulsory for all motor vehicles to be insured against third

[12] See, in particular, the survey of this area of law by Karthigesu JA, *ibid*, at paras 11-17.

[13] This is not unusual as the legislature has similarly provided for this in situations where the person claimed against is bankrupt. Under the Third Party (Rights Against Insurers) Act (Cap 395, 1994 Rev Ed), the successful claimant also steps into the shoes of the insured person.

[14] See *King Lee Tee* v *Norwich Union Fire Insurance Society* [1933] 2 MLJ 187, where Whitley J pointed out that

> It is clear that the person injured is not a party or privy to the contract of insurance and that neither at common law nor in equity has he any rights against the insurers.

[15] Ord No 1 of 1960.

[16] See also the judgment of Lord Denning MR in *Harker* v *Caledonian Insurance Co* [1979] 2 Lloyd's Rep 193, at 195-196, where his Lordship did a comprehensive survey of the aims and the historical background of the statutory changes made to the common law position.

party liability for death or personal injury. Secondly, as mentioned above, it gave the third party the right to have direct recourse against the insurer.

Be it as it may, although the legislature may be concerned that third party victims of traffic accidents should be compensated, one must not read into the Act more rights than has been provided for. Thus, one must draw a distinction between the rights of the parties (to the insurance contract) *inter se* and the rights between the injured third party and the insurer. The first is dependent upon the terms of the contract only, while the second is based upon the statutory rights given by the Act. As such, the right of the third party to sue the insurer directly must be limited and circumscribed by the enabling statute.

An illustration of this point is found in the decision of *QBE Insurance* v *Thuraisingam*.[17] Here, the insured was involved in an accident with a third party, whose car was damaged. Judgment in default was obtained in respect of the cost of repairs and the loss of use of the car. The insurers refused to pay the judgment sum, whereupon the third party instituted proceedings against them. At trial level, the magistrate held that since the insurers were liable for the sum. He based it on the fact that the terms of the policy provided cover for, *inter alia*, property damage. On appeal this was overruled by the Malaysian High Court. It was held by Wong Kim Fatt JC that a third party right given under the Act[18] to seek satisfaction of a judgment sum, against the insured, from the insurers is circumscribed by reference to liabilities in respect of which insurance is compulsory. Hence, since it is not required by the Act that property damage has to be insured against, it necessarily follows that the right granted by the Act to sue the insurers directly does not extend to a claim for such property damage. Wong Kim Fatt JC pointed out the error of the Magistrate in not distinguishing between the contractual liability of the insurer to the insured and the statutory right of direct action that the third party had against the insurer:

> The contention by learned counsel for the third party that there is liability on the insurers to pay the judgment sum must fail. The learned Magistrate erred in law in holding that the insurers are contractually liable to pay the judgment sum where it is clear from the record that there is no privity of contract between the insurers and the third party. The learned Magistrate erroneously equated the insurers' undertaking to indemnify the insured with a contract or undertaking to indemnify or pay the third party for property damage sustained by him.

[17] [1982] 2 MLJ 62. See also *Buchanan* v *Motor Insurers' Bureau* [1955] 1 All ER 607 and *Randall* v *Motor Insurers' Bureau* [1968] 1 WLR 1900.

[18] The statutory right of the third party in Malaysia is conferred under s 80(1) of the Road Transport Act 1985, which is *in pari materia* with s 9(1) of the MVA.

It is thus imperative to determine if the liability in question in our situation would also be one under which it is made compulsory by the MVA to be insured against. By analogy with the decision in the Malaysian case, in the instant situation, if it is held that "road" only includes roads in Singapore and not outside of the country, then since it is not a use of which is required to be insured by the MVA, then the right given under the statute should correspondingly not include any sums awarded in respect of any liability incurred in relation to such use.

However, Rubin J seemed to be making the rather novel suggestion that the terms of the policy itself can determine the scope of the rights given by the Act – since the geographical limits clause in the policy covers Malaysia, the Act must also cover the accident in question. However, that is confusing one with the other – the right to sue the insurer directly (statutorily getting around the doctrine of the privity of contract) must be limited by what is compulsory under the statutory framework. As such, the mere fact that the insurer, has by contract undertaken to insure more than what is required under the statute does not give the third party any further rights since these are not subject to the statute. The warning which Rubin J gives about insureds being surprised to find that they are not covered despite the geographical limits clause is misguided. Although one can understand and applaud the concern he expresses for the fate of unsuspecting insureds who may be getting less of a bargain than they suspect, this warning confuses the rights of the parties *inter se* and the right of the third party under the contract – it does not follow that if the arguments of the insurer are accepted that the insured will find himself not covered under the policy if he drives into Malaysia since the argument only affects the rights of third parties conferred under the Act. No one is suggesting that the insureds covered by such policies will not continue to enjoy the benefits contracted for under the contract. The only point is that persons who are not directly covered by the contract of insurance can only look towards the enabling provisions to sue the insurers and must be strictly limited to the rights the statutory provisions have given them.

Thus, insofar as the High Court seems to be suggesting that the terms of the policy should apply to afford their benefit to the plaintiff, it must be wrong. To begin with, there is no suggestion that there is any privity of contract between the third party and the insurer, nor was it within the contractual bargain that they should have the benefit under such contract. In the absence of privity, the third party has to rely on the Act to circumvent this problem. However, this right of direct recourse only relates to liability required to be insured under the MVA. This has to be determined solely from the statutory language. The terms of the policy cannot enlarge or amplify such language, nor can they have any relevance to the statutory right. The

Court of Appeal must therefore be right in declining to follow the approach of the High Court in this respect.

V. Conclusion

Whatever else may be said about this case, the point which was so eloquently and passionately expressed by Rubin J cannot be correct. If it were to be so, then the ambit of the MVA and the rights conferred thereunder would be held hostage to the whims of parties to a private treaty. This cannot and should not be the case. It would be intolerable that a statutory regime be changed on a case-by-case basis, depending on what the terms of the policy in question are. Different persons will have different sets of rights depending on these terms. That cannot be the intention of Parliament. Such a decision is also unsupported by authority.[19]

At the end of the day, the distinction drawn by the Court of Appeal between the contractual terms and the rights conferred by the Act does not in any way derogate from the rights of insured drivers who venture into Malaysia. They are still covered by the terms of the policy, as laid down in the geographical limits clause. If they should be involved in an accident, they can claim both for first party as well as third party injuries or damage. All that the decision means is that the third party is dependant on the insured to make the claim on his behalf – there is no right to sue to the insurer directly under the Act. In that sense, the concern expressed by the High Court is more apparent than real.

Lee Kiat Seng*

[19] One last interesting point which may be made here relates to whether this scenario has arisen before. One would have thought that with the volume of traffic which flows between the two countries, a situation like the one here would have arisen sooner rather than later. Well, it has. In *Yong Moi & Anor* v *Asia Insurance Co Ltd* [1964] MLJ 307, which is more well known as an authority for whether a permitted driver is able to permit another driver to drive the car, the insured lent his car to a cousin so that he could travel from Singapore to Segamat to attend a wedding. During the course of the journey, a friend of the cousin took over the wheel. While this friend was at the wheel, between Kulai and Segamat, an accident occurred whereby the cousin was killed. The accident happened in 1959, and judgment was obtained against the driver in 1961. Judgment was not satisfied, and so action was commenced, under the Motor Vehicles (Third Party Risks and Compensation) Ordinance of 1960, against the insurers. It is interesting that in such a situation, similar to the present case, no one raised the question of whether the application of the Ordinance ought to be limited to liability arising out the use of the car on Singapore roads.

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