THE MOTOR INSURER AND THIRD-PARTY RIGHTS

The motor insurer unlike his counterparts in the other fields of insurance stands apart in that he can be sued upon the policy by a party who is in no way privy to the contract of insurance and a total stranger to it.

This article seeks to examine the basis and extent of such third-party rights.

Position At Common Law

The position at common law relating to third-parties cannot be more aptly stated than in the famous words of Viscount Haldane L.C.:[1] "My Lords, in the law of England certain principles are fundamental. One is that only a person who is a party to a contract can sue on it."

Although his Lordship was there not dealing with a contract of insurance the above statement has never been doubted in the context of an insurance contract. The above principle has recently been reaffirmed by the Privy Council.[2]

A Singapore case in point is *King Lee Tee* v. *Norwich Union Fire Insurance Society*[3] Here, the plaintiff, an infant was injured in an accident. After the accident the driver's insurers, the driver and the guardian of the infant entered into a settlement under which the insurers were to be given a full discharge in consideration of a payment of $100. Subsequently an action in negligence was brought against the driver of the vehicle and damages of $750 was recovered. Before judgment could be executed the driver became a bankrupt. An action was then brought against the driver's insurers.

The issue before the court was whether the plaintiff could recover the damages obtained from the insurance company. In holding against the plaintiff, Whitley J., said:[4] "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."

The learned judge further held that the English Third Parties (Rights Against Insurers) Act 1930, was applicable in Singapore by virtue of section 5(1) of the Civil Law Ordinance.[5] In view of the settlement between the parties and breach of conditions under the policy it was held that any rights acquired under the Act were defeated.

1 *Dunlop Peumatic Tyre Co. Ltd.* v. *Selfridge & Co. Ltd.* [1915] A.C. 847 at p. 853.
2 *The Eurymedon* [1974] 1 Lloyd's Rep. 534.
3 (1933) M.L.J. 187.
4 (1933) M.L.J. at p. 189.
5 No. 1ll of 1920.

This case was decided before the introduction in Singapore of compulsory motor insurance against third-party liability.[6]

Compulsory Motor Insurance

The common law position has been radically altered with the introduction of compulsory motor insurance under the Motor Vehicles (Third-Party Risks and Compensation) Act.[7]

The object of the Act is 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.[8]

To achieve this object the Act has done two things. First, it has been made unlawful for any person to use or to cause or permit any other person to use a motor vehicle unless there is a policy covering third-party risks as required by the Act.[9]

Second, it gives the third-party in respect of a risk which is required to be covered by insurance a direct cause of action against the insurers where a judgment has been obtained against the policy-holder.[10]

Although the term "third-party risks", appearing in section 3(1), by itself is extremely wide, however in the context of the Act a much narrower range of third-party risks are contemplated. *Firstly,* it only covers cases where the liability is one in respect of the death or bodily injury of a third-party.[11] *Secondly,* the policy need not

[6] See also *Vandepitte* v. *Preferred Accident Insurance Corporation of New York* [1933] A.C. 70.

[7] 1970 Cap. 88 (hereinafter referred to as the "Act").

[8] Long title of the Act.

[9] Section 3. — (1) Subject to the provisions of this Act it shall not be lawful for any person to use or to cause or permit any other person to use a motor vehicle unless there is in force in relation to the user of the motor vehicle by that person or that other person, as the case may be, such a policy of insurance or such a security in respect of third-party risks as complies with the requirements of this Act.

[10] Section 8.— (1) If after a certificate of insurance has been issued under subsection (4) of section 4 of this Act to the person by whom a policy has been effected judgment in respect of any such liability as is required to be covered by a policy under paragraph *(b)* of subsection (1) of section 4 of this Act (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 the provisions of 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 enactment relating to interest on judgments. See also *New Zealand Insurance Co.* v. *Sinnadorai* [1969] 1 M.L.J. 183.

[11] Section 4.— (1) In order to comply with the requirements of this Act a policy of insurance must 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.

cover a person in the employment of the insured in respect of a liability which arises out of and in the course of his employment.[12]

If passengers are carried in the vehicle there is no requirement that the policy should cover them except in two cases.[13] The first of these cases is where the passengers are carried for hire or reward,[14] and the second is where passengers are carried by reason of or in pursuance of a contract of employment.[15]

An insurer who issues a policy in respect of a risk which is required to be compulsorily insured is under a statutory obligation to satisfy any judgement obtained in respect of any such liability subject to a limited number of exceptions which allow the insurer to repudiate liability.[16]

The most important of these exceptions is the provision[17] which allows the insurers to repudiate liability on the ground that the policy had been obtained by the non-disclosure of a material fact or by a representation of fact which was false in some material particular. Should the insurers choose to avoid the policy on this ground it must bring an action to obtain a declaration avoiding the policy. This must be done before or within three months of the proceedings brought by the third-party.[18] A notice specificing the non-disclosure or false representation which the insurers proposes to rely on must be given to the third-party within seven days of the action for such a declaration.[19]

[12] Proviso to section 4(1) (b) Provided that such a policy shall not be required to cover —

(i) liability in respect of the death arising out of and in the course of his employment of a person in the employment of a person insured by the policy or of bodily injury sustained by such a person arising out of and in the course of his employment;

[13] Proviso to Section 4(1)(b)(ii) except in the case of a motor vehicle in which passengers are carried for hire or reward or 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 or alighting from the motor vehicle at the time of the occurrence of the event out of which the claims arise;

Barnet Group Hospital Management Commttee v. *Eagle Star Insurance* [1960] 1 Q.B. 107; *New Zealand Insurance Co.* v. *Sinnadorai* [1969] 1 M.L.J. 183.

[14] *Albert* v. *M.I.B.* [1971] 2 All E.R. 1345; *M.I.B.* v. *Meanen* [1971] 2 All E.R. 1372.

[15] *Izzard* v. *Universal Insurance Co.* [1937] A.C. 773; *Vandyke* v. *Fender* [1970] 2 Q.B. 292; *Chan Kum Fook & Ors.* v. *Welfare Insurance Co.* [1975] 2 M.L.J. 184; *China Insurance Co. Ltd.* v. *Teh Lain Lee & Anor.* [1977] 1 M.L.J. 1.

[16] Section 8(1). See also *New Zealand Insurance Co.* v. *Sinnadorai* [1969] 1 M.L.J. 183.

[17] Section 8. — (4) No sum shall be payable by an insurer under the foregoing provisions of this section if in an action commenced before or within three months after the commencement of the proceedings in which the judgment was given he has obtained a declaration that apart from any provision contained in the policy he is entitled to avoid it on the ground that it was obtained by the non-disclosure of a material fact or by a representation of fact which was false in some material particular or, if he has avoided the policy on that ground, that he was entitled so to do apart from any provision contained in it.

[18] Section 8(4).

[19] Proviso to section 8(4) Provided that an insurer who has obtained such a declaration as aforesaid in an action shall not thereby become entitled to the benefit of this subsection as respects any judgment obtained in proceedings

The second situation where the insurer may escape liability is when the policy has been cancelled before the happening of the event.[20] In order to come within the protection of section 8(1) the third-party must give notice to insurers of the proceedings against the policy-holder within seven days of the commencement of such proceedings.[21]

A third-party who has obtained a judgement within the meaning of the Act is placed in a far superior position than the policyholder in respect of his rights to claim an indemnity from the insurers. Not only can the third-party sue the insurers directly[22] to enforce the indemnity but certain conditions in the policy which would be binding on the policyholder cannot be pleaded against the third-party.[23]

A condition which provides that no liability shall arise under the policy or any liability so arising shall cease in the event of some specified thing being done or omitted to be done after the happening of the event giving rise to the claim,[24] although binding on the policy-holder will not affect a third-party.

This particular provision[25] was considered in *Revell* v. *London General Insurance*.[26] The plaintiff in this case was the owner of a motor van which was insured with the defendant. While being driven by a servant of the plaintiff, the van was involved in two separate accidents injuring a policeman on each occasion. In actions brought by the two policemen, damages were awarded against the plaintiff who was unable to pay. The plaintiff then sued the insurance company claiming an indemnity for her liability to the injured third-parties. The insurers denied liability on two main grounds: Firstly, they alleged that the plaintiff had made a misrepresentation in the proposal form. On the facts the court found that this ground had not been made out. The second defence raised was that the plaintiff had breached a condition in the policy thus absolving the insurers from their liability. The condition in the policy relied upon by the

commenced before the commencement of that action unless before or within seven days after the commencement of that action he has given notice thereof to the person who is the plaintiff in the said proceedings specifying the non-disclosure or false representation on which he proposes to rely and any person to whom notice of such an action is so given shall be entitled if he thinks fit to be made a party thereto.

20 Section 8. — (3) No sum shall be payable by an insurer under the foregoing provisions of this section —

(c) in connection with any liability if before the happening of the event which was the cause of the death or bodily injury giving rise to the liability the policy was cancelled by mutual consent or by virtue of any provision contained therein —

21 Section 8(3) (a).

22 *lizard* v. *Universal Insurance Co.* [1937] A.C. 773.

23 *Revell* v. *London General Insurance Co.* [1934] All **E.R.** 744.

24 Section 6. Any condition in a policy or security issued or given for the purposes of this Act providing that no liability shall arise under the policy or security or that any liability so arising shall cease in the event of some specified thing being done or omitted to be done after the happening of the event giving rise to a claim under the policy or security shall be of no effect in connection with such claims as are mentioned in paragraph *(b)* of subsection (1) of section 4 of this Act.

25 Section 6 of our Act is in *part materia* with section 38 of the English Road Traffic Act 1930.

26 [1934] All E.R. Rep. 745.

insurers provided that if a claim were made and rejected by the insurers and "an action or suit be not commenced within three months after such rejection, all benefit under this policy shall be forfeited, and the company will not be in any way liable thereunder."

It was not disputed that the plaintiff's claim was rejected by the company and the present action was not brought until twelve months later.

His Lordship Mackinnon J. held against the insurers on the following ground:

> The result is that, although the facts as specified in No. 6 of these conditions have occurred, namely, the writ was not issued till more than three months after the claim was rejected by the company, that clause in the policy is rendered invalid by virtue of s. 38 of the Road Traffic Act 1930, and therefore, the second defence also fails.

It is submitted that in so far as the case decides that with respect to a claim by a third-party such a condition would not apply to him, the decision[27] is clearly consistent with the wording of section 38. However to suggest that the condition is invalid for all purpose and that the insurer cannot rely on such a condition as against the policyholder does not seem to be consistent with the proviso[28] to section 38.

Perhaps this decision ought to be confined to its own facts, namely, that it was a claim for and on behalf of third-parties in view of the approach taken by Mackinnon J. in dealing with this claim. His Lordship said: "The action is no doubt brought in the interest of victims of the insured's car in order that they may get the damages which they are entitled to against her, but which they cannot get from her."

The above provision was also considered in the Malaysian case of *Lee Chau* v. *Public Insurance Co. Ltd*.[29] In this case the plaintiff had issued a motor policy to the defendant. A third-party claim for $5,500 against the defendant was settled by the insurers without any judgment being obtained against the insured. The insurers claim be reimbursed for the sum paid from the policyholder on the grouna that he had breached a condition in the policy in failing to give notice of the accident to the insurers within a reasonable time. They relied on a clause in the policy which provided. "… [T]he insured shall repay to the company all sums paid by the company which the company would not have been liable to pay but for the Legislation." His Lordship, Ong Hock Thye C.J., delivering the judgment of the Federal Court and referring to the proviso[30] in section 78 of the Road Traffic Ordinance, 1958 said:

> . . . [T]he contractual right to reimbursement itself is based on section

[27] See also *Jester-Barnes* v. *Licenses & General Insurance Co. Ltd.* [1934] 49 Ltd. L.R. 231.

[28] "Provided that nothing in this subsection shall be taken to render void any provision in a policy or security requiring the person insured or secured to pay to the insurer or the giver of the security any sums the latter may have become liable to pay under the policy or security and which have been applied to the satisfaction of the claims of third parties."

[29] [1969] 2 M.LJ. 167. See also *Chong Kok Hwa* v. *Taisho Marine & Fire Insurance Co. Ltd.* [1977] 1 M.L.J. 244.

[30] Section 78 is in *part materia* with $. 6 of our Act.

> 80 and this section[31] imposing a statutory liability on the respondents as insurers, must be construed strictly. Insurers are liable to satisfy a third-party claim only if there is a judgment but not otherwise.... Payment by simple agreement between the third party and the insurers is not payment "in respect of any judgment" and that is all there is to it.

If in the above case the insurers had paid upon a judgment obtained against the insured instead of a settlement they would have been entitled to rely on the breach of condition to claim a reimbursement from the insured.

It has also been held in *Gan Chwee Leong* v. *New India Assurance Co*.[32] that in the absence of an express undertaking in the contract providing for reimbursement the insurers cannot take advantage of the proviso. Similarly certain conditions relating to the state of the vehicle which purport to restrict the coverage of the policy will not affect third-parties.[33] They would however be effective as against the insured.[34] In *New India Assurance Co. Ltd.* v. *Yeo Beng Chow*[35] the insurers after discharging their liability towards a third-party brought an action to recover the amount from the policyholder. They did so on the ground that the policyholder had breached a condition in the policy, namely to take all resonable steps to safeguard the motor vehicle from loss and to maintain the motor vehicle in efficient condition. The Privy Council hearing the appeal from the Federal Court of Malaysia allowed the appeal by the insurers. His Lordship, Viscount Dilhorne in delivering the judgment of the Board said:

> Insurance companies can insert such conditions as they choose and if the conditions inserted are accepted by the insured, they are binding upon him. There is no obligation on an insurance company to relate the conditions to particular aspects of the policy.

31 Section 80 is in *pari maleria* with $. 8 of our Act.

32 [1968] 1 M.L.J. 196.

33 Section 7. Where a certificate of insurance has been issued under sub section (4) of section 4 of this Act to the person by whom a policy has been effected so much of the policy as purports to restrict the insurance of the persons insured thereby by reference to any of the following matters:-

(a) the age or physical or mental condition of persons driving the vehicle; or
(b) the condition of the vehicle; or
(c) the number of persons that the vehicle carries; or
(d) the weight or physical characteristics of the goods that the vehicle carries; or
(e) the times at which or the areas within which the vehicle is used; or
(f) the horse-power or value of the vehicle; or
(g) the carrying on the vehicle of any particular apparatus; or
(h) the carrying on the vehicle of any particular means of identification other than any means of identification required to be carried by or under Part 1 of the Road Traffic Act,

shall as respects such liabilities as are required to be covered by a policy under paragraph *(b)* of subsection (1) of section 4 of this Act be of no effect.

34 Proviso to section 7 "Provided that nothing in this section shall require an insurer to pay any sum in respect of the liability of any person otherwise than in or towards the discharge of that liability and any sum paid by an insurer in or towards the discharge of any liability of any person which is covered by the policy by virtue only of this section shall be recoverable by the insurer from that person."

35 [1972] 1 M.L.J. 156. See also *Conn* v. *Westminster Motor Insurance Association* [1966] 1 Lloyd's Rep. 407.

The Insurer And The Authorised Driver

It is usual in motor policies for insurers to include a clause which purports to extend the indemnity under the policy to any person driving the car with the permission or consent of the policy-holder.

A typical clause[36] would read as follows:

> In terms of and subject to the limitations of and for the purposes of this section the company will indemnify any authorised Driver who is driving the Motor Vehicle provided that such Authorised Driver
>
> i) shall as though he were the Insured observe fulfil and be subject to the Terms of this Policy insofar as they can apply.

Such clauses have had a long history and have been the subject of much litigation.

One of the most basic question which have arisen in relation to this clause is as to whether an authorised driver who has incurred a liability towards a third-party can sue the insurers directly to enforce the indemnity given under the policy.

One fundamental objection to any such action would be that the authorised driver being a stranger to the contract cannot sue upon it. This point which was discussed earlier in relation to third-party actions against the insurers would apply with equal force to the case of an authorised driver.

The discussion here will not include the case where the policy-holder seeks to enforce the indemnity for the benefit of the authorised driver. In such a case no question of privity of contract will arise.[37]

When the question was first raised before the courts[38] it was readily accepted that the authorised driver cannot sue the insurers on the policy being not a party to the contract.

The privity of contract principle has been the subject of a recent Privy Council decision in *The Eurymedon*[39] The issue before the court in this case was whether a firm of stevedores can take advantage of an exemption clause in a bill of lading entered into between the shipper and the shipowner. The court held that a separate contract between the shipper and stevedores had been brought into being and the exemption clause form part of the terms of this new contract. In arriving at this conclusion the court purported to work within the traditional framework. They traced an offer originating from the shipper and accepted by the shipowners as agents on behalf of the stevedores. The consideration for the contract being provided by the work undertaken by the stevedores.

It is submitted that even in the light of the above innovation by the court, the position with regard to the authorised driver would still remain the same. This is so because the element of consideration would be absent even if any such agreement could be imputed. All

[36] See *China Insurance Co. Ltd.* v. *Teh Lain Lee & Anor.* [1977] 1 M.L.J. 1 at p. 2.
[37] *Williams* v. *Baltic Insurance Assurance of London Ltd.* [1924] *2* K.B. 292.
[38] *Vandepitte* v. *Preferred Accident Insurance Corporation of New York* [1933] A.C. 70.
[39] [1974] 1 Lloyd's Rep. 534.

this has changed since the Motor Vehicles (Third-Party Risks and Compensation) Act came into force. This has been brought about by section 4(3) of the Act.[40] This provision was considered in *Tattersall v. Drysdale*[41] where the court held that the section had effected a change in the law. In this case an authorised driver was found negligent in an action brought against him by a third-party. The driver then sued the insurers directly for an indemnity under the policy. The court held that although there was no privity of contract between the authorised driver and the insurer it was clear that section 36(4) of the Road Traffic Act 1930 intended a change in the law to give the authorised driver under such a policy a direct cause of action against the insurers. Similarly, it has also been held in *China Insurance Co. Ltd.* v. *Teh Lain Lee & Anor.*[42] that the liability of the insurers to indemnify the authorised driver is separate and distinct from their liability to indemnify the policyholder.

Indeed, the courts have construed such an extension clause in the policy fairly widely. In *Digby* v. *General Accident Fire & Life Assurance Corporation*[43] the House of Lords held that such a clause was wide enough to cover the liability of the driver to the policyholder who was travelling in his own car as a passenger.

Unlike an injured third-party the authorised driver takes the benefits of the policy subject to all conditions in the policy in the same way as the policyholder. This issue arose in *Austin* v. *Zurich General Accident & Liability Insurance Company.*[44] The authorised driver in this case was found liable to third-parties arising from an accident. The authorised driver had a policy of his own and his liability was settled by his own insurers. An action was then brought by the driver for the benefit of his own insurers against the insurers of the car which he drove. The insurers alleged that there had been a breach of condition, namely that the driver had failed to notify the insurers of a summons which he had received for dangerous driving in connection with the accident. The Court held that the authorised driver was bound by this particular condition in the policy and the insurers were entitled to rely on a breach of the condition.

Insolvency Of The Policyholder

The rights of the insurers will also be affected if the policyholder becomes bankrupt. If the policyholder becomes bankrupt or insolvent either before or after incurring a third-party liability within the meaning of the Act his rights in respect of that liability passes to the third-party.[45]

[40] Section 4.— (3) Notwithstanding anything in any Act a person issuing a policy of insurance under this section shall be liable to indemnify the persons or classes of persons specified in the policy in respect of any liability which the policy purports to cover in the case of those persons or classes of persons.

[41] [1935] 2 K.B. 174. Section 4(3) is in *pari materia* with section 36(4) of the English Road Traffic Act 1930.

[42] [1977] 1 M.L.J. 1.

[43] [1943] A.C. 121.

[44] [1945] 1 K.B. 250.

[45] Section 9. — (1) Where under any policy issued for the purposes of this Act a person (hereinafter called "the insured") is insured against liabilities to third parties which he may incur then —

(a) in the event of the insured becoming bankrupt or making a composition or arrangement with his creditors; or

This provision was rendered necessary before the introduction of compulsory motor insurance because an injured third-party did not acquire any direct rights against the insurers.[46] So in the event of the bankruptcy of the policyholder the indemnity under the policy would be paid to the trustees in bankrutpcy and thus go into the common fund and become available to all other creditors of the policyholder. This of course is of no consolation to the third-party.

It has been held that the right given by this section to the third-party to sue the insurers under the policy only arises after liability against the policyholder has been established.[47] Further, the insurers are entitled to rely on breaches of conditions in the policy occurring after the event giving rise to the liability.[48] It has however been held that a condition preserving the insurers' right to claim unpaid premiums under the policy does not pass with the policy.[49]

It would appear on the whole that the protection given under section 9 is considerably less favourable than that provided under section 8. Moreover a case which would fall under section 9 of the Act would also be within section 8. All in all section 9 is otiose. One may well wonder whether section 9 had been allowed into the Act by an inadvertent slip.

Although section 9 is redundant in the context of compulsory motor insurance the section would have been useful in other areas of third-party liability insurance which has not been made compulsory. The English provision from which section 9 was adapted is much wider and covers all classes of third-party risks policies and is not restricted to motor policies alone.[50]

Conclusion

It is quite clear from the above survey that many inroads have been made into existing legal rules in order to achieve the primary object of ensuring compensation for the bodily injury or death of third-parties arising from the use of vehicles on the road. Although the scheme is by no means perfect it serves as a useful model should compulsory insurance become necessary in other areas of third-party liability insurance.

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(b) in the case of the insured being a company in the event of a winding-up order being made or a resolution for a voluntary winding up being passed with respect to the company or of a receiver or manager of the company's business or undertaking being duly appointed or of possession being taken by or on behalf of the holders of any debentures secured by a floating charge of any property comprised in or subject to the charge,

if either before or after that event any such liability as aforesaid is incurred by the insured his rights against the insurer under the policy in respect of the liability shall notwithstanding anything in any written law to the contrary be transferred to and vest in the third party to whom the liability was so incurred.

46 *In re Harrington Motor Company* [1928] 1 Ch. 105.

47 *Post Office* v. *Norwich Union Fire Insurance Society* [1967] 2 Q.B. 363.

48 *Freshwater* v. *Western Australian Assurance Co.* [1933] 1 K.B. 515; *King Lee Tee* v. *Norwich Union Fire Insurance Society Ltd.* [1933] M.L.J. 187; *Farrell* v. *Federated Employers Insurance Ltd.* [1970] 1 W.L.R. 1400.

49 *Murray* v. *Legal & General Assurance Society* [1969] 3 All E.R. 794.

50 See the English Third Parties (Rights Against Insurers) Act 1930.

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