Privy Council Appeal No. 19 of 1974

(1) **Tan Keng Hong**

(2) **Yoong Leok Kee Corporation Ltd.** – – – – *Appellants*

v.

New India Assurance Company Ltd. – – – – *Respondent*

FROM

THE FEDERAL COURT OF MALAYSIA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 19TH DECEMBER 1977

Present at the Hearing:

LORD SALMON
LORD EDMUND-DAVIES
LORD RUSSELL OF KILLOWEN
LORD SCARMAN
SIR HARRY GIBBS

[*Delivered by* LORD SALMON]

On the 1st June 1963 a forester in the employment of the Forestry Department was being given a lift in a lorry owned by the second appellants and driven by the first appellant when the lorry overturned and the forester was killed. The administrators of his estate sued both appellants against whom they obtained judgment for $21,600 damages and costs on the grounds that the accident and death had been caused by their negligence. The appellants' appeal from that judgment both on liability and quantum was dismissed. The appellants however had brought in their insurers as third parties, claiming an indemnity from them in respect of the damages and costs awarded to the deceased's estate. This claim was dismissed by the learned trial judge and so was the appeal from his judgment. The appellants now appeal to this Board against the dismissal of their appeal by the Federal Court.

The facts lie within a short compass. The second appellants have a timber concession in the jungle at Bukit Tinggi and a saw mill about 32 miles away in Seremban. On the day of the accident, the second appellants' lorry had been fully loaded with logs at Bukit Tinggi and had been driven to the Government forest checking station in Kuala Pilah about 10 or 12 miles away. Here the logs were checked by the Forestry Department. This check satisfied the Department that the royalties due in respect of the logs had been paid. After leaving Kuala Pilah the lorry was on the road to the second appellants' saw mill at Seremban when it was stopped by the deceased forester who asked for a lift into Seremban. The driver told him to get into the lorry and continued his journey towards Seremban. It was in the course of this journey that the fatal accident occurred.

Prior to the accident, it was not unusual for timber lorries to give lifts to foresters, both to the logging areas and to Seremban. The deceased was one of the foresters whose duty it was to inspect lorry loads of logs at checking stations or on their way to saw mills in order to ensure that the royalties due on the logs had been paid. It will be remembered that the second appellants' lorry load of logs had been duly examined and passed at a checking station shortly before the deceased forester was given a lift. There was no evidence that the deceased forester was on duty at the material time, nor that he was going to Seremban other than for private purposes. The learned trial judge's finding was that he was merely getting a free lift into town; and there was certainly no evidence to the contrary. The learned trial judge also accepted the driver's evidence to the effect that he agreed to give the forester a free lift because he feared that if he refused to do so it might annoy the forester and cause him to create difficulties for the second appellants in the future.

It is now necessary to consider the relevant provisions of the policy of insurance. Section II of that policy provides that:

> " The Company [the insurers] will subject to the Limits of Liability indemnify the Insured [the second appellants and their servant the first appellant] in the event of accident caused by or arising out of the use of the Motor Vehicle . . . against all sums including claimant's costs and expenses which the Insured shall become legally liable to pay in respect of (*a*) death of or bodily injury to any person . . ."

The relevant " Exceptions to Section II " read as follows:

> " The Company shall not be liable in respect of . . .
>
> (ii) death of or bodily injury to any person in the employment of the Insured arising out of and in the course of such employment
>
> (iii) death of or bodily injury to any person (other than a passenger carried by reason of or in pursuance of a contract of employment) being carried in or upon . . . the Motor Vehicle at the time of the occurrence of the event out of which any claim arises."

The result of this appeal must depend upon whether the deceased forester, when he met his death, was " a passenger carried by reason of or in pursuance of a contract of employment." There is nothing to suggest, nor has it been argued, that the forester's contract of employment made any provision, express or implied, for him to obtain lifts in timber lorries for his own convenience. Counsel for the appellants conceded that at the material time he was not being carried *in pursuance of his contract of employment*. He contended however that the deceased was being carried " *by reason of his contract of employment* " because, but for that contract, the first appellant would not have given him a lift. He did so only because he feared that, if he refused, the forester would be displeased with him and his employers and might in the future be ill disposed towards them when inspecting their logs. If that ingenious and novel argument is sound, it would open up a very wide and hitherto unsuspected escape route from the clause in insurance policies designed to exclude from the risks insured, the risk of the death of or injury to passengers in the assured's motor vehicle. Any assured would be able to say every time, *e.g.*, when he gave a lift to the buyer or an executive of a customer with

whom he did or hoped to do business, that his passenger was being carried " by reason of his contract of employment " within the meaning of those words as used in the policy of insurance.

Their Lordships are unable to accept a construction of the insurance policy which leads to such results and which, not only lacks any authority, but is as irreconcilable with existing authorities as it is with commonsense.

In their Lordships' view the words " by reason of his contract of service " must be read in conjunction with the words " in pursuance of," and, properly construed, mean because the contract of employment expressly or impliedly requires the employee or gives him the right to travel as a passenger in the motor vehicle concerned. It does not mean that the passenger was being carried because the driver of the vehicle thought that by reason of the passenger's employment he might gain some business advantage by doing the passenger the favour of giving him a lift.

The leading case on this subject is *Izzard v. Universal Insurance Co.* [1937] A.C. 733. Lord Wright, with whose speech Lords Atkin, Thankerton, Russell of Killowen and Roche concurred, said at page 782:

> " I think the Act [the language of which is the same as that of the policy] 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 the adequate criterion of such reasons."

Lord Wright was, in their Lordships' view, using the word " practical " as being synonymous with " business " reasons. In the present case, on the facts as found, the deceased forester was certainly not on the lorry for business reasons but for personal reasons, *i.e.* his own personal convenience. Nor, as already indicated, is there anything to suggest that his contract of employment, so far as he or his employers were concerned, could have any connection with his presence on the lorry.

Lord Wright went on to point out that the words " contract of employment " could, perhaps in exceptional cases, apply to a contract of employment between the passenger and the insured owner of the vehicle but they would certainly apply to a contract of employment between the passenger and the person whose goods were being carried on an insured carrier's vehicle, if *e.g.* the employer has ordered his employee to accompany the goods in order to look after them in transit and see to their unloading upon delivery. In such circumstances, the passenger would clearly be on the vehicle " by reason of or in pursuance of his contract of employment." In *Izzard's* case, the plaintiff was killed whilst being driven home from work in a lorry whose owner was not his master. The lorry owner was covered by a policy virtually identical with the policy in the present case. It was a term of Izzard's employment that the lorry in which he was killed should be at his disposal when returning from work at weekends. The House of Lords unanimously held that he was a passenger being carried by reason of or in pursuance of his contract of employment, and that the assured being bankrupt the insurers were liable to pay the deceased's widow £850 damages for which she had obtained judgment against the assured.

In *McSteen v. McCarthy* [1952] N.I. 33 the plaintiff was injured whilst travelling in his employer's lorry on his way home after his work was done. The employer was insured under a policy which, as in *Izzard's* case, was identical with the one in the present case The reason why an employer is rarely able to claim under his policy of insurance in respect of

injury sustained by anyone in his employ whilst being carried on one of his vehicles, is because the accident causing such an injury would usually arise out of and in the course of the passenger's employment; and the insurers would accordingly be protected by Exception (ii). In *McSteen's* case, however, the plaintiff employee was injured whilst being driven home; and accordingly could not have been held to have been injured in the course of his employment; see *St. Helen's Colliery Co. Ltd. v. Hewitson* [1924] A.C. 59. Lord MacDermott C.J. found that:

> " though the plaintiff was not obliged to travel back on his employer's lorry he was entitled to do so if he wished. As one would expect there was no formal agreement entered into about this, but the plaintiff, as the defendant must have known, lived in Belfast and . . . it was understood between them when the plaintiff agreed to do this work . . . that he would be allowed to travel back in the defendant's lorry when the job was finished . . . I am . . . of opinion that the plaintiff's right to travel back on the lorry cannot be dissociated from his employment and that he was ' a passenger carried by reason of or in pursuance of a contract of employment ' within the meaning of Exception [(iii)] ".

These two authorities and all the others to which reference was made in argument make it plain that whether a passenger is carried by reason of or in pursuance of a contract of employment within the meaning of Exception (iii), depends solely upon the terms of the passenger's employment. In the present case, there is no term of the forester's contract of employment, express or implied, which required or entitled him to travel on the second appellants' lorry. It is true that there was no prohibition in his contract of employment against asking for and accepting a lift in a timber lorry or, for that matter, in any other vehicle. The absence of such a prohibition cannot be seriously regarded as any evidence that he was being carried in the lorry by reason of his contract of employment within the meaning of those words in Exception (iii). Still less, in their Lordships' view, can the fact that the lorry driver gave him a lift because he thought that, by reason of the forester's employment, it might be good for business to do so.

Their Lordships will advise His Majesty the Yang di-Pertuan Agong that the appeal should be dismissed with costs.

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In the Privy Council

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1. TAN KENG HONG

2. YOONG LEOK KEE

CORPORATION LTD.

v.

NEW INDIA ASSURANCE COMPANY LTD.

DELIVERED BY
LORD SALMON

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