

Hui Ting Hang

Appellant

v.

Grand Union Motor Insurance
Company Limited

Respondent

FROM

THE COURT OF APPEAL OF HONG KONG

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE
OF THE PRIVY COUNCIL, DELIVERED THE
12TH JUNE 1989

Present at the hearing:-

THE LORD CHANCELLOR
LORD MACKAY OF CLASHFERN
LORD BRIDGE OF HARWICH
LORD BRANDON OF OAKBROOK
LORD ACKNER
LORD OLIVER OF AYLERTON

[Delivered by Lord Ackner]

The material facts. This appeal arises out of a tragic road accident which occurred on 20th February 1982. On that day the appellant, who was an employee of Mr. Law Chung Wing, was driving five fellow employees of Mr. Law to a work site at Gin Drinker's Bay in a van owned by Mr. Law. The vehicle was involved in an accident on Kwai Chung Road with the result that all the passengers were injured, two of them subsequently dying from their injuries. At the time of the accident, the respondent was the insurer of the vehicle and was contractually obliged vis à vis Mr. Law, subject to the terms of the policy, *inter alia*, to indemnify any "authorised driver" against all sums including costs and expenses which such authorised driver became legally liable to pay in respect of the death of or bodily injury to any person, where such death or injury arose out of an accident caused by or in connection with the vehicle.

In due course the appellant was charged with, and pleaded guilty in the Magistrate's Court to, dangerous driving. However both he and Mr. Law failed to notify the respondent, either of the accident, or the charge, as was required by the terms of the policy of insurance.

There then followed a number of actions by the

surviving passengers and the personal representatives of the deceased passengers for damages for negligence against the appellant and Mr. Law. By April 1985 final judgment had been obtained in each action, the total liability of the appellant, inclusive of costs, amounting to HK\$2,224,092.90 plus interest. These judgments have, however, remained unsatisfied.

By writ and statement of claim dated 26th May 1987, the appellant started the present action, claiming an indemnity against the respondent. The claim was brought on the basis that the appellant was driving the vehicle with the knowledge and consent of Mr. Law and was therefore an "authorised driver" within the meaning of the policy. There being no privity of contract between the appellant and the respondent, the appellant was, no doubt, relying on section 6(2) of the Ordinance set out hereafter. In its defence the respondent denied liability, contending that the appellant and/or Mr. Law were in breach of the conditions precedent contained in clauses 5 and/or 6 of the conditions of the policy as a result of their failure to notify the respondent as stated above.

Clauses 5 and 6 were in the following terms:-

"5. In the event of any occurrence which may give rise to a claim under this Policy the Insured shall as soon as possible give notice thereof to the Company with full particulars Every letter claim writ summons and process shall be notified or forwarded to the Company immediately on receipt Notice shall also be given to the Company immediately the Insured or any person claiming to be indemnified shall have knowledge of any impending prosecution inquest or fatal inquiry in connection with any such occurrence In case of theft or other criminal act which may give rise to a claim under this Policy the Insured shall give immediate notice to the police and co-operate with the Company in securing the conviction of the offender.

6. No admission offer promise or payment shall be made by or on behalf of the Insured or any person claiming to be indemnified without the written consent of the Company which shall be entitled if it so desires to take over the conduct in the name of the Insured or such person the defence or settlement of any claim or to prosecute in the name of the Insured or such person for its own benefit any claim for indemnity or damages or otherwise and shall have full discretion in the conduct of any proceedings and in the settlement of any claim and the Insured and such person shall give all such information and assistance as the Company may require."

The appellant applied for summary judgment under Order 14, which application was heard by Nazareth J. on 3rd December 1987. He dismissed the application and his decision was upheld on appeal by the Court of Appeal of Hong Kong (Fuad, V.-P., Hunter and Penlington, JJ.A.) on 3rd May 1988.

Before dealing in some detail with the policy of insurance and the Motor Vehicles Insurance (Third Party Risks) Ordinance (Cap. 272) ("the Ordinance"), it is convenient to summarise certain important matters which are common ground:-

- (i) A policy issued by the respondent was in force at the time of the accident.
- (ii) The appellant was an "authorised driver" within the policy.
- (iii) The policy was issued for the purposes of the Ordinance.
- (iv) There are judgment debts outstanding against the appellant and his employer.
- (v) The liability upon which such judgment debts are based arose out of and in the course of the employment of the various passengers by the appellant's employer.
- (vi) The appellant and his employer were in breach of conditions of the policy which were conditions precedent to the respondent's liability to indemnify the appellant arising thereunder.

The material terms of the policy:-

"SECTION II - LIABILITY TO THIRD PARTIES

2. The company will subject to the Limits of Liability and the Jurisdiction Clause indemnify any Authorised Driver or at the request of the Insured any person (other than the person driving) in or getting into or out of the Motor Vehicle against all sums including claimant's costs and expenses which such Authorised Driver or person shall become legally liable to pay in respect of

- (a) death of or bodily injury to any person
- (b) damage to property

where such death or injury or damage arises out of an accident caused by or in connection with the Motor Vehicle or the loading or unloading of the Motor Vehicle.

EXCEPTIONS TO SECTION II

The Company shall not be liable

- (a) under sub-sections 2 or 3 to indemnify any person
 - (i) unless such person shall observe fulfil and be subject to the Terms of this Policy in so far as they can apply
 - (ii) if such person is entitled to indemnity under any other policy
- (b) in respect of death or bodily injury to any person arising out of and in the course of such person's employment by the person claiming to be indemnified under this Section
- (c) ...
- (d) ..."

The Ordinance.

Section 9 of the Ordinance provides:-

"Any condition in a policy or security issued or given for the purposes of this Ordinance, 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 connexion with such claims as are mentioned in section 6(1)(b):

Provided that nothing in this section shall be taken to render void any provisions in a policy or security requiring the person insured or secured to repay to the insurer or the giver of the security any sums which 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."

Section 6 of the Ordinance provides:-

"6.(1) In order to comply with the requirements of this Ordinance, a policy of insurance must be a policy which -

- (a) is issued by an authorized insurer; and
- (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 on a road:

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; or
- (ii) [Deleted, 22 of 1976, s.3. Effective from 1 June 1977]
- (iii) any contractual liability.

(2) Notwithstanding anything in any law, 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."

The point of construction. As their Lordships have already observed, the respondent repudiated liability to indemnify the appellant on the ground of breach of conditions precedent referred to in conditions 5 and 6. The appellant, however, while admitting the breach of these conditions, contends that, on the true construction of section 6(1)(b) and section 9 of the Ordinance, the respondent is not entitled to repudiate such liability. This dispute falls to be resolved according to what is the true construction of the concluding words in the first paragraph of section 9 "... such claims as are mentioned in section 6(1)(b)".

In order to answer the question - what are the claims mentioned in section 6(1)(b)? - one turns immediately to that section, but only to find that there is no mention in the section of "claims". What is mentioned in section 6(1)(b) is "liability". Accordingly "such claims as are mentioned in section 6(1)(b)" must be read as meaning such liability as is mentioned in section 6(1)(b). This then gives rise to a choice between any liability which may be incurred in respect of the death of or bodily injury to any person caused by or arising out of the use of the motor vehicle on the road unqualified, or qualified by the proviso. However, since section 9 refers to the whole of section 6(1)(b), there can be no justification for ignoring the proviso, which stipulates for the exclusion from liability of the two specified classes of potential claims. Thus construing the words in section 9 "such claims as are mentioned in section 6(1)(b)" in their natural and ordinary meaning, they mean "such liability as may be incurred in respect of the death of or bodily injury to any person caused by or arising out of the use of the motor vehicle on the road other than liability in the specific classes as provided for in the proviso and in particular

liability in respect of the death or bodily injury arising out of and in the course of his employment of a person in the employment of a person insured by the policy".

This construction is justified, not only by the literal approach as set out above, but also by considering the purpose of the legislation. This was to provide for compulsory third party road traffic cover in respect of the liability circumscribed by section 6(1)(b). To avoid this cover proving in many cases illusory, it was necessary to restrict the insurer's rights to avoid or cancel the policy. Section 9 is directed essentially at post-accident breaches of condition. Section 10 imposes a duty on insurers to satisfy judgments against persons insured in respect of third party risks, notwithstanding that the insurer may be entitled to avoid or cancel, or may have avoided or cancelled the policy. Section 11 provides that the bankruptcy etc. of insured persons is not to affect certain claims by third parties and section 12 is concerned with the avoidance of certain restrictions on the scope of policies covering third party risks.

It is accepted by Mr. Robin Stewart Q.C., who presented the appellant's case with great ability, that in sections 10, 11 and 12 the words of limitation such as (s.10) "in respect of any such liability as is required to be covered by a policy under section 6(1)(b)" do not include liability to insure in respect of the excepted classes stipulated in the proviso to section 6(1)(b). However there is no logical ground of policy for depriving insurers of their contractual entitlement to rely upon post-accident breaches of condition, in respect of liability for the death or bodily injury to any person caused by or arising out of the use of the motor vehicle on a road, not required by the Ordinance to be the subject matter of compulsory road traffic cover, and yet to allow them to avoid liability in respect of such cover in the situations to which sections 10, 11 and 12 are directed. Yet this was in essence Mr. Stewart's submission as to the effect of the legislation. Their Lordships cannot accept that the minor differences in language between section 9 and sections 10, 11 and 12 establish that it was the intention of the legislature, in relation to post-accident breaches of conditions, to render such breaches of no effect, not only in relation to compulsory cover but in relation to cover made optional by virtue of the proviso to that section.

Their Lordships have been invited to consider the statutory origins of the Hong Kong legislation. The Ordinance first came into effect in 1951. Section 6 of the Ordinance was derived from, and follows the language of, section 36 of the Road Traffic Act 1930, the first English statute to impose compulsory third party insurance. Section 9 of the Ordinance is derived from, and follows the language of, section 38. This

latter section gave only limited protection to third parties until four years later when sections 10, 11 and 12 of the Road Traffic Act 1934 imposed further restrictions on insurers. Sections 10, 11 and 12 of the Ordinance are derived from these sections.

Shortly before the Road Traffic Act 1934 came into force, road accidents occurred which were the subject matter of litigation in the case of *Revell v. London General Insurance Company Limited* (1934) 50 Ll.L.Rep. 114. MacKinnon J. in giving judgment said at page 118:-

"I think the reference in the words 'such claims as are mentioned in paragraph (b) of sub-section (1) of section 36' refers to the passage '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 vehicle on a road' It is true that the wording is perhaps not very happy, but I think quite clearly that that is the meaning of the provision in section 38. It applies to what I may call the third-party liability referred to in paragraph (b) of sub-section (1) of section 36."

It may well be that it was this critical observation which caused the draughtsman of the new sections 10, 11 and 12 of the Road Traffic Act 1934 to use in those sections the more precise wording "such liability as is required to be covered by a policy under paragraph (b) of sub-section (1) of section 36 of the Principal Act". However it was not until the Road Traffic Act 1960 that the opportunity was taken in section 206(2) to apply consistently the same formula "such liabilities as are required to be covered by a policy" to all the relevant situations in which the insurers might otherwise have been entitled to avoid liability.

The long title to the Road Traffic Act 1960 reads "An Act to consolidate, with corrections and improvements made under the Consolidation of Enactments (Procedure) Act, 1949, certain enactments relating to road traffic". In their Lordships' view this correction was designed to facilitate improvement in the form or manner in which the law had been stated (see section 2 of the Consolidation of Enactments (Procedure) Act 1949). It made no substantive amendment to the law.

Although the Hong Kong Ordinance was amended from time to time between 1951 and 1983, the opportunity was not taken to adopt the course taken by the 1960 Act and accordingly the original and criticised wording of section 38 "such claims as are mentioned" has stood in section 9 unaltered since 1951.

Without deciding whether or not resort to the statutory origins of the legislation can be used as a legitimate aid to the construction of sections 6 and 9 of

the Ordinance, their Lordships are satisfied that the legislative history tends to add support to their Lordships' view of the true construction of the relevant words in section 9 of the Ordinance, based both on the natural meaning of the words used and upon the purpose of the legislation.

Their Lordships share the strong reluctance expressed by the Court of Appeal in having to reach this conclusion, since the accident occurred prior to 1st January 1984, when employees' compensation insurance became compulsory. However their Lordships have no alternative but humbly to advise Her Majesty that this appeal should be dismissed. The appellant must pay the respondent's costs.

