J A M A I C A

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 7 of 1971

BEFORE: The Hon. Mr. Justice Edun, J.A.
The Hon. Mr. Justice Graham-Perkins, J.A.
The Hon. Mr. Justice Hercules, J.A.

BETWEEN	ENGLISH AND AMERICAN INSURANCE COMPANY LIMITED	DEFENDANT APPELLANT
AND	STANLEY McDERMOTT	PLAINTIFF RESPONDENT
AND	MOTOR AND GENERAL INSURANCE COMPANY LIMITED	DEFENDANT RESPONDENT

R.N.A. Henriques for the appellant.

Peter Rickards for the plaintiff respondent.

C. Rattray, Q.C., and N. Wright for the defendant respondent.

December 3, 17, 1974

GRAHAM-PERKINS, J.A.:

On June 11, 1966 Stanley McDermott was riding his motor cycle on the Constant Spring Road in St. Andrew when he was run into and knocked down by a motor car driven by Yousef Warwar and owned by Winston Feanny. He sustained personal injury, loss and expense as a consequence whereof he instituted proceedings in the High Court against Feanny and Warwar to recover damages for negligence. On April 5, 1968 judgment was entered in his favour against Warwar only in the sum of £1,924 with costs to be taxed. These costs were, on October 12, 1968, taxed in the sum of £206.7.0.

It appears that Warwar did not satisfy the judgment against him and, in the result, McDermott sought, in an action tried by Melville, J., to recover from the appellant, the English and American Insurance Co. Ltd., (hereinafter referred to as "the E.A.Co.") and the defendant respondent, Motor and General Insurance Co. Ltd., (hereinafter referred to as "the M.G.Co.") the amount of that judgment and costs, together with the sum of £161.14.5. by way of interest thereon. He alleged that the E.A.Co. and the M.G.Co. were jointly and/or severally liable to pay him these amounts by virtue of the provisions of s. 16 (1) of the Motor Vehicle Insurance (Third-Party Risks) Law Cap. 257.

The following facts, about which there was no dispute, should now be noticed.

(i) Feanny was the registered owner of motor car No. R4029 involved in the accident with McDermott. The E.A.Co. had issued to Feanny a policy of insurance (hereinafter referred to as "the E.A. policy") by which that company had agreed, subject to certain "limits of liability", to indemnify Feanny

> "in the event of accident caused by or arising out of the use of the Motor Vehicle, against all sums .... which (Feanny) shall become legally liable to pay in respect of
>
> (a) death of or bodily injury to any person ..."

The E.A. policy contained, inter alia, a clause in the following terms:

> "in terms of and subject to the limitations of the indemnity granted by this Section, the Company will indemnify
>
> (a) any Authorised Driver (as defined in the Schedule hereto) who is driving the Motor Vehicle, provided that such Authorised Driver
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> (i) is not entitled to indemnity under any other policy,
>
> (ii) shall, as though he were the Insured, observe, fulfil and be subject to the terms, conditions, provisos, limitations and exceptions of this policy, in so far as they can apply."

An authorised driver was defined in the schedule attached to the policy as "(a) The Insured (Feanny), and (b) any other person driving on the order or with the consent of the Insured ..."

The E.A. policy was expressed to be subject to the following conditions, inter alia:

> "1. This Policy and the Schedule shall be read together as one contract and any word or expression to which a specific meaning has been attached in any part of this Policy or of the Schedule shall bear such specific meaning wherever it may appear.
>
> 5. No admission, offer, promise, payment or indemnity shall be made or given by or on behalf of (Feanny) without the written

> consent of the Company, which shall be entitled, if it so desire, to take over and conduct in the name of (Feanny) the defence or settlement of any claim ... and shall have full discretion in the conduct of any proceeding-ings or in the settlement of any claim ..."

(ii) Warwar was at all material times the "authorised driver" of motor car No. R 4029.

(iii) By a policy of insurance (hereinafter referred to as "the M.G. Policy") issued by the M.G.Co. to Warwar that company agreed to indemnify him "whilst personally driving a private motor car not belonging to him ..."

(iv) On June 11, 1966, the date of the accident, both policies were in force, as also the Certificates of Insurance in relation thereto.

(v) Both the E.A. policy and the M.G. policy contained the following condition:

> "8. If, at the time any claim arises under this Policy, there be any other insurance covering the same loss, damage or liability, the Company shall not be liable to pay or contribute more than its rateable proportion of any loss, damage, compensation, costs or expenses, PROVIDED ALWAYS that nothing in this Condition shall impose on the Company any liability from which, but for this Condition, it would have been relieved under (the proviso in relation to an authorised driver entitled to indemnity under another policy)."

The provisions of s. 16 (1) of the Motor Vehicle Insurance (Third-Party Risks) Law Cap. 257 should also be noticed. That sub-section, in so far as is relevant, provides:

> "If after a certificate of insurance has been issued under ... this Law in favour of 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 ... this Law ... is obtained against any person insured by the policy, then, ... the insurer shall, ... pay to the persons entitled to the benefit of the judgment 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."

In answer to McDermott's claim the E.A.Co. denied any liability on its part to pay him the sum claimed "or any sum at all". This denial of liability rested on the premise that Warwar was, in the circumstances of the case, entitled to be indemnified under the M.G. policy in respect of the judgment obtained against him by McDermott. Similarly, the M.G.Co. denied any entitlement in McDermott to recover from them the amount of the judgment in his favour on the ground that Warwar was entitled to an indemnity under the E.A. policy. It should be noted here that the indemnity enjoyed by Warwar, under the M.G. policy, while driving a private motor car not belonging to him is not limited by a proviso excluding that indemnity in any circumstance.

It was in the foregoing circumstances that the matter came before Melville, J.

On behalf of the M.G.Co. Mr. Rattray advanced the following propositions before the learned trial judge. I hope I do no injustice to those propositions by summarising them in my own words. The E.A. policy in effect contemplated two categories of liability - primary and secondary. In relation to a person suffering bodily injury as the result of an accident arising out of the user of the vehicle described in that policy a primary liability to that person would be incurred by the E.A. company with respect to the <u>owner</u> of that vehicle. It is only if that primary liability, vis-a-vis the owner, failed to attach that the injured party could call in aid the secondary liability in relation to an authorised driver. There was no necessity, in the circumstances of this case, for McDermott to have recourse to any secondary liability arising from the circumstances that Warwar, and not Feanny, was, at the material time, the authorised driver. Once it was established that Warwar was driving Feanny's car a presumption arose that he was driving that car as the servant or agent of Feanny. It followed that so long as that presumption remained unrebutted the vicarious liability of Feanny would attract the primary liability under the policy. A judgment against Warwar, therefore, created a liability in the E.A.Co. to satisfy that judgment.

The foregoing propositions were, in substance, advanced before this Court. I pause here to confess the gravest difficulty in appreciating the alleged distinction between any such primary and secondary liabilities as is suggested by Mr. Rattray. Indeed, during his submissions before us, I enquired as to the origin of, and the reasons for, this theory of reading into a policy like the E.A. policy categories or levels of liability. Mr. Rattray referred us to certain dicta by Rowlatt, J., in <u>Weddell v. Road Transport & General</u> (1932) 2 K.B. 563. I do not read that case as laying down or supporting any such proposition. <u>Weddell's</u> case involved two policies each of which contained a clause excepting the insurer from liability where the claimant was entitled to indemnity under another policy. Rowlatt, J., held that in those circumstances both insurers were liable under their respective policies since those policies covered the same accident because "The reasonable construction is to exclude from the category of co-existing cover any cover which is expressed to be itself cancelled by such co-existence." With the greatest respect I am of the firm view that Melville, J., was in error in thinking, as he clearly appears to have thought, that the decision in Weddell's case was in any sense applicable to the circumstances of this case. There is here no co-existence of cover which purports to cancel the cover extended to Warwar by the M.G. policy.

It seems perfectly clear to me that what the E.A. policy does, in the ordinary use of language, is to impose on the E.A.Co. an obligation to indemnify the insured and any authorised driver in particular circumstances and in respect of particular consequences of an accident caused by, or arising out of the use of, a particular motor vehicle. obligation is indivisible. The fact that it is expressed to be subject to certain limitations in certain circumstances is nothing to the point since those limitations do no more than prescribe the area within which the single obligation to indemnify is to operate.

Mr. Rattray submitted further, however, that if the Court found it necessary to look beyond the primary liability contemplated by the E.A. policy the only possible conclusion to which it could arrive was that liability to satisfy the judgment in favour of McDermott should be rateably proportioned in the terms of Condition 8 (supra) which, as noted earlier, formed part of both the E.A. policy and the M.G. policy. This submission found favour with Melville, J., who, in the end, awarded judgment in favour of McDermott against the M.G. Company and the E.A. Company in the sum of "£1924 plus interest from 5.4.68 to 4.3.71 at 6% per annum and costs taxed at £206.17.0. with costs of this action to be agreed or taxed. Between the defendants contribution should be rateably agreed at 50% each and without prejudice". I am far from clear what the last sentence of Melville, J's judgment means.

The E.A. Company now challenge that judgment in so far as they are required to contribute 50% of the amount awarded. By a respondent's notice that the M.G.Company contends that the judgment should be varied as follows:

> "... that the said judgment be set aside and that judgment be entered for (McDermott) against (the E.A.Company), for the sum of £1294. (sic) with interest thereon ... AND THAT judgment be entered for (the M.G. Company) against (the E.A.Company), with costs to be agreed or taxed."

In my view the propositions advanced by Mr. Rattray are demonstrably misconceived as I now proceed to show. In unmistakably clear language the E.A.Policy provides that the obligation of the E.A. Company to indemnify Feanny or an authorised driver who "is not entitled to indemnity under any other policy" will arise in a precisely defined circumstance. The circumstance in which that obligation arises is defined to be one in which Feanny or such authorised driver has become "legally liable to pay" an ascertained sum to some person in respect of bodily injury suffered in an accident caused by, or arising out of, the use of Feanny's motor vehicle. This result necessarily follows from reading the policy as a whole. It is, in my opinion, clearly wrong to read any one clause of this policy in complete isolation, or as though each clause involved a separate and distinct contract. It is equally clear, and I so hold, that no obligation attaches to the E.A.Company to indemnify Warwar in respect of any sums he became legally liable to pay to McDermott for the very simple, but perfectly valid, reason that Warwar was an authorised driver who, at the material time, was "entitled to indemnity" under another policy, namely, the M.G.policy.

The question may now be asked: Did Feanny ever become legally liable to pay any monies to McDermott? I have not the least hesitation in aswering that question with an emphatic "No". Clearly Feanny could not become "legally liable to pay" until his liability to McDermott was "ascertained and determined to exist, either by the judgment of a court, or by an award in an arbitration or by an agreement." See, for example, Post Office v. Norwich Union Fire Insurance Society Ltd. (1967) 1 All E.R. 577, per Lord Denning, M.R., at p.579. Let the matter be tested this way. Could McDermott, at any time after obtaining judgment against Warwar, and without proceeding to judgment against Feanny, say to Feanny: 'I have a judgment in my favour against Warwar by whose negligence I was injured while he was driving a car of which you are the owner. I know nothing of the circumstances in which Warwar came to be driving your car but there is a presumption operating in my favour that he was driving your car as your servant or agent. I therefore require you, without more, to pay to me the amount of that judgment notwithstanding that I have not proceeded to judgment against you'? I apprehend that Feanny would be entitled to say to McDermott: 'If you do not have a judgment against me I am not interested in your demand'. Indeed, in my opinion, Feanny would be obliged to so advise McDermott by reason of Condition 5 (supra) of the E.A. policy. It would be too startling a proposition to contemplate if it were possible for an injured person knowing, for example, that the car which caused his injury was, at the material time, being driven by a thief, to avoid proceedings against the owner of that car and to recover judgment against the thief and thereafter, while concealing his knowledge that the driver had stolen the car, demand of the owner that he satisfy that judgment on the ground that the thief was presumed to be his servant or agent.

If, as I hold, Feanny never became liable to pay any monies to McDermott it necessarily follows that the E.A.Company could not, at any time, have incurred any obligation to indemnify Feanny.

In the circumstances as I have so far described them it appears to be beyond debate that McDermott is not entitled to call in aid the provisions of s. 16 (1) of the Motor Vehicles Insurance (Third-Party Risks) Law Cap. 257, in respect of either Feanny or Warwar, as far as the E.A.Company is oconcerned. This is so because McDermott is unable to show an essential prerequisite of that subsection, namely, a judgment in his favour "against any person insured by the policy". He can show neither a judgment against Feanny, nor that Warwar was a person insured by the policy. He can, therefore, acquire no rights against the E.A.Company. As against the M.G.Company, however, the position is fundamentally different. Warwar was, at the material time, a person insured by the M.G.Policy and entitled to indemnity thereunder in respect of those sums which he became legally liable to pay to McDermott as a result of the judgment against him. McDermott could, therefore, step into Warwar's shoes in respect of the latter's right against the M.G.Company. This he could do because of the positive sanction contained in s.16(1) of Cap. 257.

In the result I would order that the judgment awarded by Melville, J., be varied to the extent prayed for by the E.A.Company, that is:

> 'that the said judgment be set aside and that judgment be entered for (McDermott) against (the M.G.Company) for £1924, with interest thereon from the 5th April,1968 to the 4th March, 1971 at the rate of 6% per annum with costs taxed at £206.17. and costs of the action to be agreed or taxed. That judgment be entered for the E.A.Company against McDermott with costs to be agreed or taxed."

I would also award to the E.A.Company the costs of this appeal to be agreed or taxed and to be paid by the M.G.Company.

EDUN, J.A.:

In this matter there is a judgment obtained by the plaintiff/respondent against Joseph Warwar. The first-named defendant (that is, the Motor and General Insurance Co. Ltd.) has agreed by its policy of insurance with Joseph Warwar to indemnify him in respect of any liability at law for compensation, costs and expenses which might occur in respect of bodily injury to any third party arising out of his driving a private motor car not belonging to him. By the provisions of section 16 (1) of the Motor Vehicles Insurance (Third Party Risks) Law, Ch. 257, the first-named defendant must pay such judgment, costs and expenses awarded to the plaintiff/respondent against Joseph Warwar.

By the terms of an insurance policy with the second-named defendant (that is, the English and American Insurance Co. Ltd.) and Winston Feanny, the second-named defendant was in the first instance liable to indemnify Winston Feanny in respect of any liability at law for compensation, costs and expenses which might occur in respect of bodily injury to any third party arising out of his driving of the insured vehicle. If, however, Winston Feanny authorised any person to drive the insured vehicle and a third party was injured the second-named defendant would extend its liability only if the authorised driver was not entitled to indemnity under another policy.

In the circumstances of this case, Joseph Warwar was such an authorised driver of the vehicle insured against third party liability by the second-named defendant and Winston Feanny. Under the provisions of the insurance policy the first-named defendant, Joseph Warwar was entitled to an indemnity by the first-named defendant with respect to the judgment, costs and expenses awarded against him.

In my view, the second-named defendant is entitled to say, as it has said, that as Joseph Warwar was entitled to indemnity under another policy it was not liable to pay the whole or any part of the judgment costs and expenses awarded against him. Therefore, the decision of the learned trial judge, in the circumstances of this case, that both defendants must each contribute rateably fifty per cent of the judgment, costs and expenses awarded to the plaintiff/respondent, was unjustified.

I agree that the appeal be allowed, that judgment be entered for the plaintiff/respondent against the first-named defendant, (that is, the Motor and General Ins. Co. Ltd.), and with the orders for costs as proposed

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HERCULES, J.A.:

There is nothing I can usefully add to these two judgments. I agree that the appeal should be allowed in the terms indicated by Graham-Perkins, J.A.

EDUN, J.A.:

The appeal is allowed. The judgment of Melville, J. is set aside. Judgment is hereby entered for the plaintiff/respondent against the defendant/respondent for $3,848.00 with interest thereon from April 5, 1968 to March 4, 1971 at the rate of six percent per annum with costs taxed at $413.70 and costs of the action No. C.L. 401 of 1969 to be taxed or agreed. Judgment is entered for the defendant-appellant against the plaintiff-respondent with costs to be taxed or agreed. Costs of this appeal to be agreed or taxed in favour of the defendant-appellant and to be paid by the defendant-respondent.