Property Damage under section 96(1) of the Road Transport Act 1987— Interpretation [2013] 2 MLJ cxxix

Malayan Law Journal Articles

PROPERTY DAMAGE UNDER SECTION 96(1) OF THE ROAD TRANSPORT ACT 1987— INTERPRETATION

K Siladass

Barrister-at-Law of Malaya

Advocate & Solicitor

In the case of MSIG Insurance (M) Berhad v Gan Dee Chin,[1] the insurers being dissatisfied with the decision of the Segamat Sessions Court appealed to the High Court sitting at Muar. The action in the sessions court against the appellant was, for all intents and purposes, a recovery proceeding under s 96(1) of the Road Transport Act 1987. The High Court was faced with the question as to the effect of s 91(1)(a) read together with s 96(1) of the Road Transport Act 1987 ('RTA 1987'). The courts and the legal profession had no reason to doubt that these benevolent statutory provisions which had been constantly and consistently followed to yield adequate protection to road accident victims would be subjected to critical scrutiny after almost nearing eight decades.

BRIEFLY THE FACTS

The facts in the MSIG case are that, on or about 20 May 2005 at about 11pm, there was a collision along KM 163, Jalan Johor Bahru — Seremban — Labis between a motor car (No JGE 2356) which was driven by the respondent and a motor car (No BCX 6809) which was driven by its owner, Khoo Gi Foong, the insured of the appellant. The Respondent commenced an action in the Segamat Sessions Court *vide* Civil Action No 53–197 of 2005, in which she claimed damages caused to her motor car No JGE 2356 by motor car No BCX 6809 driven by the owner. Since Khoo Gi Foong, the owner of the vehicle did not appear, judgment in default was entered followed by an assessment of damages by the sessions court, which awarded RM119,237.50 as special damages, cost of RM7,598 and interest.

The respondent then commenced recovery action against this appellant, the insurer of vehicle No BCX 6809 in the Sessions Court at Segamat claiming the judgment sum of RM145,167.89 made up of RM119,327.50 being special damages, interest at the rate of 4% pa from 25 May 2005 to 16 December 2005 amounting to RM2,759.24, interest at the rate of 8% pa from 17 December 2005 to 31 July 2007 amounting to RM15,483.15 and costs of RM7,598.

THE MAIN ISSUE

The main issue before Ahmadi J, was whether s 96(1) of the Road Transport Act 1987 covers property damage, and more particularly, damage caused to a third party's vehicle.

In the sessions court, the learned sessions court judge had relied heavily on the decision of

Suriyadi J (as he then was) in the case of *The People's Insurance Co (M) Sdn Bhd v Sykt Kenderaan Melayu Kelantan Bhd*.[2] For ease of reference, the parties in that case will be referred to as 'The People's Insurance' and 'Syarikat Kenderaan' respectively.

In the present case at the sessions court, the appellant did raise the point that s 96(1) of the RTA 1987 was not pleaded, but the learned sessions judge ruled that the pleadings sufficiently disclosed the cause of action. Before the learned sessions court judge, the respondent had raised the issue that the appellant has failed to produce the policy of insurance and as such, it must be held against it by virtue of s 114(g) of the Evidence Act 1950. The court records show that there was no request for the production of the policy of insurance. Besides, this point was only raised at submission stage. The learned sessions judge when delivering the judgment did not touch upon the issue of non-production of the policy of insurance and did not consider invoking s 114(g) of the Evidence Act 1950. At the appellate stage in the High Court, the appellant confined its case on the effect of s 96(1) of the RTA 1987. There was no cross-appeal on the question of non-production of the policy of insurance by the respondent.

The *People's Insurance*'s case, involved a claim for damages by Sykt Kenderaan being the damage caused to its vehicle. No one suffered bodily injury or death. The insurance policy issued to the tortfeasor was a comprehensive policy. The learned sessions court judge in that case had entered judgment against People's Insurance in an action under s 96(1) of the Road Transport Act 1987.

The issue before Suriyadi J (as he then was) in the *People's Insurance*'s case, could be formulated as follows:

> In the absence of injury or death would the insurer be liable to satisfy a judgment obtained against its insured under s 96(1) of the Road Transport Act 1987.

It must be remembered, at this stage, that s 96(1) of the RTA 1987 and its predecessor s 80(1) of the Road Traffic Ordinance 1958 (repealed) both could trace their origin to s 10(1) of the English Road Traffic Act 1934 (repealed), and now found in the English Road Traffic Act 1988 s 145. Section 10(1) of the (repealed) 1934 Act read as follows:

> 10 Duty of Insurers to satisfy judgments against persons insured in respect of third-party risks — (4) if, after a certificate of insurance has been delivered under subsection (5) of section thirty-six of the principal 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 the section thirty-six of the principal 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 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.

The English Legislature enacted this provision creating a right exercisable by those who suffered death or bodily injury in a road accident involving a motor vehicle, who would, otherwise be caught by the doctrine of privity of contract and deprived of any relief under the policy of insurance. It was an era when insurance companies used every legal technicality to defeat those who were victims of road traffic accidents. It could be observed that the English RTA 1934 s 10(1) did not extend protection to property damage.

In 1979, Lord Denning, the Master of the Rolls in the case of *Harker v Caledonian Insurance Co*[3] explained how the law stood in the 1920s on motor insurance matters:

> In the 1920s motor cars on the roads were rapidly becoming a menace to life and limb. The persons injured had no recourse against anyone except the driver or his principal, whom I will call 'the owner'. Sometimes that owner was insured in full or in part against third party risks. Sometimes he was not insured at all. In any case, the injured person had no call upon the insurance company whatsoever or on the moneys which were payable under the policies. The injured person's only recourse was against the negligent owner and he was often worth nothing, or did not have enough money to pay the damages.[4]

Manifold difficulties did surface in consequence of the unsatisfactory state of affairs which then prevailed, thus causing unbearable hardship to road accident victims. Lord Denning described them as 'evils', and added:

> In order to mitigate those evils, Parliament in 1930 passed two conjoint statutes within a few days of one another. The principal one was the Road Traffic Act, 1930. Under the Act it was compulsory for motorists to insure against third party risks *in respect of certain classes of liability*. They were bound to insure in respect of their employees or in respect of passengers in private cars. But for other classes of insurance they were bound to insure. The trouble is that the 1930 statute did not make it clear whether the insurance companies were bound to cover the full liability of the driver: or whether they were at liberty to cover only partial liability, such as the excess over, say, £X: or whether they were able to limit their liability to a specified sum, say, £1000.'[5] (Emphasis added.)

If it was envisaged that the insurance companies would have ceased towards looking at technicalities to avoid their liability under the policy of insurance so issued by them, sadly this was not to be; for they were still actively devising ingenious methods to escape their liability under the policy. They were not concerned with the plight of the injured or the dependants of the deceased. According to Lord Denning, the two 1930 Acts 'proved illusory'.[6]

In an earlier case, *Zurich General Accident & Liability Insurance Co Ltd v Morrison*,[7] Lord Justice Goddard touching on the same provision said:

> Part II of the Road Traffic Act 1934 was passed to remedy a state of affairs that became apparent soon after the principle of compulsory insurance against third party risks had been established by the Road Traffic Act of 1930. That Act and the Third Party (Rights Against Insurers) Act, passed in the same year, would naturally have led the public, at least those who were neither lawyer nor connected with the business of insurance, to believe that if thereafter they were, through no fault of their own, injured or killed by a motor car, they or their dependants would be certain of recovering damages, even though the wrongdoer was an impecunious person. How wrong they were quickly appeared. Insurance was left in the hands of companies and underwriters who could impose what terms and conditions they chose. Nor was there any standard form of policy, and any company, who could fulfil the not very onerous financial requirements that were necessary for acceptance as an approved insurer, could hedge the policies with so many warranties and conditions that no one advising an injured person could say with any certainty whether if damages were recovered against the driver of the car there was a prospect of recovering against the insurers.

The Lord Justice went on to add:

> In the case of motor car insurance it was the third parties who needed the warning, and unfortunately they held a policy that careless drivers were enabled to drive and put other persons in peril. It is not surprising, therefore, that by 1934 Parliament interfered, and by s 10 of the Act of that year they took steps towards remedying a position which to a great extent nullified the protection that compulsory insurance was intended to afford. Generally speaking, s 10 was designed to prevent conditions in policies from defeating the rights of third parties.[8]

Thus, it could be seen that the sole purpose of s 10(1) of the English Road Traffic Act 1934 was to prevent injustice being caused to injured persons and dependants of deceased persons who had been brought to that state of affair due to the negligence of the insurance policy holder, or his servant or agent, and nowhere could it be gleaned that property damage featured in the Act or in the decided cases. If Parliament had intended that property damage should also be included, it would have said so in no uncertain terms, but it did not; and there were valid reasons for not including property because such risks would entail in huge sums being paid out when the coverage and premium did not cater for such eventualities or risks. Insurance companies would be prepared to indemnify if such risks are specifically covered with the payment of additional premium, which coverage is known as comprehensive insurance policy.

DISTINCTION BETWEEN DEATH AND BODILY INJURY AND PROPERTY DAMAGE

The courts in the past have consistently adopted the distinction between a claim for bodily injury and death, and a claim purely representing property damage. This distinction may be an anomaly but it is how the courts had approached consistent with the wordings of s 80(1) of the RTO 1958 and now s 96(1) of the RTA 1987. Therefore, there has not been any uncertainty on how the courts would deal with a case when the facts were identical. The conditions applicable to invoke the statutory liability were neatly elucidated as follows:

> The first condition of the obligation of the insurers is that there is a judgment. The second condition is that the judgment must be in respect of a liability which is required to be covered by compulsory insurance. In other words the only person who can maintain a right of action direct against the insurers is a *person falling with the limited class of third parties* whose bodily injury or death is required to be covered by a motor policy. The third condition is that the liability is in fact covered by the terms of the policy or would be covered by the policy but for the fact that an insurer is entitled to avoid or cancel or has avoided or cancelled the policy … The fourth condition is that the judgment must be against a person insured by the policy. This language covers permitted driver as well as the person by whom the policy has been effected.[9] (Emphasis added.)

In all the cases where s 96(1) or its predecessor s 80(1) of the RTO 1958 had been invoked, it was very clear that the courts were referring to death or bodily injury. Damage to property or damage to motor vehicles in particular was consistently excluded when those provisions were invoked.

In *QBE Insurance Limited v Dr K Thuraisingam*[10] Wong Kim Fatt JC (as he then was) correctly stated that:

> The first condition of the obligation of the insurers is that there is a judgment. The second condition is that the judgment must be in respect of liability which is required to be covered by compulsory insurance. In other words the only person who can maintain a right of action direct against the insurers is a person falling within the limited classes of third parties whose bodily injury or death is required to be covered by a motor policy.

The decision in *QBE Insurance Limited*, was consistent with the law which had been so since 1934. However, Suriyadi J (as he then was) held in the case of *People's Insurance*, that it had become inapplicable. That was a strong stand, no doubt; but, it was a stand on weak grounds, and unsupportable. Authorities would not lend credence to the reasoning of the learned judge to depart from established precedents.

The next thing the learned sessions judge did in the *MSIG*'s case was to approach s 96(1) of the RTA 1987 by calling in aid the interpretative exercise. It is trite law that the aid of interpretation is only sought when there is uncertainty or anomaly in the statutory provisions.

But, when the words are clear, the need to look for interpretative aid seems an exercise in futility. Lord Goddard CJ in *R v Wimbledon Justices, ex p Derwent*[11] said that although, 'in construing an Act of Parliament the court must always try to give effect to the intention of the Act and must look not only at the remedy provided but also at the mischief aimed at, it cannot add words to a statute or read words into it which are not there, and, if the statute has created a specific offence, it is not for the court to find other offences which do not appear in the statute.'

The first question that would face us is whether s 96(1) of the RTA is clear as it is or is it a source of ambiguity necessitating the inquiry of the meaning of the words used in the section, and especially the words confining the recovery of damages representing death or bodily injury. Section 96(1) reads as follows:

> (1) If, after a certificate of insurance has been delivered under subsection (4) of section 91 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 91 (being a liability covered by the terms of the policy) is given against any person insured by the policy, then notwithstanding that the insurer may be entitled to avoid or cancel, or may have avoided of cancelled the policy, the insurer shall, subject to this section, 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 interest on that sum by virtue of any written law relating to interest on judgments.

Section 96(1) should be read together with s 91(1)(b) which reads as follows:

> In order to comply with the requirements of this Part, a policy of insurance must be a policy which —
>
> (a) (a) is issued by a person who is an authorised insurer within the meaning of this Part; and
>
> (b) (b) insurers such person, or class 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 or bodily injury to any person caused by or arising out of the use of the motor vehicle or land implement drawn thereby on a road.

It could be seen that right from the beginning, and we may say it all started before 1934 with the English experience that those who needed statutory protection were those who suffered bodily injury or death. Damage to property which included motor vehicles was left out deliberately. Had it been the intention of Parliament to extend the protection to property damage including damage to motor vehicles, there would not have any discrimination in deliberately restricting the recovery exercise to death and bodily injury. The reason for excluding property damage is understandable, as it would involve a different type of policy of insurance covering such a risk: perhaps a comprehensive insurance with a comprehensive coverage, which was the exact position in the *People's Insurance*'s case.

In the present case (*MSIG Insurance (M) Berhad*),[12] the learned sessions court judge held that the court should adopt a purposive approach in interpreting s 96(1) of the RTA 1987. The first case the learned sessions judge relied upon was *Syed Mubarak bin Syed Ahmad v Majlis Peguam Malaysia*.[13] *Syed Mubarak*'s case, involved the construction of s 30(1)(c) of the Legal Profession Act 1976 which provided that no advocate and solicitor shall apply for a practising certificate if he is gainfully employed by any other person, firm or body in capacity other than as an advocate and solicitor. In that case, Gopal Sri Ram JCA also pointed out s 17A of the Interpretation Acts 1948 and 1967 to impress the point that the aim should be to promote the purpose or object underlying the Act.[14]

Section 17A reads:

> In the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object.

While the decision of the Court of Appeal is consistent with the attitude of Parliament, it has to be borne in mind that this statutory provision ie s 17A of the Interpretation Acts 1948 and 1967, could only be invoked if there emerges some ambiguity in the wordings of the statutory provisions.

In *Syed Mubarak*'s case, s 30(1)(c) of the Legal Profession Act 1976 was very clear and indeed it was unnecessary to look beyond the wording of the section. *Syed Mubarak*'s case, stands on a strong ground as far as s 30(1)(c) of the Legal Profession Act 1976 is concerned. But that case relied upon by the learned sessions court judge could not be said to be a correct approach in deciding a case on s 96(1) of the RTA relating to recovery proceedings. Similarly, the reliance on the case of *Kesultanan Pahang v Sathask Realty Sdn Bhd*[15] was unhelpful.

The case of *Rafiah bte Bakar v East West-UMI Insurance Bhd*[16] relied upon by the learned sessions judge was a personal injury case. Thus, also the case of *Malaysian National Insurance Sdn Bhd v Lim Tiok*[17] to which s 96(1) of the RTA applied.

While the purposive approach, as canvassed and relied upon by the learned sessions court judge could be the most benign approach, it would be patently wrong to give an interpretation that would nullify the effect intended by Parliament, limiting the range of damages recoverable under s96(1) of the RTA 1987. Aside from this, while the courts may look at obvious omissions and give effect to the intention of the Act, the court cannot insert something that is not in the Act on the erroneous assumption that such a course is permissible.

The decision in the *People's Insurance*'s case, seems to have acquired a status of precedent with the binding effect on the subordinate courts. It is submitted that the decision in *People's Insurance Co*, in so far as allowing the claim based on the fact that, *there existed a comprehensive policy of insurance, and which by its very nature is adequately capable of compensating a third party whose vehicles had been damaged, is correct*. But that claim, does not come within the purview of s96(1) read together with s 91(1)(b) of the RTA 1987. All the parties, including Suriyadi J (as he then was) went on the premise that s 96(1) applied in the *People's Insurance*'s case. Broadly speaking, in that case the necessity to rely on s96(1) did not arise at all since the damage to the vehicle was obviously covered by the admission that a comprehensive policy was in force at the time of the accident.

It is necessary to bear in mind the distinction between third party insurance cover and comprehensive insurance cover. Under a comprehensive insurance cover based on the terms of the policy, many risks could be covered; but not in the case of a mere third party insurance. It is the limited scope of the third party coverage that prompted Parliament's intervention to protect those classes of persons and damages envisaged therein ie the dead and the bodily injured.

Within the factual parameters of the *People's Insurance*'s case, the admission that a comprehensive insurance policy was in force at the time of the accident was sufficient to hold it

liable and reliance on s 96(1) was unnecessary. Therefore, whatever Suriyadi J (as he then was) said in relation to s 96(1) of the RTA 1987 is irrelevant to the case before the court, and at best it was obiter dictum. It cannot be an authority relating the application of s 96(1) of the RTA 1987 and all His Lordship's comments fall to the ground. The *People's Insurance*'s case, cannot be an authority on the exposition of s 96(1); nor, is it an authority that can be safely followed. The learned author S Santhana Dass in his book entitled *The Law of Motor Insurance*[18] at p 226 is also of the view that the *People's Insurance*'s case has been wrongly decided.

It would be interesting to see the development in regard to this area of law in England. The English Road Traffic Act 1988 s 145(3)(a) reads as follows:

> Subject to subsection (4) below, the policy —
>
> (a) must insure 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 or damage to property caused by, or arising out of, the use of the vehicle on a road [or other public place] in Great Britain.

This new provision covers damage to property: however, when we look at sub-s(4), it clearly states that the policy of insurance shall not, by virtue of sub-s(3) be required to cover liability in respect of damage to vehicle. So, we are back to square one and that is damage to vehicle still remains a damage outside the scope of the English RTA 1988 s 145(3).

Now, reverting to the present case, (*MSIG Insurance*) in the High Court Ahmadi J, held that s 96(1) of the RTA 1987 does not apply where the damage is only to property, in this case damage to vehicle. The learned judge very correctly held that the necessity to go into interpretative exercise did not arise. But, the learned judge went on to dismiss the appeal on the ground that the insurers having failed to produce the policy of insurance, s 114(g) of the Evidence Act 1950 should be invoked; therefore, by virtue of that section, the failure to produce the policy of insurance was fatal to the insurers, and dismissed the appeal.

In the Court of Appeal, it was submitted for the appellant (*MSIG*) that the learned judge erred when he held that the failure to produce the policy of insurance enabled the court to invoke s 114(g) of the Evidence Act 1950 whereby adverse inference could be drawn against them. It was the contention on behalf of the insurers, that there was no privity of contract between the third party and the insurers. Parliament had corrected this problem by creating a statutory remedy by way of s 96(1) of the RTA 1987. So far as the third party who has suffered death or bodily injury is concerned, s 96(1) accords protection, not otherwise. When a third party who has suffered death or bodily injury, and the insurers refuse to pay the amount of damages awarded by the court, then, that injured party has a statutory right of remedy against the insurers by virtue of s 96(1) of the RTA 1987 who have issued a policy of insurance covering third party risks as required by the RTA 1987 and it is immaterial whether the policy of insurance covers third party risks or comprehensive insurance which cover all forms of risks unless they deny that the policy is forged or that they did not issue at all.

The cause of action that had accrued to the victim is by virtue of s 96(1), a statutory remedy; therefore, the necessity to look at the policy does not arise and the claim is not brought under the policy but under s 96(1). Counsel for the respondent submitted that the non-production of the policy of insurance was fatal to the insurer's cause. He relied on *Mary Colete John v South East Asia Insurance Bhd*[19] where the court looked into the policy to see whether any liability

could be fastened against the insurers. There, the injured was travelling in the car and the question was whether she was an employee of the insured. Again, that case was not helpful to the respondent.

After deliberation, the Court of Appeal unanimously decided that s 96(1) of the RTA 1987 only applied to cases involving death or bodily injury and does not cover damage to property. In the circumstances, it was unnecessary that the policy of insurance needs to be produced. The appeal was allowed with no order as to costs.

In conclusion, it must be emphasised that one cannot deny that with the increasing numbers of motor vehicles on the roads, damages cannot be confined to deaths or bodily injury. There are many ways accident could happen and inflict damage and the objective of the Parliament must be to ensure that innocent third parties should not go through the agony of further losses for which they were not responsible. The English law had been amended to allow damages to be recovered in respect of property damage. This was achieved by amending s 145 of the English Road Traffic Act 1988;[20] but, strangely, it had been noticed that in so far as motor vehicles are concerned, they labour under the same disability as before. This is understandable, because, an insured who wants to protect himself against claims resulting in damages to third party vehicles should insure against such risks by having comprehensive insurance coverage on payment of extra premium. And this, it is submitted is a sound and pragmatic policy. Perhaps motor vehicle owners need to be educated of the advantage in having comprehensive coverage for their vehicles against all types of third party risks.

[1] Unreported: Court of Appeal Civil Appeal No: J-04–1–01/2012, Coram: Ramly Ali JCA, Zaharah Ibrahim JCA and YA Azahar Mohamed JCA, Counsel: K Siladass, Mandave Singh Gill and S Shanker (Vohrah & Tan Chee Lan) for the appellant and Mohd Radzi bin Yatiman (Rahim & Lawrnee) for the respondent. Oral judgment was delivered on 11October 2012.

[2] [2001] 1 MLJ 279.

[3] [1979] 2 Lloyd's Rep 193.

[4] *Supra* p 195, Lord Denning referred to four cases: ie *In re Harrington Motor Co Ltd ex parte Chaplin* (1927) 29 Ll L Rep 102; [1928] Ch 105; *Croxford v University Insurance Co Ltd* (1936) 54 Ll L Rep 171; [1936] 2 KB 253, *Merchants and Manufactures Insurance Co Ltd v Hunt and Others,* (1940) 68 Ll L Rep 117; [1941] 1 KB 295, and *Zurich General Accident & Liability Insurance Co Ltd v Morrison* (1942) 72 Ll L Rep 167 to show the predicament faced by the injured third parties.

[5] *Ibid*.

[6] *Ibid*.

[7] (1942) 72 Ll L Rep 167.

[8] *Supra* at p 174. See s 96(1) of the RTA 1987 is in par with s 10(1) of the English RTA 1934.

[9] See *Halsbury's Laws of England*, (4th Ed), para 775 pp 394–395.

[10] [1982] 2 MLJ 62.

[11] [1953] 1 QB 380 (DC); See also *R v Oakes* [1959] 2 QB 350.

[12] Unreported, see n 1, above.

[13] [2000] 4 MLJ 167; [2000] 3 CLJ 659.

[14] At p 175 (MLJ); p 663 (CLJ).

[15] [1997] 2 MLJ 701; [1997] 2 CLJ 723.

[16] [1993] 1 MLJ 39.

[17] [1997] 2 MLJ 165; [1997] 2 CLJ 375.

[18] See Marsden Law Book, 2010.

[19] [2010] 6 MLJ 733 (FC).

[20] See s 145 of the Road Traffic Act 1988 [UK].

End of Document