N/S. D.F. Mwaungulu

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NUMBER 1481 OF 1992

BETWEEN:

MATANDA FACHI ..... PLAINTIFF

and

STELLA MARIS SECONDARY SCHOOL .... 1ST DEFENDANT

and

COMMERCIAL UNION ASSURANCE
COMPANY LTD. ..... 2ND DEFENDANT

Coram: D F MWAUNGULU, REGISTRAR
Mrs. Kanyongolo, Counsel for the Plaintiff
Mr Kaphale, Counsel for the 2nd Defendant

ORDER

This is a summons by an insurance company, Commercial Union Assurance PLC, to be struck off an action commenced by Matanda Fachi, the plaintiff, to recover damages for negligence on the part of Stella Maris Secondary School, the first defendant. The plaintiff, a student at the School, was injured when the school's driver negligently managed a motor vehicle owned by the school. This motor vehicle is insured by the second defendant.

The plaintiff took out this action against the first defendant as owners of the motor vehicle and employer of the driver who caused the accident. Before 1988 insurers, because there was no privity of contract with the victim, could not be sued directly. Section 65(A), introduced in 1988, makes this possible.

> (1) Any person having a claim against a person insured in respect of any liability in regard to which a policy of insurance has been issued for the purposes of this Part shall be entitled in his own name to recover directly from the insurer any amount, not exceeding the amount covered by the policy, for which the person insured is liable to the person having the claim:
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> Provided that:

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(a) the rights of any such person claiming directly against the insurer shall, except as provided in subsection (2), be not greater than the rights of the person insured against such insurer;

(b) the right to recover directly from the insurer shall terminate upon the expiration of a period of two years from the date upon which the claimant's cause of action against the person insured arose;

(c) the expiration of such period as is mentioned in paragraph (d) of this proviso shall not affect the validity of any legal proceedings commenced during such period for the purpose of enforcing a right given under this section;

(2) In respect of the claim of any person claiming directly against the insurer by virtue of subsection (1) any condition in a policy purporting to restrict the insurance of the person insured thereby shall be of no effect:

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 the operation of this subsection may be recovered by the insurer from that person.

The second defendant is sued under this section.

The defendant filed a notice of intention to defend on 13th January 1993. On 15th February 1993, the defendant took out this summons to have the insurer struck off as a wrong party.

In the affidavit in support of the application it is deponed that the second defendant is insurer of motor vehicle registration number BH 2840. The policy number is 303901591. The policy is not exhibited. The deponent has exhibited the proposal form which has this statement:

"I/We hereby agree that this proposal form shall be held to be promisory and be a basis of the contract between we/us and the Company".

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It is conceded in the affidavit that the plaintiff was a passenger on the motor vehicle. It is avered that the plaintiff was not carried for hire or reward.

There is no affidavit from the plaintiff. The plaintiff in argument raised facts which have not been sworn in affidavit, this has a bearing, albeit tangential to the result of the application.

The cardinal point taken for the second defendant to be struck off is that an insurer can only be sued directly under section 62(A) where there is compulsory third party insurance under part V of the Road Traffic Act. It was contended very strongly that there is no obligation to have third party insurance cover for passengers except for motor vehicles in which passengers are carried for hire or reward.

It was argued for the defendant that the plaintiff was a passenger not for reward or hire. It is contended for the plaintiff that she paid a certain amount of money at the beginning of the term to cover use of the school motor vehicle. She was, therefore, a passenger for reward and covered by the insurance.

Mr. Kaphale relied heavily on two decisions of the Court of Appeal in the United Kingdom: Coward vs. Motor Insurers Bureau (1962)1 All E.R. 531 and Connell vs. Motor Insurers Bureau (1969)3 All E.R. 572. The ratio decidendi of these two cases is that under the Road Traffic Act it is compulsory to insure for injuries to third parties. It is not compulsory to insure for passengers on motor vehicles in which passengers are not carried for hire or reward. Lord Denning said in Connell vs. Motor Insurers Bureau 573:

> "Everyone who is using a vehicle on a road is compelled by law to insure against third party liability; but there is this important exception: he is not compelled to insure against injury to passengers ..... But there is a proviso to this exception in this respect: although a driver is not usually bound to insure his passengers, yet he is bound to do so in the case of vehicles in which passengers are carried for hire or reward."

It is also significant that the insurance is related to the use of the motor vehicle and not whether the passenger is or is not for reward. If it was the latter then in each case the court would be called upon to decide whether a passenger was for hire or reward. There are statements to this effect in Coward vs. Motor Insurance Bureau. Lord Denning, however, in Connell vs. Motor Insurers Bureau at page 574 said:

> "At any rate, the court in Cowards Case did not decide the point we have here".

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If the motor vehicle is not one in which passengers are carried for hire or reward it does not matter whether the passenger paid on a particular occasion or a serries of occasions. The magical words "motor vehicles in which passengers are carried for hire or reward" have been construed to mean vehicles that as a matter of course are used to carry passengers for hire or reward. (per Branson, J in Wyatt vs. Guildhal Insurance Company (1937)1 All E.R. 792, 796. In Connell vs. Motor Insurers Bureau Lord Denning M.R. said:

> "The result is, therefore, that the owner of a vehicle, such as a motor coach, a taxi, and a private hire car, is bound to insure his passengers. But the owner of private car is not bound to insure his passengers, even though they may make a contribution towards the petrol or pay a sum of money in return for a lift".

There is no obligation on privately owned cars that are not habitually used for hire or reward to be insured against injuries to passengers. In this particular case it is insignifcant that, although there was no affidavit to the effect, the students paid towards the use of cars. The motor vehicle is not used to carry passengers for hire or reward.

The effect of the legislation as it stands now is that there is no obligation to insure for injury to passengers except for vehicles for hire or reward. Consequently, passengers get on private cars at their peril if the motor vehicle owner turns to be a man of straw or impecunious. In England there was criticism of this legislation by Judges who advocated legislation to insure passengers. A subsequent legislation left the provision intact. I think the position of the English Parliament is understandable. There is great wisdom in insuring all passengers. Insurance, however, involves risk and spreading of risk. The greater the risk is spread the profitable the portfolio. If fewer people are covered insurers can cope with the strains of road accidents. If more people are covered high premiums could very well get insurance companies out of business; motor vehicle owners would not be insuring their cars. The injured, who insurance was supposed to assist, would be hurt without remedy. The spirit of both Parliaments, Malawian and English, has been to make it compulsory for third parties other than passengers and leave it to the insurer and insured to agree about whether to cover passengers or even himself.

This leads me to the critical matter in this case. It is contended for the defendant that the defendant should be struck out because the defendant is excluded from liability

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because cover for passengers is excluded by section 62 (b) of the Road Traffic Act. The section should be reproduced:

> "A policy of insurance shall not be required to cover -..... except in the case of motor vehicle or trailer 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·the death of or bodily injury to persons being carried in or upon or entering or getting on to or alighting from the vehicle or trailer at the time of the occurence of the event out of which the claims arose."

The second defendant argues as if the Road Traffic Act has decreed that you shall not have cover for passengers if your motor vehicle is not used for carrying passengers for hire or reward. If there was a proscription, no doubt, in the circumstances of this case the second defendant would be entitled to be struck off because he cannot be sued under section 62(A) of the Act. The section, however, provides that for purposes of the part it shall not be a requirement. Section 61 provides:

> "In order to comply with the requirements of this Part a policy of insurance must be a policy which:-
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> (a) is issued by an insurer approved by the Minister; and
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> (b) insures such persons or classes of person as may be specified in the policy in respect of any liability which may be incurred by him or them in respect of:
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> (i) the death of or bodily injury to any person;
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> (ii) damage to property
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> caused by or arising out of the use of the motor vehicle or trailer on a road.

In my opinion the section leaves it to the insured and insurer to determine the persons or class of persons to be covered by the policy for compulsory third party insurance. Section 62 excludes those where it is not compulsory. My understanding of Section 62 is that it is not proscriptive. It only says that third party insurance shall not be compulsory for those in (a) and (b). It is not saying that you cannot cover passengers. The insurer and the insured can agree to cover such risks. At the end of the day it turns out on the agreement or the policy worked by the insurer and the insured. It may mean heavy premiums but the

insurer and insured can agree. That the question turns on the terms of agreement or policy seems to have been accepted by Lord Justices Denning and Karminsk in Connell vs. Motor Insurers and Lord Justice UpJohn in Coward vs. Motor Insurers Bureau. Lord Justice Denning said in Connell vs. Motor Insurance Bureau 573:

> "The plaintiff wanted compensation for his injuries. But .... English's insurance did not cover it. His policy contained a clause which excluded "any legal liability to passengers", and also a clause excluding "any liability while the car was being used for hire or reward."

Later in the passage the Master of Rolls continued:

> "The insurance company did not pay. They were not bound to. The insurance did not cover it.

Both the statements imply that if the insurance policy provided for it passengers would be compensated notwithstanding section 62 of the Road Traffic Act. Lord Justice Karmiski said:

> "As things stand, it is or may be difficult for a passenger in a car to ascertain whether or not the owner or driver is covered by a policy of insurance if they meet with an accident. Indeed to come to any safe conclusion whether or not he is protected a wise passenger would, I suppose have, first of all, to inspect the driver's or owner's policy of insurance, and it may thereafer be wise for him to consult his solicitor."

All then turns out on the terms of the insurance policy.

I think in dealing with a situation like the present where the defendant seeks to be struck out because insuring a passenger is not compulsory under the Road Traffic Act, and I would think in every case where the insurer is avoiding liability to a passenger in a motor vehicle, recourse should not be had to the general provisions of section 62. In all fairness recourse should be had to the policy agreed between the insurer and insured. Where the policy provides that liability for passengers or a certain class of passengers is covered the court will enforce the agreement notwithstanding section 62 of the Road Traffic Act. In the present case if the policy of insurance was silent or specifically excluded liability for passengers on the motor vehicle the second defendant could not have been sued under section 62A of the Road Traffic Act. The agreement or the insurance policy has not been proferred. The defendant has exhibited a proposal form which specifically looks forward to an actual contract. In the absence of the policy or agreement it is conjecture

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whether passengers like the plaintiff are not covered for liability. This omission cannot be resolved by the general provisions in section 62. I would dismiss the application to strike the second defendant with costs.

The second defendant can appeal to a Judge in chambers.

Made in chambers this 5th day of April 1993.

D F Mwaungulu
REGISTRAR OF THE HIGH COURT