

IN THE COURT OF APPEAL OF BRUNEI DARUSSALAM

CIVIL APPEAL NO. 5 OF 1997

THE ASIA INSURANCE CO. LTD.

V

JULIA BTE CHEE

Before: FUAD, P.; HUGGINS, J.A. AND CONS, J.A.

Date of Hearing: 22ND APRIL, 1998.

Date of Delivery of Reasons: 30TH APRIL, 1998.

J U D G M E N T

CONS, J.A.:

On the 22nd of this month we dismissed this appeal with costs. We now give our reasons for so doing.

The appeal was by a defendant Insurance Company against the order of the Chief Justice that the Company indemnify the plaintiff in accordance with the terms of a policy of insurance that the Company had issued to her. The policy was in respect of her motor car and by its terms indemnified her against, inter alia, "loss or damage to the Motor Vehicle by accidental collision" and "expenses which the insured shall become legally liable to pay in respect of damage to the property" of third parties.

The policy noted that "Authorised Driver" included any person driving with her permission provided that that person was legally permitted to do so.

On the 2nd March two years ago, just before 9 o'clock in the evening, on the road between Seria and Kuala Belait, the Plaintiff's son, driving her car with her permission and with no suggestion of his being unlicensed, had a serious accident. In evidence in the Court below he said that he was travelling at about 90 k.p.h., swerved to avoid a dog crossing the road, hit a pile of debris upon a construction site at the side, lost control and ran into a lamp post and a tree. The car was a complete write off and the Plaintiff had made good to the Brunei Government the damage to the lamp post and the

tree.

It appeared from the evidence of a Superintendent Abu Daniel that the son later pleaded guilty to a charge, arising from the accident, of dangerous driving. No point was taken as to that in the Court below. The point that was taken was that the alcohol content of the son's blood was found, about half an hour after the accident, to be 12.86 milligrams in 100 millilitres of blood. The policy contained the usual term voiding the policy if the car was at the time being driven "under the influence of intoxicating liquors or drugs". The Company had relied upon this term to refuse payment.

The words "under the influence of intoxicating liquor" have long appeared in insurance policies. We are not prepared to construe them, as the Company contended by its second ground of appeal, to include everybody who has consumed some alcohol, however small the amount. Mere presence of alcohol in the body is not enough. The alcohol must be having some influence, an influence that can be seen, and if contested, demonstrated to the Court. That was the view taken by Lord Coleridge and Denman J. as long ago as 1877 in Mail v Railway Passengers Assurance Co. (Limited) (1877) 37 Law Times 356. Adopting their constructions in 1961, in London v. British Merchants Assurance Co. Ltd. [1961] 1 W.L.R. 798 @ 801, Lawton J. said:

"Both were of the opinion that these words connoted a disturbance of the faculties, Lord Coleridge using the words 'as disturbs the balance of a man's mind' and Denman J. the words 'disturbing the quiet, calm, intelligent exercise of the faculties'."

No evidence was adduced below to show that the plaintiff's son was so disturbed. No one said, in the once time honoured phrases, that his footsteps were unsteady, that his speech was slurred and that his breath smelled strongly of alcohol. Indeed no evidence at all was given of his condition, save that there was alcohol in his blood in the proportion of 80 mgs to 100 mls.

It was argued, on a 3rd ground of appeal, that the influence of alcohol was sufficiently shown by the circumstances of the accident itself, coupled with the evidence of the laboratory technician, who said that "If he had a glass of wine or a can of beer, his ability to control at speed might be affected". She had to concede, however, that her experience was only as to the content of alcohol in the blood, not its effect. We are unable to accept that argument.

By section 26 of the Road Traffic Act, Cap. 68, it is an offence to drive a motor

vehicle on a road or other public place when under the influence of drink or a drug to such an extent as to be incapable of having proper control of that vehicle. Other jurisdictions take a different approach. They have no regard to the actual capability of the driver, but make it an offence merely in itself to drive with more than a specified amount of alcohol in the blood. In England the amount seems to depend on the ratio of 80 mgs of alcohol to 100 mls of blood. That, at any rate, from the evidence of Superintendent Abu Daniel, is the standard adopted by the Royal Brunei Police Force when deciding whether or not to prosecute under section 26. No doubt, when the case comes to trial, further evidence is produced. It is common knowledge that alcohol is an intoxicating liquor and the Court will therefore take judicial notice of that. But the actual or probable effect of any particular percentage of alcohol in the blood is not common knowledge by any means, and the Court, to appreciate that, must be given assistance in some form of expert evidence, as e.g. in the case Kho Teng Hooi v. The British India General Insurance Co. Ltd. (1959) 25 M.L.J. 34, to which our attention was drawn, by way of the contents of the Government Chemist's certificate.

The main ground of appeal, if successful, would obviate the need for such evidence. By that ground this Court was invited to ignore the contractual wishes of parties to insurance policies such as the one in question and instead impose upon them, and indeed within the civil law generally, a conclusive presumption that any person found to have any alcohol at all in his blood, was under the influence of intoxicating liquor. The zero base was chosen having regard to the particular circumstances of this jurisdiction. Counsel was unable to satisfy our curiosity as to the source of our authority to be so bold and was indeed constrained to concede that we have no power to rewrite contracts generally or to legislate.

That concession immediately and conclusively disposes of the ground of appeal. If an insurance company wishes to have the benefit of such a provision as regards its own clients, the remedy is in its own hands. It may rewrite its policies, either upon renewal or upon initial issue, along the lines of the criminal legislation in other jurisdictions. But unless and until it does so it will, if necessary, have to prove in Court an actual influence upon the person in question. The defendant company did not do so in the present instance. It was inevitable then that the Chief Justice would make an order against the Company. In the event he reached his conclusion by a different route. It was one which, with respect, we find ourselves unable to endorse.

SIR DEREK CONS
Judge, Court of Appeal

KUTLU TEKIN FUAD
President, Court of Appeal

SIR ALAN HUGGINS
Judge, Court of Appeal

Kumar Nadasan

for Appellant

Yusof Halim

for Respondent