ROYAL EXCHANGE ASSURANCE COMPANY v. JENNER-WRIGHT, YASSIN and JABBER

COURT OF APPEAL (Ames, Ag. P., Bankole Jones, C.J. and Dove-Edwin, J.A.): March 20th, 1964
(Civil App. No. 21/63)

[1] **Insurance—motor vehicle insurance—limitations on use—burden of proof of use for contemplated purpose on policyholder:** Where a policyholder seeks to recover from an insurer following an accident arising out of the use of a motor vehicle, the burden of proving that the vehicle was being used for a purpose contemplated by the policy lies on the policyholder (page 28, lines 27–35; page 29, lines 19–21).

[2] **Insurance — motor vehicle insurance — limitations on use — social, domestic and pleasure purposes—question of fact:** Whether a vehicle is being used at a particular time for social, domestic or pleasure purposes is a question of fact (page 28, lines 27–34).

The first respondent brought an action against the second and third respondents in the Supreme Court to recover damages following a road accident. The appellants, the insurers of the second respondent's vehicle, were joined as a third party.

The insurance policy in force in respect of the vehicle at the time of the accident limited coverage to occasions when the vehicle was used "for social, domestic and pleasure purposes." The third respondent was driving the vehicle (a van) with a view to buying it from the second respondent. He was carrying in the back of the vehicle 10 cases of empty Coca-Cola bottles which he was taking to his shop. He negligently collided with the first respondent's stationary car.

The appellants, having been joined as a third party in the first respondent's action against the second and third respondents, refused to accept liability under the policy on the ground that the vehicle was not being used for any of the purposes contemplated in the policy. The trial court held that the vehicle was being so used and awarded damages against the appellants.

Case referred to:

(1) *Passmore* v. *Vulcan Boiler & Gen. Ins. Co.* (1935), 52 T.L.R. 193; 154 L.T. 258, observations of du Parcq, J. considered.

Candappa for the appellants.
The respondents did not appear and were not represented.

AMES, Ag. P.:

My two learned brothers have read this judgment of mine but are unable to agree with it. It is therefore a dissenting judgment and I dissent with all respect to them.

This appeal arises out of a motor accident. The second respondent (the first defendant in the lower court), who is a trader, was the owner of what the policy of insurance describes as a Ford van. At the time of the accident it was being driven by the third respondent (the second defendant in the lower court) with the authorisation of the second respondent. It collided with the plaintiff's car while the latter was stationary. The plaintiff (the first respondent in this appeal) sued both defendants for damages for negligence.

The first defendant obtained an order under the third party procedure of Part V of Order XII of the Supreme Court Rules joining the appellants, an assurance company, as a third party, because he claimed to be entitled to indemnity by them under his policy of insurance.

The suit ended with judgment for the plaintiff against the first defendant (so one infers: it was not so stated specifically) for damages on account of his vicarious liability for the negligence of the second defendant and also with an order "that the assurance company are liable to indemnify the insured without prejudice of their right to any claim they could bring against the second defendant." This appeal is brought by the company against that order. Neither defendant (nor plaintiff) has appeared at the hearing.

The appeal is not concerned with the first defendant's liability; nor with the quantum of damages. It is concerned only with the question of whether the use of the van on the occasion when the accident happened was a use covered by the policy. The case for the appellants is that it was not, and although there were several grounds of appeal, they add up to a complaint against the learned trial judge's finding that it was.

Now whether it was or not, is, as the learned judge pointed out, a question of fact. The first defendant was the claimant against the appellants and so the onus was on him to establish the fact. This appeal has been by way of rehearing, as provided in r.12 of the rules of this court, and has involved a close examination of the evidence.

I have said that the first defendant had authorised the second defendant to use the vehicle. In a statement (Exhibit D) made on August 15th, 1960, he said that he did so because the second defendant

"wished to purchase the van and was trying it out in order to decide whether or not he would buy it." In his affidavit of October 14th, 1961 (at p. 19 of the appeal record), he said that on the day before, he had left the van with a mechanic for some repairs to be done and, not being able to collect it himself, had "requested the second defendant to collect the said vehicle from the said Perindo Bamin and try same for me to see that it was in working order."

Mr. Candappa drew our attention to this inconsistency but I do not think it matters, because the vehicle was being tested, whether with a view to purchase, or on behalf of the first defendant. The vehicle is covered by the policy when in use only for "social, domestic and pleasure purposes." Mr. Candappa conceded that had the use on the occasion been for the purpose of testing only, its use would have been within the coverage of the policy. But there was something more, "because at the time of the accident the second defendant was using the van to transport" 10 cases of empties, which, so Mr. Candappa argued, was outside the coverage. On the face of it, it looks like a commercial or business use because of the large number of cases. Even that number of cases could, however, be transported for a social or domestic or pleasure purpose. The onus was on the first defendant to show it to be the latter. He could use the car for the latter while testing it and be within the policy but not for the former.

How did the first defendant attempt to discharge the onus? He did not go into the witness box or call any witness, nor did the second defendant. Consequently, he had to rely on what evidence the plaintiff and the third party gave.

First of all, it is to be noticed that in his affidavit filed in support of his application for third party directions he averred in para. 5: "That as the second defendant was driving with my authority and in and about my business. . . ." And this was repeated in para. 4 of his statement of claim against the third party where he averred: "That at the time . . . the second defendant was driving . . . in and about the business of the first defendant." On that basis the first defendant was out of court completely, because the policy has an endorsement limiting the use of the van to "Use only for social, domestic and pleasure purposes." This endorsement is a printed one, and the print contained also the words "and for the insured's business." But these words have been ruled through to exclude them.

The manager of the third party company said in the witness box: "Both Yassin and Jabber made statements which form part of our

record. These are two." The statements were admitted in evidence. That of the second defendant includes the following:

> "My reason for driving C.92 was with a view to buying it for N. Jabber and Sons. I came from Murray Town towards Freetown and as a favour carried on back of the van 10 cases of empty Coca-Cola bottles which I was taking to my shop and these were to be collected by Freetown Cold Storage. . . ."

The mechanic who had repaired the van happened to be near when the accident happened. He was a witness called by the third party and he said: "I rushed to the scene. Jabber was driving the van proceeding from west to east. The van was carrying 10 cases of empties. He said he was carrying them as a favour for a friend. . . ." Under cross-examination he added: "He said he was dropping the crates for friends at the Mesurado Fishing Co."

That is the entirety of what the first defendant relied on to discharge the onus of proof. There was nothing more. The learned trial judge in his judgment, after remarks about bailments which, with respect, I think were irrelevant, continued:

> "With regard to these crates, Bamin's evidence was that the second defendant said '. . . he was carrying them as a favour for his friend.' Bamin was called by the third party and his evidence was not challenged; further, there is no other evidence from which I should conclude differently."

It is correct that the evidence of Bamin was not challenged: but it would be more relevant to note that his evidence of what the second defendant said was not evidence as to the truth of what he said and that as neither the second defendant nor the friend gave evidence, the statement of the second defendant was not substantiated, not able to be tested and of no more value than hearsay is.

The learned judge continued:

> "In *Passmore* v. *Vulcan Boiler & Gen. Ins. Co.* (1), du Parcq, J. (as he then was) said that if the insured, as a matter of kindness, courtesy or charity, gave a lift to someone who happened to be on business of his own, he would think that the proper view was that the vehicle was then being used for a social purpose—in this case domestic purpose. I am not satisfied that as a fact the second defendant was not using the van for a domestic purpose and I also feel that the principle enunciated by du Parcq, J. could be extended to a person who is using the vehicle within the competency of the policy—that is, with the permission of the insured."

What du Parcq, J. said in *Passmore's* case (1) was *obiter* and very different. He had in mind a man with a car insured when used for social, domestic and pleasure purposes and also for purposes of his own business (but not anyone else's business). While using the car in his own business, he sees a friend walking on his way to his place of business, and gives him a lift. That would be using the car for a social purpose and not for the friend's business. It is not analogous to what we have here. A more correct analogy to our case would have been of a man who, with a van insured when used for social, domestic and pleasure purposes but not his business purposes (much less anyone else's), passes a friend's shop with 10 cases of beer stacked outside looking as if they are to be transported somewhere, and he stops and finds that they are to be delivered to a customer. Out of kindness to his friend he transports them himself and has an accident while doing so. Du Parcq, J. would not have called that a "social" purpose: the very facts in his decision in the case before him show that he would not have done so.

Of course the second defendant's alleged friend might drink Coca-Cola in such quantities as to have 10 cases of empties to return or he might have given a large party the night before. On the other hand, he might have some business in which Coca-Cola drinks are sold, and so might the second defendant, but nowhere in the proceedings did it appear what is the business and occupation of the second defendant. How simple it would have been, since the second defendant had declined to explain, to have called the friend to explain the social, domestic or pleasure circumstances in which the Coca-Cola was being transported by the second defendant while having the temporary use of the first defendant's van for the purpose of testing it.

In my view, the first defendant failed to discharge the onus which was upon him. I would allow the appeal, set aside the order made against the third party appellants and give judgment for them.

BANKOLE JONES, C.J.:

I have had the opportunity of reading the judgment of the learned President and it is my misfortune to disagree with him and I do so with the utmost respect.

This appeal arises out of a claim for damages from an insurance company in a road accident case. The facts can be stated shortly:

On June 30th, 1960, a Ford van belonging to the first defendant was being driven by the second defendant when it ran into the

plaintiff's stationary car in circumstances from which the learned trial judge found that the second defendant was guilty of negligence. Third party proceedings were instituted by the first defendant, and the Royal Exchange Assurance Company, with whom the first defendant's van was insured, were ordered to be joined as parties to the action and they were so joined. On the date of the accident, the van was insured to cover only "social, domestic and pleasure purposes" and on the face of the insurance policy the following printed words "and for the insured's business" had been struck out. When the accident occurred the second defendant was carrying 10 empty crates of Coca-Cola.

Both the first and second defendants made statements to the insurance company after the accident. The second defendant made his on August 5th, 1960, and this was what he said:

> "My reason for driving C.92 was with a view to buying it for N. Jabber and Sons. I came from Murray Town towards Freetown and as a favour carried on the back of the van 10 cases of empty Coca-Cola which I was taking to my shop and these were to be collected by Freetown Cold Storage."

The statement of the first defendant is not important in this context.

Judgment, so it seems, awarding damages against the company, was given in favour of the first defendant on the learned trial judge's finding that the second defendant's use of the van was covered by the policy.

The company are the appellants in this appeal, and although there are several grounds of appeal, all add up to one question for determination by this court, namely, whether the learned trial judge's finding was right.

It is conceded that at the time of the accident, the second defendant was driving the van with the permission and authority of the insured on a test trip in order to find out whether it had been properly repaired by Perindo Bamin, a motor mechanic who gave evidence on behalf of the appellants. Mr. Candappa's contention is that at the material time the van was not being used for any of the purposes of the insured. He submitted that it was being used contrary to the limitations of use endorsed on the policy of insurance in that, cover having been restricted to social, domestic and pleasure purposes, the van was used for the carriage of goods.

It is, as a rule, a pure question of fact, as the learned trial judge stated, whether a vehicle was on any particular occasion being used for private or business purposes, and the onus of proof in my view,

must rest on the defendant. In this case, the defendants did not give evidence nor were witnesses called on their behalf. This is not to say that one must not look at the entire evidence to find out whether that burden was discharged in some way or other. Looking at it very carefully, as I think I have done, it seems to me clear that the second defendant was carrying the empty crates merely as a matter of kindness or favour for a friend or friends of his at the Mesurado Fishing Company to his own shop, there to be collected by the Freetown Cold Storage. It is common knowledge that this Fishing Company operates its fishing business at Murray Town from where the second defendant stated he was proceeding to Freetown.

The evidence on the whole amounts to nothing more than this, namely, that the prime purpose of the second defendant in driving the van was to test it and that his conveying the empty crates was merely incidental to that purpose. In principle, it would have made no difference whether he was conveying one empty crate or 10 empty crates, if this was done as a matter of favour to someone and not in the course of either the insured's business or his own or any other person's as appears to be the case here. The quantity in my view does not matter. There was in fact no complaint about his exceeding the carrying capacity of the van. Even if there was, he would only have been guilty of an offence under our Road Traffic Act. What I find significant is the fact that Mr. Candappa in his argument conceded that if the insured had himself been carrying these empty crates in the circumstances under which the second defendant carried them, the appellants would have been liable. This, to my mind, is an admission that the second defendant was covered under the policy, because if the insured could have done the same thing, so to speak, with impunity, so could anyone driving his vehicle with his permission and authority. The learned trial judge in my view was therefore right in the finding of fact he arrived at.

Mr. Candappa has quarrelled, and not without justification, with the manner in which the learned trial judge framed his purported award of damages. The learned trial judge stated: "I order that the assurance company *are liable* to indemnify the insured *without prejudice to their right to any claim they could bring against the second defendant.*" The italics are mine. He ought, with respect, to have stated in clear and unequivocal language that he was "awarding damages" against the third party and nothing more.

I would dismiss the appeal.

DOVE-EDWIN, J.A.:

The facts in this appeal are simple. On or about June 30th, 1960, the plaintiff's car C.350 was involved in a collision with the first defendant's Ford van No. C.92. The plaintiff alleged negligence on the part of the then driver of the Ford van C.92. The driver was the second defendant.

In her action against both defendants, the plaintiff succeeded and got damages totalling about £368. 7s. 0d. The first defendant had applied to join the appellants, the Royal Exchange Assurance Company, who the first defendant claimed should indemnify him against any judgment that may be given against him, as his van at the time of the collision was comprehensively insured with them.

The insurance company denied liability and said that at the time of the accident the van was being used outside the scope for which it was insured. The learned trial judge found against them and made this order: "I order that the assurance company are liable to indemnify the insured" and went on to say "without prejudice to their right to any claim they could bring against the second defendant." It is with this order that this appeal is concerned.

The plaintiff and the two defendants in the main case did not appear in this court and there was no appeal from any of them.

The grounds of the appeal could easily be stated thus: "Was the vehicle C.92 at the time of the collision carrying goods which would be outside the scope for which the vehicle was insured?" It is not denied that the vehicle at the time of the collision was comprehensively insured with the appellants. In the policy, which is an exhibit in the case, the limitation as to use reads thus: "use for social, domestic and pleasure purposes." It is because of this that the insurance company has refused to accept liability. They say that at the time of the collision the van was carrying goods.

It is not disputed that at the time of the collision there were 10 cases of empty Coca-Cola bottles in the van and it is this that the company has referred to as goods.

In the affidavit of the solicitor for the insurance company it is said in para. 2:

> "The first defendant's van C.92 was being used contrary to the limitations of use endorsed on the said policy of insurance in that, cover being restricted to social, domestic and pleasure purposes, the said motor van was being used for the carriage of goods."

Another solicitor for the insurance company at the trial said in his

submission to the court: "The second defendant said he was carrying the crates for his friend. This was a social purpose connected with the second defendant and not the first defendant." As I understand counsel who appeared for the appellant in this court, had the first defendant, the owner of the vehicle, been driving his vehicle at the time of the collision the appellants would have been liable. This view agrees with counsel's view at the trial to some extent.

In my view the 10 cases of empty Coca-Cola bottles in the van at the time of the collision were not "goods" and I agree with the solicitor at the trial that it was social, but disagree with him in the rest of his submission.

The vehicle, a Ford van, was being driven by the second defendant with the consent and approval of the insured, the first defendant. It was going through a test with a view to it being purchased by the second defendant. To put 10 cases of empty Coca-Cola bottles at the back of the van, which by its construction could carry a load, could not make a purely social matter into a business one. It could be useful in the test. The fact that the second defendant was driving at the time makes no difference at all, for according to the policy:

> "In terms of and subject to the limitations of the indemnity which is granted by this section to the insured the company will indemnify any driver who is driving the motor car on the insured's order or with his permission provided that such driver (a) is not entitled to indemnity under any other policy and (b) shall as though he were the insured observe, fulfil and be subject to the terms, exceptions and conditions of the policy as far as they can apply."

The second defendant did not do anything that could be said to be outside the terms of the policy.

It is my opinion therefore that this was purely social and that the insurance company must be held liable to indemnify the insured. For these reasons I find myself in entire agreement with the learned Chief Justice's views dismissing the appeal and respectfully regret that I am unable to agree with the learned President's decision to allow the appeal. I would dismiss the appeal.

Appeal dismissed.