Privy Council Appeal No. 21 *of* 1934.

Marjorie L'Estrange Trickett - - - - - - - *Appellant*

v.

The Queensland Insurance Company, Limited, and others - *Respondents*

FROM

THE COURT OF APPEAL OF NEW ZEALAND

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 9TH DECEMBER, 1935

Present at the Hearing:

LORD ALNESS.
LORD ROCHE.
SIR SIDNEY ROWLATT.

[*Delivered by* LORD ALNESS.]

This is an appeal from a judgment of the Court of Appeal of New Zealand, dated 25th November, 1932, affirming, by a majority, a judgment of the Supreme Court of New Zealand, whereby judgment was entered for the respondent company.

The issues in the case lie within narrow compass. The appellant, who was plaintiff in the action, and whose title is not in dispute, is a daughter of a retired civil servant named Alfred John Ernest Wiggs. Wiggs was killed in a motor accident on the night of the 17th of November, 1930. At the time of his death he was insured with the respondent company under a policy of motor insurance; and the claim made by the plaintiff in the action was for a sum of £1,000, payable, as she maintained, under the said policy, in respect of the death of her father.

The question in the appeal is whether, in the circumstances under which Wiggs was killed, the respondent company is exempted from liability by reason of one of the exceptions in the policy of insurance.

The policy is dated 19th February, 1930. The clause under which the claim is made by the plaintiff is in these terms:—

> "If the insured, whilst between the ages of 16 and 65, shall be injured by an accident sustained in connection with any motor vehicle described in the Schedule hereto, . . . the Company shall pay to the insured or his legal personal representative compensation under the following scale:—
>
> (*a*) If the accident shall within three calendar months of the occurrence thereof be the direct and immediate cause of the death of the insured, the sum of £1,000."

The exception, under which the respondent company successfully resisted liability in the Courts below, is in these terms :—

> "No liability shall attach to the Company under this policy in respect of any loss, damage or liability occurring or any personal accident to the insured occurring :—
>
> "(1) While any motor vehicle in connection with which indemnity is granted under this policy is :—
>
> "(*e*) Being driven in a damaged or unsafe condition."

The circumstances under which the appellant's claim arises are as follow :—About midnight, on the 17th of November, 1930, a motor car was being driven by the deceased, Wiggs, in a northerly direction, on the Hutt Road, from Petone to Wellington. His car collided with another car, which was being driven in the opposite direction—i.e., in a southernly direction on the Hutt Road—by a Dr. Findlater. As a result of the collision Wiggs was killed.

The respondent company maintained that Wiggs's car was, at the time of the collision, being driven without lights, that it was therefore in an unsafe condition, and that accordingly, under the proviso already quoted, they were relieved from liability under the policy.

All the Judges in the Courts below held that, at and about the time of the collision, the lights of Wiggs's car were not shining. In particular, the dissentient Judge in the Court of Appeal, Mr. Justice Herdman, in the course of his judgment said :—

> The learned Chief Justice, in the Court below, found that before the collision took place the condition of the car, so far as its lights were concerned, was unsafe, and that this unsatisfactory state of affairs had existed for some time, at any rate, before the actual impact. The evidence justifies this finding of fact.

This finding was not challenged in argument by the appellant's counsel. Indeed he was constrained to admit that it was correct, and justified by the evidence.

Mr. Chappell, however, for the appellant, maintained these contentions :—

(1) That, in order that the respondent company should escape liability under the policy, it must show, not only that the car was being driven in a damaged or unsafe condition, but also that the driver was aware of that fact;

(2) That it was not established in evidence by the respondent company that the driver of the car was aware of its damaged or unsafe condition;

(3) That the law affecting the proviso referred to can be assimilated to the maritime law of sea worthiness, and that, on that analogy, proviso (1) (*e*) applies only where the car was in a damaged or unsafe condition at the beginning of its journey, or that, in other words, there is no running warranty by the driver of the roadworthiness of the car.

Their Lordships proceed to examine these contentions in their order, bearing in mind that the *onus* is on the

respondent company to show that the case falls within an exception to the policy of insurance issued by them. This was recognised in the Court of first instance, where the respondent company led in the proof. On the other hand, it must not be forgotten that the function of an exception to a policy is to limit the liability under it, and to destroy a right which, apart from the exception, would survive.

(1) Is knowledge on the part of the driver of a car of its damaged or unsafe condition an essential ingredient of proviso (1) (*e*) of the general exceptions to the policy? The appellant maintained that it is, inasmuch as the proviso is ambiguous in its terms, and is therefore open to the conclusion contended for by the appellant. The proviso being, as the appellant's counsel maintained, ambiguous in its terms, he compared it with exception (*d*) in the policy, under the heading of " Loss or damage to motor vehicle ", and contended that, only on the view that his argument upon proviso (4) (1) (*e*) was sound, could the provisions of the two clauses reasonably be reconciled. It must be remembered that, in the present case, the defect was not a latent one, which was potentially dangerous. As to the case of a latent defect their Lordships offer no opinion. The car in the case under consideration was actually and *de presenti* unsafe to drive, because a necessary appliance was not functioning. It was driven after that state of affairs had developed. Unless their Lordships can assume—which they cannot—that in every case which could occur under proviso (*d*) under " loss or damage to car " the general proviso (4) (1) (*e*) would also apply and displace it, the suggested repugnancy does not arise.

Their Lordships are unable to take the first step which is essential to the success of the appellant's argument, and to hold that proviso (4) (1) (*e*) is couched in ambiguous terms. On the contrary, in the judgment of their Lordships, the terms of the proviso are unambiguous and plain—indeed intractable. Their Lordships cannot find any justification for supplementing the terms of the proviso by adding to it the words " to the knowledge of the driver ", as they are invited to do by the appellant, or for reforming the contract into which he entered. It is not immaterial to observe in this connection that, in certain of the other provisos which are adjacent to that with which the Board are concerned, the knowledge of the assured is set out *eo nomine*, where it is intended that that knowledge should form a condition of the contract between the parties. Their Lordships have in these circumstances no hesitation in rejecting the first contention of the appellant, and in refusing to read into the policy words which are not there.

(2) If the views above expressed are sound, the second argument propounded by the appellant, which relates to the proved knowledge by the driver of the damaged or unsafe condition of the car does not arise. Their Lordships however cannot refrain from adding that, on the evidence, they would

have great difficulty in holding that the deceased was ignorant of the unlit condition of his car.

(3) The third point argued by Mr. Chappell for the appellant is quite independent of the previous two points. His contention depends for its validity on certain *dicta* of Mr. Justice Goddard in *Barrett* v. *London General Insurance Co.* [1935] 1 K.B. 238. All that their Lordships find it necessary to say regarding that judgment is that, while not questioning the conclusion reached by the learned Judge on the facts of the case, they find great difficulty in agreeing with the reasons upon which that conclusion was based. They are not able to assimilate, as did the learned Judge, the position of a ship at sea with that of a motor car on land, and in rigidly applying the same code of law to both cases. For reasons which are too obvious to be stressed in detail, their Lordships think the analogue imperfect and indeed misleading. They are of opinion that the argument based by the appellant on the identity of the conditions which govern the sea-worthiness of a ship at sea and the road-worthiness of a car on land is unsound.

In the result, therefore, their Lordships are of opinion that the three contentions advanced on behalf of the appellant fail, that the majority judgment of the Court of Appeal falls to be affirmed, and that the present appeal should be refused. They will humbly advise His Majesty accordingly.

(32444—3A) Wt. 8034—41 PO 12/35 P. St. G. 338