SC 322

IN THE SUPREME COURT
OF THE TERRITORY OF
PAPUA AND NEW GUINEA.

GLADYS EVELYN BROWN

Plaintiff

and

LAHUI EGI

Defendant.

SMITHERS, J.
PT. MORESBY.

In this case the plaintiff sues for damages for injuries alleged to have been caused by the negligent handling of a motor car by the defendant. Mr. Pile and Mr. Cory appear for the plaintiff and Mr. White for the defendant.

I am informed that the parties have agreed to settle the action but on terms which depend for their ultimate result upon the view of the Court of the meaning and effect of Section 13(1)(d) of the Motor Vehicles (Third Party Insurance) Ordinance, 1952, (No.9 of 1953).

The agreement for settlement provides that Mr. White will consent to a judgment for £4,000 with costs if Section 13(1)(d) is effective in the events which have happened to render the insurer of the vehicle liable to indemnify the defendant for those costs, but otherwise he is to consent to judgment only for £4,000. The relevant events are that the insurer has handled the defendant's defence of this action pursuant to Section 13 of the Ordinance and that the agreement mentioned above has been made by the insurer under its power to "undertake the settlement" of the plaintiff's claim pursuant to Section 13(1)(a). £4,000 is, of course, the limit of the insurer's liability as defined in the relevant insurance policy. The policy was issued pursuant to the Motor Vehicles Third Party Insurance Ordinance 1952-1955.

In actions brought in this class of case the insurer may defend the action, settle it or take no steps in the action merely being ready to provide an amount up to £4,000 if and when the extent of the liability for the damages is established.

If the insurer defends the action the result may be a judgment for damages and costs for a sum which together exceed £4,000, or for damages in excess of £4,000 plus costs.

In some cases the insurer may decide before the action reaches trial that the wisest course is to settle the action but, as in this case, may be unable to settle otherwise than on the basis of a consent judgment for at least £4,000 damages.

It is said by Mr. White that in any of these cases the position between the defendant and the insurer is that the insurer is required to contribute £4,000 only and the defendant must himself bear the liability for the costs for which he has become liable to the plaintiff as well as any excess over £4,000 for damages. I do not agree with this contention.

Section 6(1) of the Ordinance requires the owner of a motor vehicle to indemnify himself by a third party policy against all sums for which he may become liable by way of damages for the death of, or bodily injury to, any person caused by the use of that vehicle.

Section 7(1)(b) of the Ordinance provided, when first enacted, that in order to comply with the requirements of the Ordinance a policy of insurance issued in relation to a particular motor vehicle should insure the owner against all liability incurred by the owner in respect of the death of, or bodily injury to, a person. Section 7(1)(c) provides that the policy should be in the prescribed form. The form is to be found as Form 2 in the schedule to Regulation No. 9 of 1954.

According to the form the insurer indemnifies the owner against all liability incurred by the owner in respect of the death of, or bodily injury to, a person caused by the use of the motor vehicle insured.

Section 13(1) provides that the insurer -

(a) may undertake the settlement of a claim against a person in respect

of a liability against which he is insured under the policy;

(b) may take over during such period as he thinks proper the conduct on behalf of that person of proceedings taken or had to enforce that claim or for the settlement of a question arising with reference thereto;

(c) may defend or conduct those proceedings in the name and on behalf of that person; and

(d) shall indemnify that person against all costs and expenses of or incidental to any such proceedings while the licensed insurer retains the defence or conduct thereof.

In this case the insurer has taken advantage of each of his privileges under (a), (b) and (c) of the section. In so doing it has no doubt incurred costs to the legal advisor employed by it in the conduct of the defence. In addition, costs of the proceedings are recoverable by the plaintiff against the defendant because it is conceded that this is an action in which the plaintiff must get a judgment with costs.

Section 13(d) may be relevant to both those items of costs but I am only concerned with the latter.

Mr. White takes his stand on the terms of the policy and says that it provides, and provides lawfully, that the amount of liability insured thereunder is limited to £4,000 in respect of the death of, or bodily injury to, any one person in any one case. Such a limitation was made lawful by Section 7 of the Motor Vehicles (Third Party Insurance) Ordinance (No.24) of 1956. Mr. White says that the permissible limit of £4,000 is a substitute for "all liability" referred to in Section 6(1) and is an absolute limit in all respects as between the insurer and the defendant.

It seems to me that the short answer is that the liability of the insurer to indemnify the defendant in respect of the costs for which he may become liable to the plaintiff is that that indemnity does not arise under the policy at all. It is a separate liability arising under the statute in respect of costs incurred by the defendant to the

plaintiff as a consequence of the conduct of the insurer. It is true to say that the insurer's liability under the policy is limited to £4,000. If the insurer had indicated its willingness to pay up to £4,000 when it was clear that the defendant had incurred that much liability there would be no question of its being asked to pay anything further. But when the insurer declined to remain passive in that way and exercised its right under the statute to control and conduct the proceedings concerning the issues of liability or the amount of damages to the exclusion of the defendant, then it was acting under the statute and not under the policy. It was the existence of the policy which gave it the rights under the statute, but those rights are outside the policy. When the insurer steps out of the policy into the statute he must accept the burdens as well as the benefits. Sub-paragraph (d) of Section13(1) says that one of the burdens is to indemnify the defendant against all costs and expenses of or incidental to any such proceedings while the insurer retains the defence or conduct thereof. I think that costs for which the defendant becomes liable to the plaintiff are within costs so described.

This result seems to me to accord with the reality of the situation. When the insurer takes control of the defence in this class of action he may be expected to do so only in cases where it believes that it by efficient defence can achieve a better result than the defendant can if he is left to handle the matter himself and can thereby save some of the £4,000 for which it has insured the defendant. Its desire to ensure that the defendant's liability is kept as low as possible is perfectly proper, but the course taken is directed to save its own money and not that of the defendant. Normally, where it is clear that the defendant's liability exceeds £4,000 it will not trouble itself to take control of the proceedings but merely await the determination of liability and pay its £4,000.

The policy of the statute is that where the insurer is controlling the litigation in reality in its own interest it shall bear the burden of legal costs which that course may entail. It

achieves that policy by attaching the burden of the costs to the insurer whilst the insurer controls the litigation on the common sense assumption that the insurer will only control the litigation when it believes it is in its own interest so to do. In this case no doubt the insurer took control of the litigation believing that it might possibly keep its expenditure under £4,000. This has not turned out to be the fact.

In my opinion the defendant is entitled to be indemnified against costs for which he may be liable in this action even although the damages plus those costs exceed £4,000.

I therefore enter judgment by consent for £4,000 and costs.