MOTOR VEHICLE INSURANCE — ITEMS IN SMALL PRINT

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The ever increasing bill faced by insurers of motor vehicles has led in recent years to a stiffening resistance to payment of claims where liability might be in question. No longer can a holder of a motor vehicle policy expect his insurer to meet the cost of making good all accident damage without more than formal enquiry. No reasonable vehicle owner can cavil at this attitude. His own premium could reach astronomic proportions if claims are not kept down to a proper level. Future developments in motor insurance form no part of this paper but one should note in passing (a) the possibility of further compulsory insurance, (b) the natural refusal by insurers of unsatisfactory risks will result in an increase in the number of uninsured vehicles on the roads and (c) the loading of premiums against those with a history of accidents. Whatever the future holds, it can be expected that insurers will subject claims to close scrutiny and will be even more astute to find, in proper cases, relief from liability in the conditions and exceptions in the policies.

Since no insurance company has wished to advertise the fact that it was other than prompt and generous in settlement of claims, disputes have, in large measure, been determined by arbitration. There have therefore been less reported decisions than the practical importance of the subject merits. A recent decision by Henry J. in Invercargill, *Public Trustee* v. *N.I.M.U. Insurance Co.*[1] provides an interesting example of reliance on an exception by the defendant insurer. The decision is interesting, in the first place, for its analysis of a fact situation in relation to an allegation that the driver of the car at the time of the accident was under the influence of intoxicating liquor. The second point of interest is the comment upon an apparent previous judicial tendency in New Zealand to import a causative element into the meaning of the conjunction "while" as used in the exception under consideration and in s.55(2) of the Transport Act 1962[2]. An exception using the words "while the driver is under the influence of intoxicating liquor" or very similar words will be found in all motor vehicle policies. The word "while" has a temporal meaning only with no causative element. The insurer claiming exemption from liability under this exception has therefore no need to show that the damage in question was caused by the driver's state but only to show that he was at the time under the influence of liquor.

The learned judge did not find it necessary, despite considerable argument suggesting he would be bound so to do, to settle the meaning of the words of the exception. Rather did he emphasise that the proper function of the Court was first to determine the facts in the case before it and then to consider whether the fact situation so found is within the ordinary meaning of the words used by the parties in their contract. Fact situations giving rise to claims which may possibly come within

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the exception will be infinitely various. A long time may elapse before a court will find it necessary to embark upon a generalised discussion of the meaning of the words in the exception.

Much of the judgment referred to is of assistance in approaching other exceptions commonly found in motor vehicle policies. It is proposed to deal in some detail with one such exception, that relating to a vehicle in an unsafe condition. A typical clause reads:

> The insurer shall not be liable in respect of any damage occurring while the vehicle is . . . in an unsafe or unroadworthy condition or is being driven or used in a damaged or unsafe condition.

The last few words may be intended primarily to exclude damage resulting from the driving or using of the vehicle after an accident but may also involve the exclusion of liability in the particular driving circumstances as, for example, if the vehicle is overloaded. In some instances other words are added to the clause to protect a driver who cannot know that his vehicle has become unsafe as for example when brake fluid leaks and brakes suddenly fail during the course of a journey.

The added words last mentioned appear to owe their insertion to the decision of the Privy Council in *Trickett* v. *Queensland Insurance Co. Ltd*[3] a 1935 New Zealand case which has been referred to frequently in later decisions. *Inter alia,* the Privy Council rejected an analogy between motor vehicle insurance and marine insurance whereby it was sought to import into the exception clause in the former the element of knowledge on the driver's part of his vehicle's condition. This would follow the customary warranty of seaworthiness implied in marine policies which refers to the state of the vessel at the commencement of the voyage. More recent judicial comment on the suggested analogy is mentioned later. The important point, however, remains valid, that, unless the exception contains words exempting from its operation a driver who could not reasonably know of the defect, knowledge of the unsafe condition is immaterial.

In some policies common in New Zealand a form of exemption similar to that quoted above has these added words:

> for the purposes of this exception the term "unsafe condition" shall include such condition as may result in damage to the vehicle or any part or component thereof.

The purpose of this addition appears to be the exclusion of any suggestion that "unsafe" *simpliciter* might imply a hazard only to something other than the vehicle, i.e. to other road users or to passengers in the vehicle. On the other hand it may import into the exception an element of causation. The writer has experience of an arbitration in which this form of exception was invoked by the insurer. Counsel conceded that he was bound to show some causal connection between the particular alleged "unsafe condition" and the accident causing the damage. This may have been no more than sweet reasonableness on the part of the insurer, as to the best of the writer's knowledge there has not so far been a tendency on the part of insurers to look for defects quite unrelated to the accident in an endeavour to find grounds for invoking the exception. As will be shown, a simple "unsafe condition" exception, unqualified by words of causation, can give rise to an escape from liability where such defects can be found.

To adopt the reasoning of Henry J. in *Public Trustee* v. *N.I.M.U. Insurance Co.*[4] the word "while" as used in "unsafe condition" exceptions is still purely temporal in meaning. The exception clause first quoted above simply says liability is excepted in the event that the vehicle, at the time when liability would otherwise arise, is in an unsafe or unroadworthy condition. It is the unsafe condition which constitutes the exception and not the causing of the loss or damage as a result of that condition.

This view of the question was accepted in *Conn* v. *Westminster Motor Insurance Association Ltd.*[5] The insurer sought to escape liability by invoking a condition of the policy expressed:

> The Policyholder shall take all reasonable steps to . . . maintain in efficient condition the vehicle . . .

It was found that the tyres were badly worn and that the brakes were defective. As to the brakes, the owner was able to show that he had had them attended to by a mechanic a few days before the accident and so showed he had taken "reasonable steps" to maintain them. The tyres, however, were in a condition variously described as "smooth", "bald", "dangerous", "unserviceable" or, more generally, "deplorable". The accident was unexplained, having occurred on a dry road in fine weather and without other traffic being involved. In the Queen's Bench Division, Sellers L.J. sitting as an additional judge, found for the owner. The headnote to the report appears to indicate that the fact that the faulty tyres and brakes were not the cause of the accident was at least part of the reason for this decision. The judgment contains a close analysis of the details of the accident leading to the conclusion that the defects described did not bring it about. This conclusion is referred to several times, not as the reason for refusing to exempt the insurer, but as one indication that the vehicle was not indeed in an inefficient condition. In the Court of Appeal, the decision was reversed, there being a unanimous finding that the tyres as described indicated that the owner had failed to maintain the vehicle in an efficient condition. In the judgment of Willmer L.J. (while referring to the judgment of Sellers L.J. in the court below) there is the following passage:[6]

> The learned Lord Justice went on to point out that when the accident happened it was not associated with the smoothness of either of the front tyres or with their condition in combination with the brakes. With all respect, as I have already stated, and as I think is accepted by both sides, that is an entirely irrelevant consideration. We are not concerned with the question whether any breach of the condition (if there was one) caused or contributed to the accident. The only question is whether there was in fact a breach of the condition in the policy.

The second judgment, that of Davies L.J., did not refer to the cause of the accident. The learned Lord Justice made pointed reference to the owner's inevitable knowledge of the condition of the tyres. This had relevance to the obligation to take reasonable steps and the position is not to be confused with that arising under an exception clause containing no such obligation but involving simply a state of repair at the particular time[7].

In the judgment of Salmon, L.J. is a passage which must evoke a sympathetic response from policyholders:[8]

> . . . I do not like conditions precedent in policies of insurance which enable insurers to escape liability for a breach which has absolutely nothing to do with the loss or damage in respect of which the assured seeks to be indemnified.

He goes on to say that the dangerous tyres had nothing to do with the accident but that, on the particular facts, he does not criticise the insurers because they had reason to think that the inefficient brakes, although giving no grounds for exempting them from liability, might well have had something to do with the accident. To digress for a moment, one imagines the learned Lord Justice beaming approval on some New Zealand insurers who take an analogous course in relation to possibly intoxicated drivers. Lacking proof of intoxication, these insurers ascertain the insured driver's movements for some period prior to the accident and then scan his claim form to see whether he has truthfully answered the questions thereon. If he has omitted reference to hotel visits or consumption of alcohol his omission may well invalidate the policy as being a breach of a fundamental condition — usually printed as Condition 1[9].

From the foregoing it is apparent that an insurer may escape liability under various headings in the policy. Not least of the difficulties in construing a policy of insurance is in mastering its geography. Exceptions of different kinds may be placed indiscriminately by different insurers in the particular clauses setting out the scope of the cover, in a "General Exceptions" clause, in a "Descriptions of Use" clause or amongst the General Conditions of the policy. So it will be found that an "unsafe condition" clause under the heading "General Exceptions" is commonly supplemented by a condition requiring the insured to maintain the vehicle in good condition. These vagaries of the framers of policies make necessary the utmost caution in applying reported decisions to policies of different manufacture. The difference in wording of individual clauses in the policies issued by different insurers as mentioned earlier emphasises the need for caution.

What is an "unsafe condition" must be a matter of fact in each case. One might have thought that the same would apply to "efficient condition". Just as the learned Judge in the *N.I.M.U.* case[10] found no need to translate the words "while . . . under the influence of intoxicating liquor" into other words so "efficient condition" would seem to need no translation. In *Brown* v. *Zurich Accident and Liability Insurance Company Ltd*[11] (another case involving smooth tyres) Sellers L.J. defined the adjective "efficient" as "roadworthy" and expanded this term to "in an efficient condition for the purpose for which it was going to be used, namely, to run upon the roads"[12]. In a Scottish case, *McInnes* v. *National Motor and Accident Insurance Union, Ltd*[13] the learned Sheriff Substitute, with sturdy Scottish independence, rejected the need for such definition[14]:

> That is the opinion of a single Judge, and in England, and is not binding upon me. If what was meant was "to keep the vehicle roadworthy", I am surprised that these are not the words which were used.

Rejected as shortly was a suggestion that the words "in efficient condition" were so indefinite as to be unenforceable. Here again is shown the unwisdom of attempting to construe a phrase in the abstract — first find the facts and then consider the words of the contract against those facts!

Are reported cases then, of any assistance in construing an "unsafe condition" exception? Worn tyres, faulty brakes, defective steering, lack of lights, can obviously make a vehicle unsafe. What of engine faults, faulty door locks, obscured windows? In each case the particular

facts would have to be considered. Some idea of the scope of an exception may be gained from the decision of the Court of Appeal in England in *Clarke* v. *National Insurance and Guarantee Corporation Ltd*[15] in which it was held that a four seater car carrying nine adults was so overloaded as to be within an exception in the words "while . . . being driven in an unsafe or unroadworthy condition". In this case reference was made to the analogy with marine insurance rejected in *Trickett's* case[16]. While in no way throwing doubt on that decision, the Court found some assistance from shipping cases — an overloaded ship is unseaworthy, an overloaded car, unroadworthy.

One final word of caution — the mere possession of a recent warrant of fitness will not take a vehicle outside an unsafe condition exception. A recent expert inspection for this or some other purpose would be relevant to the owner's knowledge if this is in issue. It might also provide evidence as to the actual state of the vehicle. An owner might be forgiven for thinking that in New Zealand the regulations governing vehicle inspection provide a complete code, but consideration of some of the cases quoted above makes it obvious that instances of lack of safety or unroadworthiness can occur quite apart from the matters officially inspected. Moreover, accidents or mere wear and tear can and do result in defects between inspection dates.

This article has not been prompted by any desire to criticise insurance companies except insofar as differing forms of policy document and variations in the wording of individual clauses make for difficulties in comprehension by the insured. Rather have the insurers been tolerant, even generous, in meeting claims where exceptions might well apply. Where exceptions or conditions are invoked to defeat a claim the vehicle owner has usually committed a flagrant breach. A clearer understanding of their rights and obligations by vehicle owners is desirable. If careful investigation of claims can induce a more responsible attitude to these obligations it will be to the benefit of all — insured, insurers and the public at large.

1 [1967] N.Z.L.R.530
2 s.55(2) of the Transport Act 1962 reads:
(2) Every person commits an offence who, while under the influence of drink or a drug to such an extent as to be incapable of having proper control of the vehicle, is in charge of a motor vehicle and by an act or omission in relation thereto causes bodily injury to or the death of any person.
3 [1936] A.C.159
4 *supra*
5 [1966] 1 Lloyd's Rep. 123 (Q.B.D.), 407 (C.A.)
6 *ibid,* 412.
7 See also *Liverpool Corporation* v. *T. & H. R. Roberts* [1964] 3 All E.R.56
8 [1966] 1 Lloyd's Rep. 407, 414
9 But see *F.A.M.E. Insurance Co. Ltd.* v. *McFadyen* [1961] N.Z.L.R.1070. A breach of this kind depends on there being some moral obliquity on the part of the insured. It is suggested that the relation of alcohol to bad driving is so commonly known that moral obliquity will be easily inferred from a false answer to a pointed question on this subject.
10 *supra*
11 [1954] 2 Lloyd's Rep. 243
12 *ibid,* 246
13 [1963] 2 Lloyd's Rep. 415
14 *ibid,* 417
15 [1963] 2 Lloyd's Rep. 35
16 *supra*