Case Notes

The Standard of Knowledge Required Under Statutory Motor Vehicle Insurance Policies — *Evans v Accident Insurance Mutual Holdings Ltd*

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The recent decision of the Queensland Court of Appeal in *Evans v Accident Insurance Mutual Holdings Ltd*[1] has clarified the interpretation of statutory insurance policies over motor vehicles in Queensland, although it is uncertain whether this interpretation will be upheld in future cases. This case is particularly important as it concerns a common factual situation, and affects all standard form policies of insurance over motor vehicles in Queensland.[2]

I. Material facts and the statutory framework of the decision

The female plaintiff Evans lived with the male defendant Hausler. The plaintiff was the registered owner of a motor vehicle over which a statutory policy of insurance had been effected. On 10 January 1992, the plaintiff drove herself and the defendant to 'a hotel for an intended interval of drinking and enjoyment'.[3] Over the next five hours, the defendant and the plaintiff did not spend a lot of time together. The plaintiff gave evidence that she consumed a large amount of alcohol that evening but was not aware of the extent to which the defendant was drinking, although she noticed that he was drinking reduced alcohol beer. At about 1 am, the defendant and the plaintiff left the hotel to go home in the car, with the defendant driving and the plaintiff travelling as a passenger. An accident ensued due to the defendant's negligent driving and the plaintiff sustained personal injuries. The blood alcohol content of the plaintiff was estimated at around 0.06%, whilst the blood alcohol content of the defendant at the time of the accident was estimated at 0.218%.[4] The plaintiff subsequently brought an action for damages against the defendant and the insurer of the vehicle, Accident Insurance Mutual Holdings Ltd ('the insurer'), as the defendant by election.

The action was conducted under the statutory framework of the *Motor Vehicles Insurance Act 1988* and the Motor Vehicles Insurance Regulations 1968. Of particular relevance were Regulations 17 and 13(2)(b). The former provides:

> Notwithstanding that by reason of the provisions of a contract of insurance or policy or these Regulations and the circumstances of the case in question an insurer could, but for this regulation, avoid his liability under such contract to indemnify the insured person concerned upon a claim made thereunder by the insured person, the insurer —
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> (a) May exercise the powers and authorities conferred upon him by Reg 10 and Reg 11 of these Regulations; and

1 Unreported — BC9703816 — Appeal No 249 of 1995, 8 August 1997.

2 The Regulations that were interpreted in this decision are incorporated in all standard form insurance policies under Regulation 3 of the Motor Vehicles Insurance Regulations 1968, which requires policies to be in the standard form, and thus subject to the Act and Regulations and any otherwise consistent endorsements.

3 per Macrossan CJ at 3.

4 per Macrossan CJ at 4 — this figure was calculated as the defendant had a reading of 0.178% when a test was performed over an hour and a half after the accident occurred.

(b) Shall be subject to the liabilities and obligations imposed upon him by Reg 11 and Reg 12 of these Regulations, the provisions whereof may be enforced against him according to their terms, and for these purposes the insurer shall be deemed to be liable under the contract to indemnify the insured person concerned.

If, in such a case, the insurer pays any sum by way of settlement of any proceeding or to satisfy any judgment or order made or entered against him then he may, by way of action in any court of competent jurisdiction, recover that sum, as a debt due and owing but unpaid, from the insured person whose default constitutes the circumstances by reason whereof the insurer could, but for this regulation, have avoided his liability under the contract of insurance but only if the default is such that the court in which the proceeding for such recovery is taken is satisfied that it contributed in a material degree to the circumstances in which the insurer agreed to pay or otherwise became liable to pay that sum.

In effect, where there has been a breach by an insured person of a provision of the contract of insurance, the issued policy or the Regulations, Reg 17 deems the insurance cover to continue but gives a consequential right of recovery by the insurer against the insured.[5] To fall within the purview of Reg 17, and thus recover against the plaintiff, the insurer relied upon an alleged breach by the plaintiff of Reg 13(2)(b). This 'Repugnancy Regulation' provides that:

(2) An insured person shall not —

(b) Permit or suffer another who is under the influence of intoxicating liquor or a drug to drive or be in charge of a motor vehicle in respect of which he is an insured person.

The insurer submitted that, as the plaintiff had permitted or suffered the defendant who was under the influence of intoxicating liquor to drive and be in charge of the car in respect of which the plaintiff was insured, the insurer was able to recover against the plaintiff under Reg 17. No other default by the plaintiff was relied upon by the insurer. The onus lay on the insurer to establish that Reg 13(2)(b) had been breached and, further, that under Reg 17 this breach 'contributed in a material degree to the circumstances in which the insurer . . . became liable to pay'.

II. Decision at first instance and the issues on appeal

At first instance, the trial judge assessed damages at $56,149.50 which he reduced to $37,433.00 owing to the plaintiff's contributory negligence in travelling in a car driven by the defendant when his capacity to exercise proper control was affected by alcohol and, further, because the plaintiff was travelling without her seat belt secured when the accident occurred.[6] The trial judge further found that the plaintiff, within the meaning of Reg 13(2)(b), permitted or suffered the defendant who was under the influence of intoxicating liquor to drive the car in respect of which she had a policy of insurance. The trial judge opined that the appropriate test of knowledge under Reg 13(2)(b) was what the insured actually knew *and* that which she ought to have known, in effect an objective test of knowledge.[7] Here, the trial judge concluded that the plaintiff 'could and should' have observed the effects of alcohol upon the defendant, and that the plaintiff would have been in a position to make these observations if she had not by her own consumption of alcohol

5 per Macrossan CJ at 2; for a discussion of the rationale behind this Regulation see Pincus JA, pp.2–3; *Hanak v Green* [1958] 2 QB 9 at 16 (cited in judgment).

6 There was no appeal by the plaintiff against this finding of contributory negligence and the insurer did not cross-appeal against the judge's dismissal of a defence of volenti on fit injuria raised at first instance.

7 Canadian authorities in favour of this approach include *Storrie v Newman (No 1)* (1982) 139 DLR (3d) 461; *Bitz v Northwestern Mutual Insurance Co* (1966) 58 DLR (2d) 344; contra *Grays Haulage v Arnold* [1966] 1 All ER 896, per Lord Parker.

deprived herself of the capacity to do so.[8] Accordingly, the trial judge allowed the insurer's counter-claim, concluding that the plaintiff did permit or suffer the defendant to drive the car whilst under the influence of alcohol, thus breaching Reg 13(2)(b), and allowing the insurer to rely upon Reg 17. The amount assessed as recoverable by the plaintiff with costs was balanced by a judgment on the counter-claim in favour of the insurer. In effect, the insurer had the right to recover from the plaintiff whatever might be paid to her under the judgment entered on her claim.

There were three major issues on appeal from this decision:

(1) whether the plaintiff and the defendant were co-owners of the vehicle
(2) whether the plaintiff did permit or suffer the defendant, who was under the influence of alcohol, to drive the car and thus breach Reg 13(2)(b), and
(3) if it is concluded that Reg 13(2)(b) was breached by the plaintiff, whether this breach contributed 'in a material degree' to the insurer's liability sufficient to invoke the operation of Reg 17.

III. The decision of the Court of Appeal

The majority of the Court of Appeal, consisting of Macrossan CJ and Fryberg J, allowed the plaintiff's appeal, Pincus JA dissented. The Chief Justice was the only judge who considered all three issues outlined above in detail.

1. The first issue — ownership of the vehicle

The question of ownership of the vehicle is relevant to the extent that, under Reg 13(2)(b), it is not possible for one owner to refuse permission to another owner to use the car. Thus, if the defendant had also owned the vehicle, the plaintiff may not have been able to refuse him permission to drive it and consequently could not have been in breach of Reg 13(2)(b). Accordingly, the insurer would not have been able to rely upon this breach to invoke the operation of Reg 17 and claim against the plaintiff.[9]

On appeal, Macrossan CJ, with whom Fryberg J agreed, accepted that the plaintiff was the registered owner of the vehicle under the relevant legislation. However, his Honour criticised the trial judge's assumption that, as the car was registered in the plaintiff's name, she also owned the car 'at law' to the exclusion of the defendant. Rather, the Chief Justice declared that, in light of the arrangements which existed between the defendant and the plaintiff, the defendant should also have been regarded as an owner of the vehicle, even though he was not a registered owner.[10] Pincus JA, although dissenting on the second issue below, agreed with the majority that the trial judge's conclusion in this respect was erroneous, and that both the plaintiff and the defendant were owners of the vehicle.

8 There is no (express) evidence of the trial judge passing moral judgment on the plaintiff, or questioning her prudence in drinking to excess on the relevant evening.

9 In relation to the conflicting evidence heard in the court below, and the procedural issue of amending the notice of appeal to include the question of ownership, see the judgment of Fryberg J at 1–5.

10 At 5–6. In particular, his Honour referred to the unchallenged facts raised in the court below: the parties were living in the same house, the vehicle was purchased by a joint contribution of funds with the defendant contributing a greater amount than the plaintiff, the car was put in the plaintiff's name by agreement between the parties at the time of acquisition (as the defendant was disqualified from holding a licence, and the car could not be registered in his name,) each kept separate possession of a key to the car and the defendant would drive it sometimes. Further, in an answer to an interrogatory, the plaintiff stated that she and the defendant 'owned the vehicle jointly' and that the agreement between them was 'that at the end of the joint ownership, whoever wanted it would buy out the other person's ownership'.

2. *The second issue — did the plaintiff permit or suffer the defendant to drive — the standard of knowledge required under Reg 13(2)(b)?*

Macrossan CJ again criticised the reasoning of the trial judge on this issue, in particular for reading 'a great deal' into Reg 13(2)(b). His Honour asserted that there was nothing on the face of this regulation which suggested that there should be imputed to the plaintiff facts of which she was not aware but of which she ought to have been aware. 'To do this would read words into the regulation in a manner for which there is no justification and would transform the proper meanings of the words "permit" and "suffer"'.[11] Further, such an interpretation would introduce 'a vague test based upon a notion of morally or socially correct behaviour for the purpose of deciding upon the extent of imputed knowledge'.[12] Macrossan CJ advocated a more subjective approach:

> People permit or suffer actions only if they are aware of the actions in which they are acquiescing. There is thus no impossibly high level of vigilance thrust upon insured persons . . . The regulation does not oblige an insured to withhold permission or refrain from suffering the action because there is a possibility that the driver thus authorised may be intoxicated at a time when he (sic) might be driving[13]

Thus, Reg 13(2)(b) requires that the insured person must 'either know that the time at which or the period for which acquiescence is given is a time or period when the permittee is or will be under the influence or he must know facts from which it must be concluded that he knew the permittee was or would be under the influence'.[14] These are questions of fact, and his Honour concluded that the plaintiff did not fall within the ambit of Reg 13(2)(b).[15] Thus on this ground, the decision of the trial judge could not stand and the appeal was allowed.

The second member of the majority, Fryberg J, did not consider this issue in detail and was content to resolve the appeal on the first issue of co-ownership. Although he expressed general agreement with Macrossan CJ, Fryberg J's 'only reservation' was with regard to the question of the construction of Reg 17, which he suggested should be left for another day. In relation to Reg 13(2)(b), his Honour stated that, even if his view of this regulation had differed from that of the Chief Justice, he would not have dismissed the appeal, on the basis of the lack of proof of actual knowledge of intoxication on the part of the plaintiff. Further, Fryberg J emphasised the inappropriateness of the conduct of the insurer in previously informing the plaintiff that it would not rely upon the words 'or ought to have known' by a letter sent before the trial.[16]

In his dissenting judgment, Pincus JA placed more emphasis on the wording of the Regulations surrounding Reg 13(2)(b).[17] He concluded that 'it is not fanciful to treat as within the regulation maker's intention that para (b) should apply where the insured person's own intoxication was the reason why she did not know of the driver's intoxication'.[18] Thus, 'where the driver is manifestly intoxicated at the time the permission is given, that is properly described as permitting one who is under the influence of

11 per Macrossan CJ at 11.
12 per Macrossan CJ at 12.
13 per Macrossan CJ at 10.
14 At 13–14; he distinguished a South Australian town planning case — *Wright and Romeyko v The Corporation of the City of West Torrens* 8 May 1996, unreported decision of the SA Supreme Court, Full Court, where it was suggested in obiter that in some contexts knowledge refers to what is known or ought to have been known.
15 Macrossan CJ emphasised that the plaintiff did not remember most of the evening in question, and the fact that there was no arrangement between the parties that the defendant was to drive home that evening. Further, the plaintiff was not aware of the amount that the defendant drank, and did not notice signs of intoxication during her brief contacts with the defendant throughout the evening. The plaintiff's 'own consumption of liquor as the evening progressed deprived her of capacity to make a reasonable assessment of the defendant's sobriety' (p.6).
16 per Macrossan CJ at 6.
17 In particular, Regulations 13(2)(a), 13(2)(c) and 13(2)(d); contra Macrossan CJ at 12–14.
18 per Macrossan CJ at 18.

intoxicating liquor to drive, even if the person giving the permission for some reason fails to notice the prospective driver's condition'.[19] Further, despite concluding that the plaintiff and the defendant were co-owners, Justice Pincus rejected the argument that the plaintiff was not able to refuse the defendant permission to drive. The defendant was not lawfully entitled to drive on the ground of both his intoxication and his lack of a licence and thus had 'at the relevant time no present right, either as against the plaintiff or anyone else, to drive the vehicle'.[20] By getting into the passenger seat of the car and allowing herself to be driven off by the defendant, the plaintif permitted or suffered him to drive at a time when he was plainly intoxicated. The insurer was accordingly entitled to invoke Reg 17 against the plaintiff.

3. The third issue — whether this breach contributed in a material degree to the insurer's liability

The final issue on appeal was whether, if the plaintiff did permit or suffer the defendant to drive the car, that acquiescence contributed in a 'material degree' to the liability of the insurer that resulted from the accident. As the appeal on the second issue was allowed, it was not strictly necessary to consider this issue but Macrossan CJ ruled that the basis for the trial judge's finding on this issue was also insufficient as he did not precisely determine whether it was the giving of permission or the suffering which resulted in the judgment in the plaintiff's favour.[21] Flowing from his first conclusion that the parties were co-owners in fact of the car, the defendant should properly be regarded as a person who, under an arrangement in place between the parties, had a right equal to that of the plaintiff to have the vehicle when he desired it.[22] Whether or not the plaintiff gave permission, the defendant would have driven anyway, and the insurer would have been liable for the consequential damage to the car under the insurance policy over the vehicle.[23] Thus, in the alternative, the majority of the Court of Appeal held that any breach of Reg 13(2)(b) did not contribute in a material degree to the liability of the insurer under the policy. By contrast, Pincus JA in dissent, whilst not canvassing this issue in great detail, concluded that the breach did contribute in a material degree to the circumstances in which the insured became liable to pay the sum awarded to the plaintiff.

IV. The conclusion of the Court of Appeal

The majority of the Court of Appeal concluded that the trial judge, in making his declaration against the plaintiff on the counter claim, 'proceeded on a basis not fully justified by the state of the evidence'.[24] In these circumstances, the majority concluded that no right of recovery by the insurer against the plaintiff arose under Reg 17. The

19 per Pincus JA at 19; in reaching this conclusion, his Honour relied on the English decision of *McLeod v Buchanan* [1940] 2 All ER 179, referred to with approval by the High Court in *Proudman v Dayman* (1941) 67 CLR 536 per Rich ACJ at 539 (contra Dixon J at 541); also see *Peterson v Curran* [1950] Tas SR 9.

20 per Pincus JA at 20; On this issue, his Honour approved the judgment of Hart J in *Kirth v Tyrrell* [1971] Qd R 453 at 459 that one co-owner of a vehicle has the right to require another co-owner 'not to risk damage to the commonly owned chattel by driving dangerously or negligently'.

21 His Honour stated that there was no doubt of the defendant's intoxication. Further, it was clear that the accident, the injury and the judgment in the plaintiff's favour for damages were all contributed to in a material degree by the defendant's act of driving (pp.8–9, 14).

22 There was no reason to assume that the defendant would not have driven even if the plaintiff had not permitted or suffered him to drive on the night in question, or that the plaintiff's permission had no obvious bearing on the defendant's determining to drive.

23 Although the plaintiff's action in travelling in the car when it was driven by the defendant materially contributed to her damages, that was not the default in question — no provision of the Act, regulations or policy was breached by the plaintiff travelling in a car driven by an intoxicated driver.

24 per Macrossan CJ at 9; note that a consideration against remitting the matter to the Supreme Court for consideration was that the trial judge made reasonably full findings on facts where the plaintiff's credit was involved and the defendant did not give evidence at trial.

plaintiff's appeal was allowed with costs. The stay of execution against the plaintiff and the declaration and judgment in favour of the insurer as defendant by election were all set aside. Judgment was entered for the plaintiff on the counter claim and for payment by the insurer of the plaintiff's costs of the counter claim.

V. Conclusion

The decision of *Evans v Accident Insurance Mutual Holdings Ltd* is significant in the evolution of judicial interpretation of the *Motor Vehicles Insurance Act 1988* and the relevant Regulations. However, the judges in the Court of Appeal were divided, with one judge deliberately reserving his opinion on the interpretation of the Regulations at issue, and the authority and persuasiveness of the case is accordingly weakened. In summary:

* Macrossan CJ advocated a more subjective test of knowledge, excluding what the insured person ought to have known;
* Pincus JA posited a more objective test of knowledge, including what the insured person ought to have known; and
* Fryberg J did not expressly endorse either position.

With the retirement of Macrossan CJ, it will be interesting to see which interpretation of Reg 13(2)(b) the Supreme Court will adopt in future cases, which, it is submitted, will undoubtedly arise. All insured persons, under standard form policies over motor vehicles in Queensland, would be wise to ensure that the 'designated driver' after an evening of frivolity has in fact abstained from alcohol during the evening or to pursue alternative ways home.