In The Supreme Court of Bermuda

CIVIL JURISDICTION

2012: No. 6

BETWEEN:

KATE THOMSON **Plaintiff**

-v-

JAMES THOMSON

1st Defendant

-and-

COLONIAL INSURANCE COMPANY LIMITED

2nd Defendant

JUDGMENT

(in Court)

Date of trial: May 13-15, 2013

Date of Judgment: June 14, 2013

Mr. Paul Harshaw, Canterbury Law Limited, for the Plaintiff
Mr. Jai Pachai, Wakefield Quin Limited, for the 1st Defendant ("the Insured")
Mr. Craig Rothwell, Cox Hallett Wilkinson Limited, for the 2nd Defendant ("the Insurer").

Introductory

1. At approximately 12.30 am on Sunday January 15, 2006, the Plaintiff was seriously injured in a motor accident involving a car driven by her husband and in which she was a front seat passenger. Her husband, the 1st Defendant ("the Insured") was insured under a Private Car Insurance Policy ("the Policy") issued by the 2nd Defendant (the Insurer").

2. The Insured formally filed a claim under the Policy on March 31, 2006 although it was common ground that he had verbally put the Insurer on notice of a possible claim roughly two weeks after the accident occurred. The Insured informed the Insurer that he was likely to be charged with a drink driving offence before he was first charged in Court on March 14, 2006. He denied the charges of impaired driving and driving with excess alcohol and at his trial on June 7, 2006, the charges were dismissed seemingly because the Prosecution offered no evidence.

3. Thereafter, in the course of 2006 and 2007, the Insurer made various payments in respect of the Insured's direct claim under the Policy and the Plaintiff's third party claim. The first payment made in respect of the Plaintiff's claim was expressly made without admission of liability; thereafter payments described as "interim payments" were made without any such express reservation of rights. The Plaintiff and the Insured left Bermuda and returned to South Wales and attempts to finally settle the Plaintiff's claim bore no fruit. On December 20, 2011, just under a month before the limitation period expired, the Plaintiff's attorneys warned the Insurer that it was proposed to issue a writ in respect of her claim.

4. By way of response to this communication, the Insurer for the first time expressly denied liability under the Policy by letter dated December 21, 2011 on the grounds that:

    (a) the Insured was found to be above the drink/drive limit after the accident;

    (b) the Insured had failed to report the accident within the time mandated by the Policy.

5. The Insurer also pointed out in the same letter that it was not satisfied that the Plaintiff was wearing a seat belt at the time of the accident and that it was accepted that, even if it was entitled to avoid the Policy as against the Insured, it was required

by Bermuda law to pay the Plaintiff up to $125,000. Because of the conflict between the Insured's obvious interest in having his wife's claim met under the Policy and the Insurer's interest in avoiding such liability, the Insurer did not propose to follow the usual course of instructing lawyers to conduct the Insured's defence of the threatened claim. After the commencement of the present proceedings, the action has advanced with due despatch.

6. The Plaintiff's Generally Indorsed Writ, filed the previous day accompanied by her Statement of Claim, was issued on January 6, 2012. The Insured was the only named Defendant. However, on March 8, 2012, Ground CJ joined the Insurer to the action as Second Defendant. On September 12, 2012, Hellman J gave directions for a split trial on liability and quantum. The Insured entered the matter for trial on April 4, 2013 and a Notice of Hearing for the effective trial date was issued by the Registrar on April 5, 2013.

7. The Insurer accepted that the Plaintiff's injuries were caused by the Insured's negligence. At the commencement of the trial, it was common ground that the following issues fell for determination by the Court:

    (1) whether the Plaintiff was wearing her seat-belt at the time of the accident (even though this issue strictly went to quantum rather than liability);

    (2) whether the Insurer was entitled to avoid liability under the Policy because the Insured failed to give timely notice of his claim;

    (3) whether the Insurer was entitled to avoid the Policy because the Insured at the time of the accident was driving in breach of Bermuda's Road Traffic Act 1947 by:

        (a) exceeding the speed limit, and/or

        (b) driving with excess alcohol in his blood;

    (4) whether the Plaintiff's damages are liable to be reduced by reason of her contributory negligence in allowing the Insured to drive her when she knew he was over the limit;

    (5) whether the Insurer is estopped from avoiding liability on either of grounds (2) or (3).

8. At the end of the trial I invited counsel to file supplementary written submissions on the question of whether or not it was open to a civil court to make findings that a Road Traffic Act offence had been committed in circumstances where the relevant

charge had been actually laid before a competent court and dismissed. This issue appeared to me to be potentially relevant, if not as a free-standing point, to the Court's assessment of the Insured's submissions that either (a) the Insurer had waived the right to avoid the Policy on the stated grounds, or (b) as a matter of public policy, the general words of the exclusion clause relied upon should be construed narrowly with a view to amplifying rather than limiting the scope of protection provided to third parties under the Policy.

Findings: credibility of the Plaintiff and the Insured as witnesses

9. The Plaintiff and the Insured have a significant financial interest in the outcome of the present litigation and their evidence was in many significant respects inconsistent with independent contemporaneous documents. It was obvious to me that that they were both generally honest and decent people. However, the content of their evidence combined with their manifest interest in recalling events in a way which supported rather than undermined their claims causes me to approach the controversial aspects of their evidence with some care.

10. In short, neither party's evidence (in particular the Insured's) was easy to accept at face value in its entirety and it is entirely understandable if the Insurer flip-flopped between seeking to assist a sympathetic couple and having grave doubts about certain aspects of the Insured's claim. The Insured appeared to me to be devoted to his wife and determined at all costs to put right a situation in which she had been seriously injured as a result of his own negligence. In addition, his carelessness when completing two insurance application forms (which under cross-examination he was forced to admit contained serious inaccuracies) created the impression that he was not a witness with a refined appreciation of the importance of the objective truth.

Factual findings: was the Plaintiff wearing a seatbelt at the time of the accident?

11. On a balance of probabilities, I find that the Plaintiff was not wearing her seat-belt at the time of the accident. The Plaintiff and the Insured agreed that the passenger seat she was in as the couple drove home in stormy conditions was inclined backwards and she had her left foot on the dashboard as she removed her right boot, which had filled with rainwater as she walked from the restaurant to the car. Even if the Plaintiff ordinarily fastened her seatbelt, it would be entirely understandable if she undid her seat belt to carry out the unusual manoeuvre with her brand new footwear that she felt compelled to undertake. By her own admission and as confirmed by her hospital records, she had consumed around four drinks in the course of the evening.

12. Most significantly, the documentary records closest to the time of the accident are unanimous that the Insured initially stated that the Plaintiff's seatbelt was not on when the accident occurred. The most contemporaneous record is the notes of the Surgical

Officer, Dr. Joseph, apparently recorded at around 3.45 am. After describing various symptoms and before proceeding to list the Plaintiff's medical history, he recorded: "*Was not wearing a seat belt.*" The Plaintiff denied saying this at all; however she added that by this time (nearly two hours after her arrival at the Hospital), she had been given morphine; implying that she might have said anything without being aware of what she was saying. She did not point to any other inaccuracies in this medical record which she conceded contained other information she could have supplied.

13. The Insured gave a witness statement to the Police on January 24, 2006, nine days after the accident. The statement records in very clear terms the following:

> "*Kate had her seat reclining back and was taking off her boot. She did not have her seat belt on at the time. And I had mine over my shoulder.*"

14. The Insured could offer no convincing explanation as to why he would have said the Plaintiff's seat belt was not fastened if the true position was that she was wearing the seat belt at the material time. He could only suggest that he might have been misunderstood. This did not seem to me to be very convincing as he did not challenge the accuracy of the sentences preceding and following the reference to the Plaintiff not wearing a seat belt. Moreover, the Plaintiff's own attorney, writing the Insurer's attorneys on May 15, 2007, referred to the Insured's statement to the Police on this issue in terms which are inconsistent with the proposition that the crucial assertion was never made:

> "*Mrs. Thomson is adamant that she did in fact have her seatbelt on but states that after the collision when Mr. Thomson observed her great pain, he undid her seatbelt. Mr. Thomson's recollection now does not seem to be clear on the issue.*"

15. In the witness box, the Plaintiff was not "adamant" that she now recalled that she had her seatbelt on. Rather, she very honestly said that it was something that she automatically did. I have no doubt that this is true 99.9% of the time. But by her own account on the evening in question she was not only intoxicated; she was also upset because her brand new boots were being ruined by rain water. At the time of the accident, she was doing something obviously awkward to do with a seat belt fastened when sober, let alone while tipsy. In addition, a doctor, under a duty to record accurate notes on an occasion when a seriously injured patient (or their spouse) would likely have a strong motive to give accurate particulars of their situation, recorded that she was not wearing a seat belt at the time of the accident, a point on which the earlier nurse's notes were silent. Nine days later, after her husband had had time to reflect on the issue, he told the Police in a statement which he signed that she was not wearing a seat belt when the accident occurred.

16. If the Plaintiff ordinarily wore a seat belt, it seems most improbable that her husband would remember more clearly years later when preparing his witness statement for trial that his wife was, as usual, wearing a seatbelt at the time of the accident, having stated the opposite to the Police shortly thereafter. It seems even more improbable that the Police and the Surgical Officer would have made the same mistake and inaccurately recorded what they were told about the seatbelt issue.

17. Accordingly, I am bound to find that the Plaintiff was not wearing a seatbelt at the time of the accident itself.

18. Mr. Rothwell submitted that a further reduction in damages should be made in accordance with the guidelines in *Froom-v-Butcher* [1976] QB 286 but did not invite the Court in the context of the present trial on liability to determine what the percentage deduction ought to be. I leave any such determination to the assessment of damages phase of the present action or, should counsel so request, by way of findings supplementary to the present Judgment.

19. My provisional view is that the Plaintiffs' injuries would nevertheless have been sustained even if she had been wearing a seatbelt and that expert evidence would be required to determine to what extent, if any, the absence of the seatbelt aggravated the injuries she sustained.

Findings: did the Insured fail to notify his claim within a reasonable time?

<u>The relevant obligation</u>

20. Section 4 ("General Conditions") provides as follows:

> "(5) *When an accident, injury, loss, or damage occurs, you must advise Colonial in writing as soon as possible.*
>
> *In addition, Colonial must be advised immediately of:*
>
> *(a) any letter, claim, writ, or summons whether civil or criminal received by you or any other person covered by this Policy;*
>
> *(b) any impending prosecution, coroner's inquest, or fatal accident inquiry involving any person covered by this Policy.*"

21. Paragraph (1) of the General Conditions provides in salient part as follows:

> "*Colonial will only pay the insurance described in this Policy if-*

(a) *any person claiming the indemnity has complied with all its terms, conditions and endorsements...*"

22. There are two distinct notification requirements potentially relevant to the present claim, one expressed in more flexible terms and the second in more strict terms:

    (a) the duty to advise the Insurer of an accident "*in writing as soon as possible*";

    (b) the requirement that the Insurer "*be advised immediately of...any impending prosecution*".

23. The duty to advise the Insurer of a pending prosecution is expressed in more urgent terms than the requirement to give written advice of an accident, and need not be in writing. The only point taken, however, is that the Insured failed to give written notice of the accident itself "as soon as possible". This is probably because, sensibly construed, the clause of the Policy requiring immediate notification of any pending prosecution is only engaged after a written notification of claim has been furnished.

When notification in writing occurred

24. It is common ground that the Insured completed his claim form on or about March 31, 2006, approximately 2 ½ months after the accident. The Insured's evidence that he verbally advised the Insurer of the accident and the fact that he had been charged by the Police around the end of January was not directly contradicted by any other evidence.

25. Ms. Deshield, the Claims Supervisor who dealt with him, accepted that this may have occurred under cross-examination. In her Witness Statement the Claims Supervisor, who understandably made no notes when the Insured dropped to see her on an impromptu basis, admitted he might have mentioned having to go back to "see" the Police. Her notes recorded that she was told on March 31, 2006 that the Insured had been charged in Magistrates' Court on March 7 with a drink driving offence and was due to be tried in June.

26. The best available evidence as to the history of the Traffic offences comes from the Police and the official record itself. Based on this evidence I find that the Insured was in fact charged by the Police on January 24, 2006 and charged in Court on March 14, 2006. I find that the insured notified the Insured that he was due to be charged in Court approximately seven days after he was charged by the Police. I find that the Insured first became aware of the fact that he would be charged on the same date when he answered bail, was told the results of his alcohol level tests and was charged by the Police.

27. Accordingly, I find that he verbally advised the Insurer of the pending charges approximately seven days after becoming aware of them. Although he may have been somewhat inarticulate and incoherent, I am satisfied that the Insured effectively communicated the fact that he might be convicted of a traffic offence of some description at this initial impromptu meeting. The effectiveness of this communication in my judgment is not diminished by the fact he failed to disclose the accident (possibly simply by ticking the wrong box) when applying for a new policy for a new car on or about February 15, 2006.

When was notification required?

28. The Insurer's case on late notice is notable for its lack of specificity. The Insurer's pleaded case is that the Policy was issued on June 25, 2005; I assume that the policy period was the usual Bermudian policy period for motor policies of one year. So the claim was formally made and notice formally given well within the policy period. No or no clear evidence was adduced as to what it considered to be a reasonable period of time within which to file a formal claim. Nor was there any credible prejudice to the Insurer in its ability to handle the present claim which flowed from the delay advanced.

29. Ms. Deshield implied that it was commonplace for clients to make a tentative verbal report of an accident and to go away and think about whether to make a formal claim. The Insured's evidence that the Claims Supervisor told him at their first meeting to go away and come back after the position of his wife (then still in hospital) and his traffic charges was clearer and had the ring of truth to it. This would have been a humane thing for the Claims Supervisor to have done in the circumstances and would only have reflected well on the Insurer's business ethics.

30. I am unable to make any finding as to what was the usual or typical time-frame within which formal claims would be made after road accidents because no evidence was adduced by the Insurer in this regard. Interestingly, the Claims Supervisor gave no hint that she warned the Insured that if he wished to make a formal claim he should do so within a specified period of time.

31. Mr. Pachai rightly submitted that "*as soon as possible*" should be construed as meaning "*as soon as possible in the circumstances which prevail and apply to*" the Insured: *Veralst's Administratrix-v-Motor Union Insurance Company, Limited* [1925] 2 KB 137 at 142. This common sense principle of longstanding is further illustrated by the following observations of Gloster J (as she then was) in a case not referred to in argument which dealt with a more sophisticated commercial reinsurance context:

> "*60. ...as was said in Fraser v B. N. Furman (Productions) Ltd, Miller Smith & Partners (A Firm) Third Party [1963] All ER 57 per Diplock LJ at 60 H-I), "'as soon as practicable' is as between assured and insurer*

having regard to the commercial purpose of the contract". Thus, in practice it would be rare, I suspect, for notice of circumstances given within the policy period to be rejected on the grounds that it had not complied with the requirement to provide notice as soon as practicable, although, of course, that is one of the points that is being taken here."[1]

Conclusion

32. Having regard to (a) the seriousness of the injuries suffered by the Plaintiff, the Insured's spouse, (b) the reasonably prompt informal verbal notification of the accident and pending drink driving charges, (c) the lack of any evidence that the written claim was made unreasonably late by reference to the time within which similar claims were ordinarily made, and (d) the absence of any real prejudice flowing from the comparatively short delay belatedly complained of, I find that the Insurer is not entitled to avoid liability on the grounds of late notice of a claim which was formally given less than three months after the relevant accident occurred.

Findings: interpretation of limitation of liability terms in Section 2 of the Policy in respect of contraventions of the law

The Policy wording

33. Section 2 ("Liability to Third Parties") of the Policy provides as far as is relevant as follows:

> "*Colonial will indemnify you against your legal liability arising out of an accident in connection with your car for*
>
> *an amount of up to BD$5,000,000(Five Million Dollars) in respect of the total claims arising out of any one accident and/or series of accidents arising out of one event (inclusive of Legal Fees; Costs and Expenses covered by this Policy*
>
> *but subject to*
>
> *a limit... of BD$250,000...in respect of liability for damage to property*
>
> *providing that the vehicle is not being driven or used in contravention of any law.*
>
> *However, in the event of Colonial being required to indemnify you for such liability arising solely because of the requirements of the Motor Car*

[1] *HLB Kidsons (a Firm)-v-Lloyds Underwriters* [2007]EWHC 1951(Comm).

Insurance (Third Party Risks) Act 1943, then the minimum limits as required of an insurance policy by that Act shall apply." [emphasis added]

34. The Insurer denies liability under the policy on the grounds that it is open to this Court to find that at the time of the accident the Insured was committing one or more offences under the Road Traffic Act 1947 notwithstanding the fact that he was not convicted of any such offences by the competent court (the Magistrates' Court). The Insured and the Plaintiff invite the Court to construe the relevant exclusion clause narrowly against the Insurer in whose standard form document the words appear. There were two opposing constructions:

    (a) the Insurer contended that according to its terms the Policy ought to be construed as excluding liability (save as regards statutory liability under the 1943 Act) both:

        (i) in circumstances where the Insured was convicted of speeding or driving under the influence, and
        (ii) in circumstances where the Insured had not been convicted of any such offence but this Court was satisfied on a balance of probabilities that such offences had been committed;

    (b) the Insured contended that the relevant clause was ineffective on public policy grounds because it narrowed the Insurer's liability to an unreasonable extent. The only sort of offence which could permissibly exclude liability was one which took the event upon which the claim was based outside of the parameters of an "accident".

35. In the course of closing submissions, I put to counsel an intermediary construction and invited supplementary submissions on the issue. That was, in effect, that the exclusion only applied to the extent that the Insured was convicted of a traffic offence; but if he was not, it was not open to this Court to determine a breach of the 'criminal' law in the context of civil proceedings. It seemed to me that civil courts ought ordinarily only be required to determine civil law issues which may correspond with criminal offences (e.g. negligent driving/ careless driving) as opposed to making primary findings as to whether or not a criminal offence had been committed.

36. Or, to put it another way, it seemed to me to be at first blush an improbable interpretation to place on the exclusion clause that the Insurer was entitled to avoid liability not simply if the Insured was convicted of committing some relevant offence at the material time: but, in addition, if the Insured was either not charged at all or charged and acquitted, the Insurer could seek to prove to the civil standard of proof that he had in fact committed the relevant offence in any subsequent civil proceedings as well.

Relevant legal principles

37. Mr. Pachai submitted that the governing common law public policy principle was that an insured could not recover under a policy for their intentional criminal acts. But in the context of motor car insurances policies, this exclusion was narrowly construed because of the countervailing public policy interest in insurance protection being available in relation to accidents. He invited the Court to construe the Policy in a similar manner, in reliance upon the following passages in '*MacGillivray in Insurance Law*', 12th edition, at paragraph 14-047:

> "*Although a man cannot recover an indemnity in respect of the consequences of his own criminal act intentionally committed, he may nevertheless be entitled to recover in respect of liability accidentally and unintentionally incurred while committing a statutory offence as, for instance, in respect of an accident happening whilst the assured was driving his car in excess of the statutory speed limit, or even whilst the assured was driving his car recklessly because he was drunk...*
>
> *The motor insurance cases must be seen as an instance where the overwhelming requirement of public policy is that insurances against casualties inflicted by the wrongdoer must be fully effective (short of the point where the assured actually inflicts damage on purpose) especially where the position of the innocent victims of dangerous drivers is considered...*"

38. Having regard to the provisions of the Motor Car Insurance (Third Party Risks) Act 1943, it is for Parliament to determine what the minimum protections for third parties ought to be. I would be reluctant, since Parliament has assumed responsibility for establishing the minimum protection which ought to be afforded to third parties by insurers who may contractually be able to limit their liability to their own policyholders, to engage the same public policy concerns in construing the terms of the Policy in the present case. The time may well be ripe for Parliament, if it be right that the present financial limits were fixed more than two decades ago, to consider elevating the minimum obligation owed by insurers to third parties, contract apart.

39. However, the Insured's counsel's primary submission was that the clause was simply too broad in its potential scope as potentially any even trivial contravention of the law would suffice to exclude liability. Accordingly, the following principles articulated in '*Chitty on Contracts*', 13th edition, paragraph 41-058 ought to be applied against the construction contended for by the Insured:

> "*There is one rule of construction applicable to ordinary contracts which applies with particular force in the context of insurance contracts, namely that verba chartarum forties accipiunter contra proferentem: i.e. where*

> *the contractual provision is ambiguous, the provision will be construed against the person who drafts or puts forward the provision, which in many (but not all cases) will be the insurer. The construction of terms 'against the insurer' is not limited to cases where the insurer has produced the wording. If the insurer seeks to rely on a provision, such as a condition precedent, warranty or possibly an exclusion, so as to extinguish or reduce his basic obligations, the court will resist such a construction unless the contractual terms are especially clear.*"

40. However, by way of illustration of the application of this rule of construction to an exclusion clause such as the one relied upon by the Insurer in the present case, Mr Pachai referred the Court to the Prince Edward Island Supreme Court decision of *Crown Life Insurance Co.-v- Milligan* [1939] 1 D.L.R. 737. This was a life insurance case where the exclusion clause applied to death resulting from not only suicide but also: "*Any violation of the law by the Insured.*" The insured died in a road accident and an issue arose as to whether liability could avoided by proof in the civil proceedings that the accident was caused in part by the insured's failing to stop at a stop sign. Saunders J held (at page 745):

> "*I do not think the term 'violation of the law' as contained in the policy could by any process of reasoning be applied to the negligence of another driver or the negligence of the driver himself or his violation of some local or municipal regulation. The expression violation of the law must refer to the wilful or intentional violation of a criminal law or of a well recognized law of the land.*
>
> *In any case...The Policy in question having been prepared and issued by the appellant company, they are naturally supposed to make the terms, conditions and provisions of the policy clear and unambiguous,-otherwise the policy will be interpreted contra proferentes...*"

41. This authority provides direct support for the proposition that in construing an exception clause in a standard form policy issued by an insurer, clear words are required to oust the common law public policy rule that only intentional criminal conduct is a ground for excluding liability. Mr. Rothwell initially advanced no coherent response to the submission that the Court ought to disregard the exclusion clause altogether because:

> (a) if the exclusionary words in the Policy were construed literally, the Insured would be entitled to deny liability whenever "*the vehicle is being driven or used in contravention of any law*", irrespective of

whether the contravention in question caused or contributed to the accident[2];

(b) such a broadly defined exclusion clause would be contrary to public policy insofar as third-party liability was concerned because, in the context of Bermuda where the legal speed limit was rarely honoured, it would render policies containing such wording virtually worthless from the perspective of indemnifying insureds against third party claims; and

(c) it was impossible for the Court to mitigate the consequences of such literal interpretation by reading into the Policy by way of necessary implication words which would have a curative effect.

42. In the Supplementary Written Submissions of the Second Defendant, however, it was submitted with reference to authority that there was nothing unusual about a civil court making findings that offences had been committed when the insured had been previously acquitted by a criminal court. The following three authorities were cited which did in a general sense support this submission:

(a) *TD Radcliffe & Co-v- National Farmers Union Mutual Insurance Society* [1993] CLY 708: this was a case where the insured was charged and acquitted of arson but the insurer successfully avoided liability under the policy on the basis of a subsequent civil finding that he had started the fire deliberately with a view to defrauding the insurer. According to the abstract, the judge found that "*there was no estoppel and the verdict was irrelevant*". This finding appears to have been based on the fact that what the civil court was deciding was not whether or not the criminal offence of arson had been committed but whether the fire had been started deliberately for the purposes of making a fraudulent claim, a distinct legal issue based on facts which overlapped with the criminal offence;

(b) *Gray-v-Barr* [1971] 2 Q.B. 554: this was a case where the insured was acquitted of murder and manslaughter and sought an indemnity from his insurers for civil liability for unlawfully and negligently causing the deceased's death. The criminal acquittal was disregarded in circumstances where the insurance claim was based on an overlapping and corresponding civil tort claim. The civil court held that the death was

[2] It is easy to identify numerous offences relating to the use of motor cars which an insured might be proved to have committed at the time of an accident which may have no materiality to the nature or extent of the risk assumed by the insurer. Examples include playing loud music (section 19(2) RTA); failing to carry a driver's license (Motor Car Act 1951 section 85); driving a motor car which fails to comply with design and equipment requirements under the Motor Car Act and Regulations (for instance a car without mudguards or a car with a prohibited windscreen tint).

not accidental and that the insured could not in any event recover on public policy grounds;

(c) *Marcel Beller Ltd.-v-Hayden* [1978] 3 All ER 111: this was a case where the insured driver was killed in the relevant traffic accident and so was never charged with any traffic offences. However, Judge Edgar Fay QC was required to consider, *inter alia*, whether the offences of driving under the influence and dangerous driving, which the insured was proven in the course of the civil trial to have committed, fell within the following exclusion clause: "*The underwriters shall not be liable for death or disablement directly or indirectly resulting from…the insured person's own criminal act.*" Judge Fay made the following key findings[3]:

(i) "*I find on the facts which I have narrated that the deceased committed both of these offences and that both had a causal connection with the accident sufficient to satisfy the phrase 'directly or indirectly resulting from' in the exclusion clause in the policy"*;

(ii) "*In my judgment I am concerned with criminal acts other than those of inadvertence or negligence. If I were wrong and the limitation on criminal acts was that they be crimes of moral culpability or turpitude I am satisfied that the offences of dangerous driving and driving under the influence of drink are sufficiently serious to qualify.*"

43. The *Marcel Beller Ltd.* case supports the following propositions:

(a) where a criminal court has not previously determined whether offences falling within an exclusion clause have been committed, a civil court may make positive findings as to the commission of breaches of the criminal law;

(b) driving under the influence and dangerous driving (but not, by implication, mere speeding) are offences involving sufficient deliberation to fall within a widely drafted exclusion clause referring to "criminal acts";

(c) an exemption clause excluding liability for criminal acts which involve (i) more than mere negligence and (ii) which have a causal connection to the accident, is not so broad as to be void on grounds of uncertainty or public policy.

[3] At pages 120-121.

44. What the various authorities referred to by counsel demonstrate is that in various common law jurisdictions, the courts have been required to construe the scope of contractual exclusion clauses and common law public policy exceptions in relation to policies which insure against death, personal injury and/or other loss or damage sustained as a result of an "accident". The Policy in the present case provides: "*Colonial will indemnify you against your legal liability arising out of an accident in connection with your car*". Where there is no contractual exclusion clause, however, it appears to me that it is far harder for an insurer to avoid liability based on illegal driving than will be the case where a contractually agreed exclusion clause exists. This is why the test applied by the English Court of Appeal in a case upon which Mr. Harshaw relied in his Supplemental Submissions, *Churchill Insurance-v- Charlton* [2001] EWCA Civ 112, is more restrictive than the contractual exclusion clauses cases.

45. In construing the intended scope of coverage under the various policies by way of contractual construction, a pivotal consideration has been whether or not the insurer can properly deny liability on the grounds that the relevant event was, by reason of the insured's conduct at the time of the alleged "accident", deliberately or recklessly caused and not merely attributable to the insured's carelessness. It is noteworthy that the cases relied upon by both the Insured and the Insurer as illustrations of how similar exclusion clauses had been interpreted by other courts, involved clauses which excluded liability not simply based on the commission of criminal offences. Liability was excluded where the insurer was able to prove that the relevant loss was caused by the insured's qualifying unlawful conduct.

46. Thus in *Crown Life Insurance Co.-v- Milligan* [1939] 1 D.L.R. 737 upon which Mr. Pachai relied, the relevant exception read as follows: "*the benefit will apply if the Insured's death shall result either directly or indirectly from any of the following causes…2. Any violation of the law by the Insured*" [emphasis added]. In addition to deciding the issue of causation, the Prince Edward Island Supreme Court considered the exception was too broadly framed and construed it against the insurer.

47. In *Marcel Beller Ltd.-v-Hayden* [1978] 3 All ER 111, upon which Mr, Rothwell relied, the Court was concerned with whether or not the insured's death was accidentally caused. The insurer was liable if the insured sustained "*accidental bodily injury which shall solely and independently of any other cause…result in his death*"[4]. Moreover, even the exclusion clause imported into the contract a corresponding requirement of causation: "*The underwriters shall not be liable for death or disablement directly or indirectly resulting from…the insured person's own criminal act*"[5] [emphasis added]. The English High Court, in addition to deciding the issue of

[4] At page 115.
[5] At page 119.

causation and after considering the *Crown Life Insurance Co* case, considered that the exception as drafted was too broad and construed it against the insurer to embrace any criminal acts involving more than inadvertence and negligence. The insurer was entitled to avoid liability having proved that the accident was caused by the insured's driving drunk and in a dangerous manner.

Construing the exception

48. In the present case the question of construction is not simply whether a clause purportedly excluding liability, where an accident is caused by the Insured's driving the vehicle in a manner involving a "*contravention of any law*" should be given efficacy only where the "accident" is not really an accident at all because it was caused by the Insured's deliberate criminal conduct. The question is whether the exception should, according to its terms, be capable of being relied upon by the Insurer upon proof that, even if the alleged "accident" was in fact an accident and caused by mere inadvertence or negligence, the Insured's car was being driven in contravention of any law being either:

    (a) any contravention at all; or

    (b) a qualifying contravention such as driving under the influence.

49. The Insurer's case at trial was, understandably, squarely based upon the terms of the Policy itself. Paragraph 20 of the Insurer's Counterclaim stated as follows:

> "*The Second Defendant will contend in reliance on the terms of Section 2 of the Policy …that the First Defendant is not entitled to be indemnified by the Second Defendant in respect of the Plaintiff's claim by reason of the First Defendant having driven at the material time in contravention of the law.*"

50. The issue of causation was not addressed explicitly in any of the Witness Statements and not or not directly canvassed at trial as an essential element of the case on liability. However, this was because, on the pleadings, the Insurer's case that the accident was caused not simply by the Insured's negligence, but also because he was driving whilst impaired and/or over the limit was met by a bare denial. The only issue in dispute at trial was whether or not the Insured was at the material time over the statutory alcohol limit.

51. Be that as it may, I find that the crucial question of construction which arises in the present case may conveniently be summarised as follows. There is a conflict between the Insurer's fundamental promise to "*indemnify* [the Insured] *against* [his] *legal liability arising out of an accident in connection with* [his] *car*" and the exception in

Section 2 which purportedly extends to circumstances where the car is driven in contravention of any law, including circumstances where the relevant contravention has no impact on the fact that the accident was caused by mere inadvertence or negligence. If the first part of Section 2 of the Policy is read purposively in favour of the Insurer, the obligation to indemnify only extends to losses that happen accidentally. If the exclusionary portions of the same Section are read purposively in favour of the Insured so as to be consistent with that portion which defines the Insurer's primary obligation, then liability can be avoided in circumstances where:

(a) the Insured at the time of the accident was committing an offence of deliberation or recklessness; provided that

(b) the relevant offence had a material impact, in terms of extinguishing or diminishing the accidental character of the incident forming the basis of the claim, on the cause of accident.

52. It makes no sense to construe the Policy as reflecting an agreement that the Insurer should be permitted to avoid liability wherever at the time of the accident an offence is simultaneously committed by the Insured, irrespective of whether or not the offence was material to the occurrence of the event giving rise to the relevant claim.

53. Mr. Pachai submitted (and was supported by Mr. Harshaw) that the relevant clause should not be enforced at all because it was not fit for purpose and the gap was too wide for the Court to fill: *Royal and Sun Alliance Insurance plc-v- Dornoch Ltd. et al* [2005] 1 All ER (Comm) 590. This was a very tempting argument which, very narrowly, I feel constrained to reject, based on the apparently established judicial practice of erring in favour of giving effect to such clauses in 'consumer' insurance contracts involving claims based on accidents. The courts have consistently limited the exception clauses to offences which deprive the event giving rise to the claim of the essential character of an 'accident'.

54. If the exception clause is construed in this manner, it is open to this Court to determine whether the Insurer is entitled to deny liability because the traffic incident giving rise to the Insured's claim was caused to a material extent by the Insured deliberately or recklessly driving in a manner which contravened the law. In other words, the civil issue being decided is whether or not there was an accident covered by the Policy which issue arises under the Policy independently of the criminal law position. In these circumstances, the Insured's Magistrates' Court acquittal may have been determinative of the issue of whether the relevant provisions of the Road Traffic Act 1947 were contravened as a matter of criminal law. However, it was not dispositive of the civil law question of whether or not the Insured's contribution to the occurrence of the accident was sufficiently deliberate or reckless as to deprive the event of its requisite 'accidental' character.

55. Contrary to the position suggested by a literal reading of the exception or exclusion clause, this Court is not being asked to determine the bare question of whether or not the Road Traffic Act has been contravened in circumstances where that question could have been and was determined in the Insured's favour by the Magistrates' Court.

Findings: can the Insurer avoid liability on the grounds that at the time of the accident the Insured was exceeding the speed limit?

56. As a matter of construction of the Policy, I find that the Insurer cannot avoid liability merely by proving that the Insured was exceeding the speed limit at the time of the accident. The Insurer would have to prove that the accident was caused or contributed to by the fact that the Insured was driving at a deliberately or recklessly dangerous speed.

57. This allegation was not formally pleaded. There is, in any event, no evidential basis for any such finding bearing in mind the high standard of proof all agreed was required for proving serious allegations involving a breach of the criminal law.

58. It is true that the Insured admitted travelling at between 50 to 55kph to the Police nine days after the accident; but this was merely his own estimate. Although the legal speed limit is 35kph, 50kph is regarded by many as the unofficial speed limit as motorists would only generally ever be ticketed for travelling above this speed. I am unable to attach very much weight to this estimate as the Insured, when interviewed by the Police, had a clear motive to minimize the effect of alcohol on his driving in circumstances where he knew he could not be charged with speeding. The true position is probably best reflected in answer given by the Insured to questioning on the speed issue: "*I'm not sure how fast I was going.*"

59. It may also be true that having regard to the stormy weather conditions the Insured himself relied upon when making his insurance claim and at trial to explain his loss of control of his vehicle, travelling at 50-55kph would have been a potentially dangerous speed. However, even assuming that the Insured was speeding as he initially admitted, there was no independent and/or reliable evidence that dangerous speed was a contributing cause of the accident and so this head of the Insurer's defence fails.

Findings: can the Insured avoid liability on the grounds that the accident was caused by the Insured's driving under the influence of alcohol?

Was the Insured driving with excess alcohol in his blood?

60. This was the principal issue relating to the Insurer's liability which was addressed at trial. It was addressed by the Plaintiff and the Insured (her husband), by the Police Statements and by the Insurer's Forensic Expert, Victoria Jenkins.

61. The evidence of the Plaintiff and her husband, the Insured, about the extent to which he had consumed alcohol was not given in a straightforward manner and left the Court with an uncomfortable suspicion that it was being deceived. More significantly still, their evidence was contradicted by virtually of all the evidence from independent sources. The most obvious conflicts were the following:

    (a) the Insured's drinking habits generally: the Plaintiff and the Insured (who were married in 2001) were keen to convey the notion that the Insured was not a heavy drinker. While the Plaintiff conceded that he did occasionally drink socially, she claimed not to know what her husband's preferred tipple was. I found this answer, given in cross-examination, to be unbelievable. The Insured himself, after initially being somewhat vague about what alcoholic drink he typically consumed, eventually described scotch and water as what he normally drank socially when pressed to explain an unhelpful note in the Insurer's file on what he consumed after the accident. Ms. Jenkins opined that the faster than average elimination rate shown by the first and second samples taken by the Police was consistent with the Insured being a regular heavy drinker;

    (b) the Insured's account of his drinking during the hours preceding the accident: both the Plaintiff and the Insured in their oral evidence were adamant that they had no clear recollection of what they did during the day preceding the night of the accident and whether or not they were at work. However the Insured told Ms. Deshield on March 31, 2006 "*that he had a beer with friends after work….then went home*". He accepted this may have happened but was strangely reluctant to accept that what he said when making his claim was clearly correct;

    (c) the Insured's alcohol level at the time of the accident: according to the Plaintiff and the Insured, they went out for a late Saturday-night dinner after a friend offered to have their children overnight at her home. The Insured was feeling ill from stomach ulcers and/or in any event was the designated driver and consumed no alcohol during the meal. The Insured would not have appeared to be under the influence at the scene or at the Hospital,

shortly thereafter. A friend of theirs, who was working in the Emergency Department in the early hours of January 16, 2006 and who spoke to him, affirmed in a Witness Statement made overseas that the Insured did not manifest any signs of being under the influence of drink. The Insured testified that he left the Hospital around 2.00am to walk home and collect some personal items for his wife. When he arrive home he found the electricity was off and was overcome by the trauma of the evenings events and poured himself a tall glass of neat scotch whiskey which he drank at around 2.20am. Shortly thereafter the Police arrived, found his eyes glazed and speech slurred, arrested him and took him to the station to be breathalysed. He denied having ever heard of the "hip-flask defence" or deliberately returning home to drink to create a defence for any drink-driving charge he might face. He asserted his subsequent alcohol level of 104mg per 100 ml of blood tested at 3.31am was solely attributable to the whiskey he drank after 2.00am. This account was contradicted by the following independent pieces of evidence:

(i) Ms. Deshield recorded the Insured as telling her on March 31, 2006 that when he returned home he consumed scotch and water with friends. His evidence at trial was that he consumed neat scotch alone. Ms. Victoria Jenkins opined that if the Insured that evening had been suffering from stomach ulcers as he claimed, he would be very unlikely to be able to tolerate a large dose of neat scotch;

(ii) having regard to the absorption rate for alcohol, Forensic Scientist Ms. Jenkins testified that she would not in her opinion expect the signs of intoxication observed by the arresting officer at 2.30am to be attributable solely to the whiskey the Insured claimed to have drunk a few minutes earlier. Full absorption would normally take between 1 to 1 ½ hours for neat spirits, due to a protective delaying mechanism in the stomach;

(iii) having regard to the absorption and elimination rates for alcohol, Ms. Jenkins did not believe it likely that the blood alcohol readings recorded by the Police were solely attributable to any scotch drunk by the Insured shortly before his arrest;

(iv) as a result of information received from a reserve officer who also attended the scene of the accident at Cavendish Road around 12.40 am on Sunday January 15, 2006 PC Burrows "*was of the opinion that Thomson might be an impaired*

driver". He permitted the Insured to go to the Hospital in the ambulance with his wife; but having finished his duties at the scene, he went to the Hospital to speak to the Insured. When he did not find him there he went to his home where PC Burrows himself "*noticed that his speech was <u>still</u> slurred*";

(v) Ms. Victoria Jenkins opined that if the Insured had drunk only half of what he claimed[6] to have drunk shortly before his arrest, his blood alcohol level at the time of the accident would have been 97mg as opposed to the 161mg (twice the legal limit) it would have been if he had drunk nothing at all after the accident;

(vi) Ms. Jenkins opined that on any view if the Insured had merely had one or two beers after work, or even as late as 9.00pm in the evening, that would have been eliminated from his blood by the time the samples were taken after 3.30 am.

62. Ms. Jenkins is a Forensic Scientist who has given expert evidence in England and Wales and in Jersey. I found her to be a balanced and objective witness. I accept her evidence that the alcohol the Insured claimed to have drunk after the accident could not have been the first alcohol consumed by him after he went out for dinner with his wife at around 9.00pm that evening. I find that it is more likely than not that the Insured did drink alcohol shortly before the Police arrived at 2.30am, some two hours after the accident. He was keen to place on record that he had done so to Sergeant Exell, who took the breath sample, who first had contact with him at 2.45 am, and told him that having a drink after the accident did not amount to a defence. The Insured knew that he had been drinking prior to the accident and wanted to create a potential defence.

63. It is true that Ms. Deshield recorded the Insured as saying on March 31, 2006 that he had a drink at home with friends after the accident. But on balance I find that this was probably a mistake based on his having told her on the same occasion that he had an after work beer with friends. As the Insured well knew that the Police would say they found him at home alone, and as he had already raised the 'hip flask defence' upon his arrest, it makes no sense that the Insured would have given such an inconsistent account to the Insurer, which he knew would be carefully following the course of the criminal proceedings, on such an important matter to his claim.

[6] This amount was her calculation of how much he would have had to have consumed to achieve the readings that were recorded assuming he had consumed nothing else earlier in the evening/night.

64. Was his blood alcohol level above the prescribed limit at the time of the accident? This depends on precisely how much he drank at home after the accident and before his arrest. Mr. Horseman extracted important concessions from the Insurer's expert in relation to a scenario in which, contrary to his client's case, he had been drinking both before and after the accident. The Insured's evidence on what he consumed after the accident, based on a Witness Statement dated December 10, 2012, was intended to meet the case set out in the earlier October 8, 2012 Expert Report. The crucial finding was as follows:

> "*If Mr. Thomson's blood alcohol level was as a result solely of post driving drink consumption, then Mr. Thomson would have to have consumed approximately 283 ml of scotch commencing at 1.45 AM, after driving but before the breath test.*"

65. In paragraph 13 of his Witness Statement, he deposed that after getting home (having left the Hospital at 1.00am): "*I sat down and drank a large Scotch, which I drank by itself very quickly.*" The Insured sought to align the time that this occurred with the Expert's1.45am start time; however, Mr. Rothwell's careful reference to contemporaneous documents forced him to concede that he must have started drinking around 2.15am. Only when Ms. Jenkins was cross-examined, on the basis of an hypothesis she had no reason to canvass explicitly in her Report, did it become clear that the less alcohol he drank after the accident the lower his blood alcohol level would likely have been at the time of the accident, assuming he had been drinking shortly before. On balance, I find that that the Insured more likely than not drank his usual drink of Scotch and water and not the improbably huge dose of neat spirits which he claimed to have consumed for the first time in his Witness Statement made over six years after the event, probably after the Expert Report had been served. Ms. Jenkins was forced to concede that if he drank less than he claimed after the accident the Insured might have been close to the legal limit at the time of the accident.

66. A crucial question under cross-examination was put by Mr. Horseman:

> "Q: *What* [i.e. how much Scotch] *would he need* [to have drunk at around 2.20 am] *to be under 80* [mg per 100 ml at the time of the accident]*?*"
>
> A: *145 ml. Do you want that in ounces?*"

67. Ms. Jenkins was not invited by counsel, who did not appear to immediately appreciate the significance of this answer, to provide the conversion but I take judicial notice of the fact that 145 ml is approximately 5.1 UK fluid ounces or just over ¼ pint. The Expert's evidence was that if the Insured had drunk this quantity of Scotch when he says that he did, and had been drinking alcohol earlier (contrary to his assertions that he had not), his blood alcohol level would probably have been within the legal limit at the time of the accident. I infer from this that if the Insured had consumed

approximately half a glass of whiskey (i.e. a full glass mixed with water or half a glass neat) that it is possible that he was under the limit at the time of the accident. Since all the evidence points strongly to the fact that the Insured was drinking before the accident and resorted to the 'hip-flask defence' by drinking before he was breath-tested afterwards, the possibility that he was in fact at or just below the legal limit at the time of the accident cannot be ruled out in all the circumstances of the present case. An additional point, which is not pivotal to the foregoing finding, is this. Based on the Insurer's Expert's own evidence, the absorption rate of the alcohol the Insured drank just prior to his arrest would have been faster if the Insured had drank the Scotch diluted with water (which I find more likely occurred) rather than neat (as the Insured claimed based on a layman's view of how alcohol is absorbed and the need to provide a response to the Expert Report).

68. The final paragraph of her Report did fairly concede that, contrary to her assumption based on no post-accident drinking at all of a blood alcohol level of 161mg[7] at 12.30am, the actual alcohol level might have been lower (and the apparent effects of the alcohol higher) depending on how soon before the accident the Insured had been drinking:

> "*There is some evidence to suggest that a given blood alcohol level produces more effect during the rising than the falling phase of the blood alcohol curve. It has been suggested that the drinker can to some extent adapt himself to the effects of alcohol while it is still circulating in his system. It can take up to around 1 ½ hours for alcohol to be fully absorbed, so if Mr. Thomson was drinking up until the time when he got in the car, his blood alcohol level may have been lower than the expected level calculated at 12.30 AM on 15th January 2006.*"

69. Although in her oral evidence she explained that some regular drinkers do manifest the amount of alcohol they have consumed in the same way as the average person, her Report contained the following chart which provided in salient part as follows:

Man 11 stones[8] (70kg)	***Blood-alcohol levels (mg per 100ml)***	***Reactions to different % of alcohol in the blood***
2 units[9]	*25-30*	*Sense of well-being enhanced. Reaction times reduced*
4 units	*50-60*	*Mild loss of inhibition, judgment impaired, increased risk of accidents at work and on the road; no overt signs of Drunkenness*

[7] This level in any event had to be adjusted downwards marginally as the Insured's actual weight was somewhat greater than the Expert assumed.
[8] 154 pounds.
[9] One unit = ½ pint of medium strength beer, one glass of wine or 25ml of spirits.

5 units 75-80 Physical coordination reduced, marked loss of inhibition; noticeably under the influence; at the legal limit for driving in the UK[10]

7 units 100+Clumsiness, loss of physical control, tendency to extreme responses; definite intoxication

10 units 150 Slurred speech, possible loss of memory the following day; probably Drunk and Disorderly

70. This analysis indicates that the risk of accidents can be increased even if one is driving well within the legal limit and that the average person would be "*noticeably under the influence*" if they were at (but not over) the legal limit. Slurred speech would normally be associated with someone being "*probably Drunk and Disorderly*". In her oral evidence Ms. Jenkins said that the elimination rate for alcohol in the Insured's blood revealed by the two blood test readings suggests that the Insured may have been a regular heavy drinker and possibly an alcoholic, based on the generally seen elimination rates. This was a matter which she could have included in her Report but was seemingly not asked to address. I make no finding on this aspect of her evidence because it was a very serious assertion to make on the witness stand in circumstances where the Insured's counsel had no reasonable opportunity to respond to it in a case where the Insured's affirmative case was that he was merely an occasional drinker.

71. It is true that one portion of Ms. Jenkins evidence, to the effect that the slurred speech and glazed eyes observed by PC Burrows could not plausibly be attributed to any great extent by the drink the Insured consumed only a few minutes before, does potentially support the Insurer's case that the Insured was in fact over the limit at the time of the accident. This opinion is supported by the fact that a reserve Police officer clearly suspected the Insured of being over the limit at the scene of the accident because he reported these suspicions to PC Burrows who acted on them by arresting the Insured later. However, in the absence of any direct evidence of how the Insured appeared at the scene of the accident and any cogent evidence as to the Insured's tolerance of alcohol, I am not satisfied to the requisite standard of proof based on this portion of the evidence that the Insured was actually over the limit at the time of the accident.

72. Bearing in mind how significant the reserve police officer's evidence was on the issue of whether the Insured appeared to be under the influence at the scene of the accident, his unexplained failure to provide a statement for the purposes of the criminal trial combined with the Prosecution's decision to offer no evidence against the Insured at trial, seriously undermines the weight which might otherwise be attached to the bare facts that (a) his suspicions were communicated to PC Burrows, and (b) PC Burrows

[10] And Bermuda.

took them seriously enough to effect an arrest. One would normally expect even a reserve police officer who attends the scene of a road traffic accident and has credible and crucial evidence to provide which is supportive of related traffic charges to provide such evidence in statement form. Although I am unable to attach much weight to this evidence standing by itself, it is interesting to note by way of contrast that an Australian-based nurse was willing to sign a witness statement (admitted under a hearsay notice) to the effect that he saw the Insured at the Hospital when the Plaintiff was admitted immediately after the accident and that the Insured displayed no visible signs of intoxication.

73. Not only is there an absence of reliable evidence as to precisely what the Police observed at the scene. There was an exculpatory explanation advanced for the Insured's allegedly slurred speech immediately after the accident-the impact of the collision on the Insured himself. PC Burrows allowed him to go to the Hospital in the ambulance partly to accompany his wife; but also "*to receive medical attention at the hospital for any injuries he might have had.*" He did in fact require medical treatment, although he did not obtain it until the Police took him back to the Hospital after his arrest. By his own account he hit the windscreen with his head and arm; the medical records indicate he sustained injuries to his neck and left knee. In addition, to add an observation of my own, the Insured has a strong South Wales accent which his own counsel, at one juncture during the trial, had difficulty in deciphering.

74. In summary, based on my findings that the Insured did consume alcohol after the accident in an uncertain quantity and that he also consumed alcohol in an uncertain quantity not long before the accident, I am unable to exclude the possibility that the Insured was in fact within the legal limit at the time of the accident. The only evidence I can safely rely upon is the evidence of the Police breath test taken some 3 hours after the accident and the Insured's Forensic Expert, Ms. Jenkins. The evidence of PC Burrows indirectly supports the finding that the Insured had been drinking before the accident, but it does not support a finding to the requite standard of proof that the Insured was actually over the limit because:

    (a) PC Burrows was merely told by a another officer who did not give a statement that the Insured might have been driving under the influence;

    (b) there is no direct evidence as to what the other officer observed and the reliability of those observations is not only impossible to assess. It is positively undermined by the fact that no statement was seemingly ever prepared by him for the purposes of the Police investigation and/or the subsequent charges and trial;

    (c) PC Burrows' statement in describing the Insured's voice at the time of his arrest as "still slurred" suggests that PC Burrows was told by his fellow officer previously that the Insured's voice was slurred. However, PC

Burrows himself was in no position to make a comparative assessment; and

(d) the fact that the Insured appears to have deployed the 'hip flask defence' by drinking more alcohol before the Police had a chance to administer the breath test is merely cogent evidence that the Insured believed himself to be over the limit at the time of the accident. The Court's strong suspicion that he was possibly over the limit is not sufficient to support a finding that he was actually over the limit; and

(e) based on Ms. Jenkins' evidence, I find that taking into account the amount of Scotch the Insured drank at around 2.20am (which I find was likely almost half the quantity he claimed at trial to have consumed and mixed with water as he told Ms. Deshield), it is possible that the Insured was at or just under the limit at the time of the accident.

Did the Insured's drinking cause the accident?

75. The expert evidence combined with the evidence of the Police suspicions and the Insured's own actions in seeking to defeat the ability of the Police breath test to conclusively prove that he was driving with excess alcohol in his blood at the time of the accident, are sufficient to prove to my satisfaction that the Insured must have been at a minimum close to the 80mg of alcohol in 100ml of blood limit at the time of the accident. Based on my finding that the Insurer has not proved that the Insured was at the material time above the legal limit, no need to consider the issue of causation arises.

76. In case I am held to be wrong in my conclusion that the Insurer has failed to prove that the Insured was driving with an unlawful amount of alcohol in his blood at the time of the accident, I will record my findings on causation. No great emphasis was placed upon the issue of causation in the course of argument or directly in evidence at trial. I initially had some anxiety about the fairness to the Insured about making findings about an issue which did not appear to me to have been placed fairly and squarely before the Court but had only arisen as a result of the construction I have ultimately placed upon the Policy as a result in part of supplementary submissions.

77. However, on more careful analysis, the issue was addressed by way of pleadings and the Insured's sole and simple response was to deny that he was under the influence at the time of the accident and to positively aver that he had drunk nothing alcoholic in the hours immediately preceding the accident. And at the beginning of the trial, the Insured amended a bare denial of negligence set out in his Defence to Plaintiff's Claim and to Second Defendant's Cross-claim to restrict the denial to the allegation

set out in sub-paragraphs (a) to (c) of paragraph 4 of the Insurer's said pleading. The Insurer simply made the following plea on causation:

> "4. *The Second Defendant admits the Plaintiff's allegations that the accident was caused in part by the negligence of the First Defendant as particularized in Paragraphs (a)-(g), and also in that he:*
>
> *(a) Drove having consumed so much alcohol as to impair his ability to do so safely and in any event in excess of that permitted by law; and*
>
> *(b) Failed to desist from driving having consumed alcohol to the aforesaid extent; and*
>
> *(c) Failed to ensure the Plaintiff wore her seat belt.*"

78. Although the pleadings referred to both a contravention of section 35(1) and section 35A of the Road Traffic Act, it was clear from the Insurer's submissions that only a breach of section 35A of the Act (as regards alcohol) was relied upon at trial as an operative contravention of the law. This was perhaps because the only reliable evidence the Police recorded after the accident about the involvement of alcohol was the breathalyzer test results recorded two hours later. No statement was seemingly ever taken from the reserve officer who appears to have told PC Burrows he suspected the Insured was under the influence at the time of the accident and PC Burrows made no observations of his own at this juncture. Despite the best efforts of the Insurer's attorneys, they were unable to interview the reserve officer concerned for the purposes of the present trial.

79. The impact of the Insured's drinking on the occurrence of the accident was evidentially supported at trial with reference to both (a) excess alcohol, and (b) impaired driving. The expert opinion of Ms. Jenkins to the effect that even at 50-60 mg of alcohol per 100ml of blood, not to mention at 80-85mg, there is an increased risk of accidents and a loss of coordination/inhibition respectively, was not challenged. It was even more clearly, albeit implicitly, conceded that driving with excess alcohol in the Insured's blood would have been a contributing cause of the accident. In effect, it appears to me, the Insured did not positively deny that if he was found to have been drinking alcohol at all shortly before the accident, the Court would inevitably find that this fact was an operative cause of the accident as alleged in paragraph 4(a) of the Insurer's Amended Defence and Crossclaim.

80. Accordingly, if I were required to find that the Insured was driving in breach of section 35A of the Road Traffic 1947, I would also be bound to find that this fact was a sufficient cause of the accident to entitle the Insurer to avoid liability under the relevant terms of the Policy.

Summary: drink driving as a ground for the Insurer to avoid liability

81. The Insurer at the trial on liability in the present action elected to abandon its plea that section 35(1) had been contravened and relied solely on the allegation that the Insured was driving in contravention of section 35A. In summary, I find that the Insurer has failed to establish that the Insured was driving with more than the permitted alcohol in his blood at the time of the accident which forms the basis of the present claim.

82. The Insured was charged with contravening section 35(1) and section 35A of the Road Traffic Act in the Magistrates' Court but the Prosecution formed the view they could not prove either of these offences and offered no evidence at trial. It appears to have been on the face of it a somewhat fortunate outcome for the Insured. Because in a case referred to by Mr. Rothwell but which he could not directly rely upon in the present civil context, *Chew (Police Inspector)-v-Gray* [1985] Bda LR 1 (Court of Appeal, Blair-Kerr, P held as follows (at page 8):

> "*41 If an accused does no more than state that after driving he drank liquor, whether or not he specified the amount, in my view the prosecution is entitled to stand on the presumption created by section 35D(1)(c) because there would be no evidence to rebut or even raise a reasonable doubt that the proportion of alcohol in the accused's blood at the time of the alleged offence was within the permitted limits. As stated by the New Brunswick Court of Appeal in Gallagher:*
>
> > *'Evidence of the consumption of a quantity of liquor immediately prior to the demand for breathalyzer samples, standing alone, does not, in our opinion, without adducing some evidence as to its effect on the result of a breathalyzer test, constitute 'evidence to the contrary'. The court cannot take judicial notice of the effect nor the extent of the effect of such consumption of liquor and therefore there was no evidence in the instant case to rebut or even raise a reasonable doubt that the proportion of alcohol in the blood of the defendant at the time of the alleged offence was within 10 permitted limits.'* "

83. Harvey da Costa JA (at paragraph 77) in a concurring judgment on the meaning of what is now section 35H(4) of the Road Traffic Act in prosecutions under, *inter alia*, section 35A of the Act, elaborated upon the sort of evidence which might be capable of rebutting the presumption in favour of the Prosecution:

> "*77.In my view evidence of the consumption of alcohol between the time of the alleged offence and the taking of a breathalyser test cannot by itself constitute 'evidence to the contrary'. There must, in addition, be expert evidence tending to show that the alcohol so consumed would have affected the result of the breathalyser test, and the extent to which it would have affected that result. Otherwise, there would be no 'evidence to the contrary' tending to show that*

the blood-alcohol level at the time of the alleged offence was not that disclosed in the chemical analysis…"

84. Although this reasoning does not strictly apply to the civil context, where there is no statutory presumption that the breath test results reflect the alcohol levels in the Insured's blood at the time of the accident, there is nevertheless expert evidence here which is supportive of the proposition that the alcohol consumed by the Insured after the accident makes it impossible to be sure that he was over the limit when the accident occurred.

85. Although the presumption in favour of the Crown in prosecutions under the 1947 Act does not operate in favour of the Insurer in the civil context, the Insurer can rely on a less onerous burden of proof. However, Mr. Harshaw, endorsed by Mr. Pachai, drew the Court to the following well known *dictum* of Lord Nicholls in *Re H* [1996] A.C. 563:

> "74. *Although the result is much the same, this does not mean that where a serious allegation is in issue the standard of proof required is higher. It means only that the inherent probability or improbability of an event is itself a matter to be taken into account when weighing the probabilities and deciding whether, on balance, the event occurred. The more improbable the event, the stronger must be the evidence that it did occur before, on the balance of probability, its occurrence will be established. Ungoed-Thomas J. expressed this neatly in In re Dellow's Will Trusts [1964] 1 W.L.R. 451, 455:*
>
> > *'The more serious the allegation the more cogent is the evidence required to overcome the unlikelihood of what is alleged and thus to prove it.'*
>
> *75. This substantially accords with the approach adopted in authorities such as the well-known judgment of Morris L.J. in Hornal v. Neuberger Products Ltd. [1957] 1 Q.B. 247, 266. This approach also provides a means by which the balance of probability standard can accommodate one's instinctive feeling that even in civil proceedings a court should be more sure before finding serious allegations proved than when deciding less serious or trivial matters.*"

86. I have taken into account the seriousness of the allegation of driving in contravention of section 35A of the Road Traffic Act 1947 albeit one which the Insurer need only prove on a balance of probabilities. I have also taken into account the fact that there is expert evidence supportive of the possibility that if (as I find occurred) the Insured drank after this accident his blood alcohol level at the time of the accident might in fact have been within the limit. In all the circumstances of the present case the evidence supportive of the Insurer's case on this issue fails to satisfy me that the Insured was over the limit at the material time. Strong suspicion that he was possibly over the limit, as noted above, is not enough.

Findings: was the Plaintiff contributorily negligent by allowing herself to be driven by the insured knowing that his ability to drive was impaired by drink?

87. If I had been required to find that the Insured was driving with excess alcohol in his blood at the time of the accident, it would have been open to me to find that the Plaintiff was guilty of contributory negligence in allowing herself to be driven by someone whom she knew or ought to have known could not lawfully drive. As the Plaintiff and the Insured both testified that they spent the three hours before the accident together, the Plaintiff must have been aware of whatever alcohol her husband consumed before driving her home.

88. Mr. Rothwell supported his case in this regard by reference to *Owens-v- Brimmell* [1977] 1 Q.B 859. Watkins J (at 866H-867A) held in a case involving plaintiff passenger and a defendant driver who went on a 'pub crawl' in Cardiff:

> "*.. it appears to me that there is widespread and weighty authority for the proposition that a passenger may be guilty of contributory negligence if he rides with the driver of a car whom he knows has consumed alcohol in such quantity as is likely to impair to a dangerous degree that driver's capacity to drive properly and safely. So, also, may a passenger be guilty of contributory negligence if he, knowing that he is going to be driven in a car by his companion later, accompanies him upon a bout of drinking which has the effect, eventually, of robbing the passenger of clear thought and perception and diminishes the driver's capacity to drive properly and carefully. Whether this principle can be relied upon successfully is a question of fact and degree to be determined in the circumstances out of which the issue is said to arise.*"

89. This first instance decision has been approved by the English Court of Appeal: *Booth-v-White* [2003] EWCA Civ 1708.

90. The Insurer's counsel did not expressly address the question of whether contributory negligence could be found if the Insured was not found to have been driving at over the statutory limit. That was a sensible approach because I am aware of no authority for the proposition that the *Owens-v- Brimmell* principle applies to a situation such as the present case, where:

    (a) the Court is unable to find that the driver was over the legal alcohol limit even though the Court is satisfied that sufficient alcohol was consumed within that limit to potentially impair driving competency to a legally permitted extent;

(b) the Court is unable to find that the driver by virtue of his behaviour ought to have been suspected by the claimant to have been over the legal alcohol limit.

91. Although the Plaintiff in my judgment was aware of whatever the Insured drank before he drove, in the absence of an evidential basis for this Court to find that he was in fact over the limit, what she thought about his capacity to drive is irrelevant to any question of contributory negligence on her part. The Insurer's contributory negligence claim fails.

Findings: did the Insurer by its conduct waive the right to avoid liability under the Policy?

92. In light of the primary findings I have reached, the issue of waiver becomes academic. Nevertheless, it was clearly an important issue for the Plaintiff (in equity) and the Insured (contractually) to the extent that the grounds of avoiding liability raised by the Insurer might have succeeded.

Waiver as regards the Plaintiff

93. The Plaintiff's waiver argument was belatedly pleaded as an afterthought and was on careful scrutiny of the evidence a tenuous averment in legal terms. Mr. Harshaw rightly referred the Court to the following authority on the scope of estoppel by representation, Jill E Martin, '*Hanbury & Martin, Modern Equity*', 18th edition, which states at paragraph 27-020:

> "*The basic principle is that a person who makes an unambiguous representation, by words, or conduct, or by silence, of an existing fact, and causes another party to act to his detriment in reliance on the representation will not be permitted subsequently to act inconsistently with that representation.*"

94. I accept that on or about May 30, 2006, the Plaintiff wrote to the Insured to formally make a claim. Whether or not this letter was received, the Insurer was plainly aware that she was making a third party claim against her husband, the Insured. A meeting was scheduled for August 11, 2006 which the Plaintiff was expected to attend. The first meeting attended by the Plaintiff with the Insurer was on September 26, 2006. I accept the Plaintiff's evidence that she had no idea how to pursue her claim and sought advice. The General Manager's note of what the Plaintiff said (made by Ms. Murdoch and signed by the Plaintiff) reveals that the Plaintiff at that juncture was keen to deny that her husband had been negligent; in fact, his negligence was the basis for her claim.

95. On September 28, 2006, Ms. Murdoch emailed the Plaintiff inviting her to a further meeting "*with a view to settling your claim*". A second meeting was held on October 4, 2006 and I accept the evidence of Ms. Murdoch that her senior colleague Alan Peacock advised the Plaintiff to seek legal representation because the fact that she was asserting a claim against her husband added an unusual dimension to the claim[11]. I also accept her evidence that at this meeting she discussed with the Plaintiff the fact that an interim payment would be made without any admission of liability. This is confirmed by the Insurer's letter to the Plaintiff of the same date which enclosed a $45,000 cheque "*as an interim payment on your claim*" and read in material part as follows:

> "*This payment is made on the distinct understanding, which you have agreed with, that by making this payment there has been no admission of liability by Colonial with respect to your claim or any part of it.*"

96. The submission that, taking into account two subsequent interim payments made without repeating this initial reservation of rights, the Plaintiff had never been told that liability was in issue is unsustainable in light of (a) the Insurer's October 4, 2006 letter; and (b) the Insurer's May 8, 2009 email to the Plaintiff's English solicitor. In the latter communication Paul Connolly expressed an interest in a without prejudice meeting but stated: "*I reserve our position as insurers for Mr Thomson*". It is true that interim payments of $52,000 (to the Plaintiff) and £26,607.00 (to Spire Hospital, Cardiff) were made after the initial payment without any similar express reservation of rights. But the correspondence referring to these payments was written by the Insurer's attorneys to the Plaintiff's then attorneys. And looking at the correspondence as a whole, it is impossible to see any ground-shifting event which occurred between the October 4, 2006 letter when the Plaintiff was expressly told that liability was not being admitted and the October 15, 2007 and January 22, 2008 lawyer's letters which would reasonably lead the Plaintiff and/or her lawyer to believe that liability had since been admitted.

97. From a lawyer's perspective, moreover, there is nothing inherently inconsistent with interim payments being made in circumstances where liability is admitted in part and disputed in part: see e.g. *Lomas-v-Smith* [2006] Bda LR 23 (Bell J, paragraph 6), a case in which (coincidentally) the Plaintiff's former attorney was the claimant. Moreover, under the Motor Car Insurance (Third-Party Risks) Act 1943, the Insurer was bound by a statutory duty to:

[11] To the extent that in her oral evidence Ms. Murdoch may have suggested that this advice was given at the first meeting with the Plaintiff, I find it more likely that this was said at the second meeting at which an interim payment was first discussed.

(a) pay up to "*$125,000 arising out of the death or bodily injury to any person being carried in or upon or entering or getting into or alighting from a motor car*" (section 4(1), proviso (ii)); and

(b) and was further subject to the following additional obligations:

(i)"*Where any payment is made by an insurer under a policy issued under this Act in respect of the death of, or bodily injury to, any person arising out of the use of a motor car on a highway or an estate road and the person who has so died or been bodily injured has to the knowledge of the insurer received treatment in a hospital in respect of the fatal or other bodily injury so arising, there shall also be paid by the insurer to such hospital the expenses reasonably incurred by the hospital in affording such treatment*" (section 4(2));

(ii)"*If, after a certificate of insurance has been delivered under section 4(4) to the person by whom a policy has been effected, judgment in respect of any such liability as is required to be covered by a policy under section 4(1)(b) (being a liability covered by the terms of the policy) is obtained against any person insured by the policy, then, notwithstanding that the insurer may be entitled to avoid or cancel, or may have avoided or cancelled, the policy, the insurer shall, subject to this section, pay to the persons entitled to the benefit of the judgment any sum payable thereunder in respect of the liability, including any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any enactment relating to interest on judgments*" (section 6(1).

98. In a case Mr. Pachai placed before the Court, *Argus Insurance Co. Ltd.-v-Duclos* [2008] Bda LR 26, Bell J explained this interpretation of the cited provisions of the 1943 Act in the following manner:

"*44.I have already referred to the fact that for the purpose of the alternative declaration it seeks, Argus' position is that it does not need to rely upon breaches of duty by Mr. Duclos. The application is sought on the basis that this is the effect of the Act, and particularly sections 4 and 6 thereof. The combined effect of sections 4(1)(b) and 6 (1) of the Act was considered by the Privy Council in the case of Suttle v Simmons [1989] 2 Lloyd's Reports 227. This was a case on appeal to the Privy Council from the Court of Appeal for Bermuda, so dealt with the provisions of the Act. The case was concerned with the limit of liability of underwriters to a third party claimant who had secured judgment*

> *against their insured. The limit of liability contained in section 4 (1)(b)(ii) of the Act was then $24,000, and the judgment obtained by the third party claimant was for $100,000. The third party claimant sought to recover the full amount of the judgment from the underwriters, and the Board, following the authority of Harker v Caledonian Insurance Co. [1980] 1 Lloyd's Rep. 556, held that the underwriters' liability to the third party claimant was restricted to the amount contained in section 4(1)(b)(ii) of the Act. Suttle v Simmons has since been followed in other decisions of the Privy Council concerning similar wording to that contained in the Act, and is of course binding on this Court.*"

99. So since the Insurer was under a statutory duty to pay up to $125,000 plus reasonable hospital expenses, the making of interim payments of $97,000 plus a payment towards hospital costs was not inconsistent with the Insurer reserving the right, as between the Insurer and the Insured, not to indemnify the Insured for his own tortious liability to the Plaintiff. Moreover, as Bell J held in *Argus Insurance Co. Ltd.-v-Duclos,* communications by an insurer to a third party to whom the 1943 Act applies have no bearing on the contractual position as between insurer and insured. The Plaintiff may well have indulged in wishful thinking. She may well have failed to clearly understand how personal injuries claims were customarily handled. But if she had wished to clarify the position at the time, or had asked her lawyer to clarify the position, her lawyer could have simply written to Cox Hallett Wilkinson along the following lines: 'Your client has recently made two interim payments without any reservation of rights. For the avoidance of doubt please confirm that your client now accepts liability to our client and to her husband under the terms of her husband's policy.'

100. Certainly there is no conceivable basis on which the Plaintiff's lawyer could have advised her based solely on the correspondence referred to above that the Insurer was not only accepting statutory liability to the Plaintiff but was also accepting liability under the Policy. And the Plaintiff does not herself claim that such rose-tinted advice was received. Such an important issue would not ordinarily be left by lawyers to speculation. One might reasonably expect many off the record without prejudice discussions about the scope of liability which was admitted to take place between counsel. If any formal and global admission of liability had been made, the Plaintiff's lawyer would have been keen to memorialize this fact in open correspondence. The silence of the correspondence on the scope of liability accepted by the Insured is more consistent with the absence of any admission than the inference that such an admission had been implicitly made.

101. The Plaintiff's estoppel or waiver argument fails because the Insurer made no unambiguous representation to the Plaintiff that it intended to honour the Policy before signifying by its December 21, 2011 letter that it intended to avoid the Policy and only meet its minimum statutory obligations to the Plaintiff.

Waiver as against the Insured

102. Mr. Pachai submitted that the relevant doctrine was waiver by estoppel, rather than waiver by election: *Argus Insurance Co. Ltd.-v-Duclos* [2008] Bda LR 26. Bell J in this case cites English Court of Appeal *authority Kosmar Holidays plc v Trustees of Syndicate 1243* [2008] EWCA Civ 147 (at paragraph 70). The relevant passage suggests that the doctrine of waiver by election is (or may be) ill-suited for determining whether an insurer managing a claim should be deemed to have waived the right to rely upon the breach of a condition precedent contained in the policy:

> "*37. Rix LJ reviewed the relevant authorities, and concluded (paragraph 70) as follows:*
>
> > *'In sum, I do not think that we have been shown any case where the doctrine of election has been applied, in the context of a merely procedural condition precedent, to the conduct of a claim on behalf on an insured by an insurer, nor do I think it would be consistent with the paradigm examples of election, or with the nature of the doctrine, which requires unequivocal conduct which has irrevocable effect, to treat that doctrine as being by its rationale applicable to this situation. The doctrine is ill-fitting in these circumstances, and unneeded. For there remains the doctrine of estoppel: in circumstances where it can be said that the handling of a claim by an insurer is an unequivocal representation condition precedent as affording a defence, and there has been such detrimental reliance by the insured as would make it inequitable for the insurer to go back on his representation, the insured will have all the protection that he needs.*'"

103. *The Kosmar Holidays plc* case concerned late notification of a claim, but the quoted reasoning of Rix LJ would appear to apply with equal force to other types of condition precedent as well, subject to an analysis of the facts of each case. In the present case one condition precedent was purely procedural (late notice) and the other was more substantive (contravention of any law). However, the facts relied upon as estopping the Insurer from relying on any breaches which may have occurred may be summarised as follows:

(a) the Insured personally filed his written claim under the Policy and communicated with the Insurer thereafter;

(b) the first item of loss the Insured sought and obtained compensation for under the Policy was the cost of rebuilding the wall damaged in the accident. The Insurer's Claims Supervisor, Ms. Deshield, described this item as the last issue the Insured mentioned to her. He mentioned his "DUI" charge and his wife's injuries first. The Claims Supervisor told him that the DUI case would have to be resolved. However, it seems that Ms. Deshield agreed to obtain estimates to prepare the wall on March 31, 2006;

(c) a first estimate in relation to the wall was received by the Insurer on April 18, 2006 and the second estimate on June 18, 2006. This was a lower quote and the Insurer authorised the work to be done and paid for it July 3, 2006;

(d) the damage to the wall was a third party claim. However, on July 21, 2006 the Insured also paid the Plaintiff for the damage done to his own car, which was written off;

(e) as the replacement of the Plaintiff's car was paid for by the Insurer after the Insured's DUI case was dismissed on June 7, 2006, the Insured contends that this was an unambiguous representation that the right to rely on the late notice point and/or the contravention of any law point;

(f) the Insurer's intention to avoid liability on the grounds relied upon at trial was first communicated to the Insured in a letter dated December 21, 2011. At no time during the 5 ¾ years after the claim was formally filed by the Insured did the Insurer hint that late notice was a concern or that, after his acquittal in Magistrates' Court, drink driving was an issue.

104. Mr. Rothwell relied on *Kosmar Holidays plc v Trustees of Syndicate 1243* [2008] EWCA Civ 147 as authority for the proposition that waiver by estoppel operated in a distinctive way in the context of the claims management process. I find his submissions in this regard were sound. The following observations of Rix LJ in that case directly concerning purely procedural notice clauses apply with greater force to substantive conditions precedent such as those relating to unlawful conduct:

> "*82...It would not be good practice for insurers to rush to repudiate a claim for late notification, or even to destabilise their relationship with their insured by immediately reserving their position - at a time when they were in any event asking pertinent questions about a claim arising out of an occurrence about which they had long been ignorant in the absence of prompt notification. Insurers traditionally armour themselves with all kinds of conditions precedent, but, in a relationship where there is trust, they are just as likely to forgo their strict rights. If they did not, the conduct of the insurance market might very well undergo considerable adaptation. Legal doctrine should not push insurers into over-hasty reliance on their procedural rights. No explanation for the very late notification of this serious claim had been vouchsafed to Euclidian, and I do not see why any doctrine such as election which is concerned with maintaining a fair balance between the parties to an insurance should be used to put insurers, who have been kept in ignorance of a serious occurrence for a long period of time, into peril of being forced to accept a claim advanced in breach of condition precedent before they have been put in a position properly to understand the circumstances of the accident and of its late notification.*

> 83. *That said, I would certainly not like to give the impression that insurers can equivocate for long while giving the plain impression that they are treating a claim as covered by their policy, especially at a time when a decision might be required, without running at least the risk that they will be treated as having waived some requirement of their contract or their right to avoid it. Moreover, there may well be express options given to insurers under their policy the unguarded exercise of which is simply inconsistent with the right to decline cover. In my judgment, however, this is not such a case.*"

105. Ms. Murdoch testified that helping claimants to meet urgent out of pocket expenses within the third party statutory limit was "the right thing to do". This did not really explain why the loss relating to the Insured's own car was paid by the Insurer. On the other hand, the main third party was the Insured's own wife; so the boundaries between a payment under the Policy and on a statutory basis were blurred. Moreover, this payment (of just over $5000) was on any view made at an early stage before the Insurer had concluded its investigation of the claim. Higher ranking employees than the Claims Supervisor became involved with the claim in July 2006 (no doubt because the Plaintiff's claim provided the most substantial financial exposure for the Insurer). And at the first meeting when the Plaintiff and the Insured were both present, it was made clear orally (and subsequently in writing) that the Insurer was reserving all of its rights under the Policy. These communications were directed formally at the Plaintiff, it is true. But in practical commercial terms the interests of the Plaintiff and the Insured as a married couple were indistinguishable.

106. If legal policy does not compel an insurer to make a rush to judgment on liability, the claims management process in the present case was clearly a complicated one. Firstly, in any serious personal injuries case, the extent of the injuries sustained routinely takes years to determine. The comparatively modest payments in respect of the Insured's car were probably made at a time when the Insured believed, based on medical reports then available, that the Plaintiff's injuries were not as substantial as they later turned out to be. Even after making the initial payments in 2006, the Insurer hired a private investigator, years later, to verify the true extent of her injuries. But the Insured himself can only point to the Insurer's actions in the first four months after his claim was made in support of his estoppel claim.

107. Taking the estoppel case at its highest, the Insurer very arguably unambiguously represented that it was accepting liability for that part of the Insured's claim that related to the replacement value of his car by meeting that aspect of the claim in full without any reservation of rights. I do not think it would be right for me to formally decide this issue as I was invited to address the estoppel issue on a global basis.

108. The allowance of the Insured's own claim for the loss of his car was inconsistent with the Insurer intending to deny liability, but in my judgment this did not constitute either an election or an unambiguous representation that liability was being admitted. Because when this payment was made it was or ought to have been obvious to the Insured that lion's share of the Insurer's exposure lay in his wife's third

party claim which the Insured had not had a reasonable opportunity to fully investigate.

109. In logistical terms this meant that the Insurer would not reasonably have required to reach a concluded view on the merits of the breach of condition precedent defences to the Insured's claim until it understood the maximum level of exposure involved. Ms. Murdoch testified that in September, 2006, she was still suspicious of the Insured's going home and having a drink and uncertain about whether or not the Plaintiff was wearing a seatbelt. No doubt the belief, based on the private investigator's report, that the Plaintiff was grossly exaggerating her injuries encouraged the Insurer to analyse their strict legal rights under the Policy with renewed vigour. And while the late notice point required little investigation, the "contravention of any law" point in the wake of the Insured's acquittal could not be understood without reference to expert evidence.

Summary

110. The Insurer is liable under the Policy to indemnify the Insured in respect of the Plaintiff's claim. The three defences are rejected on the following grounds:

(a) the Insurer failed to prove on a balance of probabilities that in making the written claim filed roughly 2 ½ months after the accident, the Insured failed to file his claim "as soon as possible". The contractual obligation, properly construed, meant "as soon as reasonably possible under the circumstances". The Insured substantially complied with this contractual obligation;

(b) the Insurer failed to adduce sufficiently clear evidence that the Insured was driving his vehicle "*in contravention of any law*" in circumstances where the Insured was only charged but ultimately acquitted of drink driving offences after the Prosecution offered no evidence at trial. This clause providing the Insurer with a basis to avoid liability, properly construed, required proof that the Insured's driving was deliberately unlawful in a way which was material to the occurrence of the accident itself. The Insurer failed to adduce sufficiently clear evidence required to prove such serious allegations. In particular:

(i) there was no clear evidence that the Insured's speeding in a deliberate and dangerous manner caused the accident to a material extent; and

(ii) there was no clear evidence that the Insured at the time of the accident was over the legally permitted alcohol limit. Although I was satisfied that he had been drinking before driving, the drink he had before being tested by the Police and after the accident created serious doubts, acknowledged by the Insurer's expert witness, about precisely what his blood alcohol level was at the time of the accident.

111. Without deciding at this stage the extent of the contributory negligence in this regard, I find that the Plaintiff was at the time of the accident not wearing a seat belt. However, I am unable to find that she was also contributorily negligent by allowing herself to be driven by an obviously impaired driver because the Insurer was unable to adduce any clear evidence as to apparent driving competence of the Insured immediately prior to the accident and/or clear evidence of his having consumed to the knowledge of the Plaintiff an amount of alcohol which would either impair his ability to drive or take him over the legal limit. Such a finding would only have been properly open to me if I had found that, after an evening in the company of the Plaintiff, the Insured was in fact over the legal limit. The requisite clear evidence does not exist; and the strong suspicion that the Insured was possibly over the limit and caused the accident because of his impairment is not enough to support a finding that the Insured was over the limit at the material time.

112. If I had been required to find that the accident had been caused because the Insured was deliberately driving in contravention of the law, I would have found that the Insurer had not waived the right to rely on this defence by its conduct in handling the Insured's claim.

113. I will hear counsel as to costs and any other incidental matters arising from the present Judgment.

Dated this 14th day of June 2013 _____
IAN R.C. KAWALEY C.J.