SHIRI KRISHNAN *v.* QUEENSLAND INSURANCE CO. LTD.

[COURT OF APPEAL AT SUVA (Lowe, C.J., President, Sir George Finlay and Sir Joseph Stanton, JJ/A), January 6, 1959.]

CIVIL APPEAL NO. 8 OF 1958

(Appeal from H.M. Supreme Court of Fiji—Hammett, J.)

Motor vehicle insurance—bus ran over "pothole" and stopped with wheel in shallow ditch—when accelerating engine to reverse vehicle a piston broke and damaged the engine—whether impact with a "pothole" comes within the scope of a policy insuring against "impact with any object"—whether or not the "pothole" in question was an "object".

Held: 1. If the specific provision in the policy of insurance was intended to cover damage resulting from the striking of such "potholes" on a road it would create a liability for the maintenance of a vehicle.

2. The provision did not, in this case, cover such an eventuality.

3. The "potholes" on the road in question were merely part of the road surface.

4. The damage to the engine was not the result of the vehicle striking the "pothole".

Appeal dismissed.

F. M. K. Sherani for the appellant.

H. A. L. Marquardt-Gray for the respondent.

(The following is the judgment of Sir GEORGE FINLAY, J/A. Judgments to similar effect were given by the other members of the Court.)

The judgment appealed from was given in an action in which the appellant sought to recover from the respondent a sum of £389 17s. 9d. under a policy of insurance issued to the appellant by the respondent for valuable consideration.

The grounds of appeal as stated and argued relate exclusively to questions of law which find their basis in the evidence given for the appellant at the hearing of the action. I refrain from any very detailed examination of the evidence for that is not necessary. It is sufficient to say that in the course of a journey a bus belonging to the appellant came to a portion of a tar sealed road which had been damaged by floods: there were many "potholes" in it. The driver of the bus had full knowledge of the state of the road and was, in consequence, driving slowly; he said at 15 miles per hour. What happened, as testified to by the driver, is that when it came into the potholes in the road the bus was "jerking". Then "all of a sudden it jerked forward and backward and went off the left hand side of the road."

The account given by the only other witness to the incident is slightly different but not, I think, materially different. He said "The bus struck a pothole and swung to its left." Both witnesses agreed that the left front wheel of the vehicle went, as the driver put it, "into a small drain on the edge of the road". The drain was 7 inches deep—not as deep as some of the potholes. It is worthy of notice that no one suggested that the onward progress of the bus was stopped by the drain. On the contrary, there is some reason to think it was stopped by an application of the brakes. The rate of travel was slow, as might, in the circumstances, be expected and the driver who alone gave evidence on the topic said:—

> "I stepped on the brake as soon as the bus jumped from the pothole to the side of the road. The front left wheel was about 2 feet off the road in the ditch. All the other wheels were on the 'tarmac' of the road."

The force of any impact resulting from the bus dropping into the ditch (if it dropped) was, it would seem, vertical in direction and, having regard to the shallowness of the drain, must have been minor. No one suggested in any case that that impact caused any damage, the only possible cause of damage contemplated by the experts on both sides being a sudden and violent check to the onward progress of the vehicle. The point is of importance because it leaves for adjudication the question whether an impact with a pothole on the road comes within the scope of a policy insuring against " impact with any object ". That poses the first legal issue the Judge had to determine. The second and consequential issue presented to the Judge for determination was whether, if there was in terms of the policy an impact with an object, the appellant had proved that the damage suffered by the vehicle in the course of the incident resulted from that impact. The appellant claimed it did: the respondent that it did not.

The conflict must be considered in the light of a conflict in the fundamental conceptions of the parties as to what was the real cause of the damage.

As I understood appellant's Counsel, his contention as to that was two-fold. He seemed to me to contend either that the piston which broke and, by its breaking provoked all the damage, was broken by the impact with the pothole or, if it were not then broken, that the piston broke when, as it was reasonable for him to do, the driver " revved up the engine " as it was put, in order to reverse the vehicle and replace it on the road.

Associated with this latter contention was doubtless involved the possibility of the piston having been so damaged by the impact with the pothole that it was weakened to the point that it would not stand the ordinary and necessary strain and stress of " revving up ". What the appellant in essence contended was that the breaking of the piston was a constituent element in the one comprehensive incident.

The respondent first set out as one of its defences that " the revving up " was done excessively and negligently. That defence was, however, not maintained, and the substantive defence relied upon was that the piston at the time of the occurrence had by use—or by misuse—become so defective that it was ready to break and did break in normal use and that its breaking was not in any real sense connected with the incident of striking the pothole and running off the road.

The evidence upon which this conflict fell to be resolved was the evidence of the driver and of the two expert witnesses—one called by each party. The driver made it clear that after the vehicle came to rest in the drain and before he started to " rev up ", the engine was, to all seeming, running normally. The point is of importance. Mr. Goodrum, the expert witness called for the appellant, first made the point that " under normal conditions of fitting " (and there is no suggestion that there was here any departure from those conditions) an engine cannot be " over-revved ". He next made the point that it was quite a normal and proper proceeding for the driver to reverse on to the road and that it would have been so even under more adverse circumstances than here pertained. But he made two other more material points. The first: that for an engine to suffer the damage this engine suffered —that is, for the piston to break—there must have been a mechanical defect in the piston to begin with. The second: that, in his opinion, no damage could be caused to the piston of an engine in a vehicle travelling at 15 to 20 miles per hour which " hit a pothole and then went into a shallow ditch at the side of the road ".

This statement was most important because all the damage suffered by this vehicle resulted from the breaking of the piston. There was, in consequence evidence from the appellant's expert that the damage to the piston could not accrue to the engine in the circumstances in which the appellant alleged it accrued. There was also evidence from the same source that the piston must have been already defective at the date of and before the occurrence. The continued running of the engine, the witness explained, could be due to the piston being initially only incompletely fractured.

The expert called by the respondent expressed the view that a piston could only be broken, as this one was, if the vehicle were running in top gear and stalled. There was no evidence as to what gear the vehicle was in at the time of the occurrence so the evidence of this witness was, on this point, ineffectual. What is important, however, is that he did not question in any way the evidence of the appellant's expert as to any of the matters I have mentioned. The Judge accepted the evidence of the appellant's expert and was quite justified in doing so.

From this evolved the question for the Judge whether the piston of this engine was damaged—it could not have been broken or the engine would not have gone on working—by the impact with the pothole and whether that damage caused it to break when the driver " revved up " to reverse. The Judge held on that issue that the appellant had failed to prove his case.

I return to the first question. The contingency insured against as expressed in the policy is " accidental collision or impact with any object ". What has to be determined, therefore, is whether the pothole in this road which the vehicle met is an " object " within the meaning of that word in the Policy. It is a nice question. Inherently it seems to me that " object " in the policy is indicative of something—I do not say something tangible or having substance—having an independent character or identity of its own. It cannot mean the road surface merely as such. I do not exclude the possibility of a hole or ditch, in a road, of such a size or character that it is foreign to the general nature and character of the road surface itself being an object within the policy. Such a hole or ditch might well have an independence and a character of its own. A hole or ditch might be foreign to the general nature of the road. But these potholes were an integral part of the road surface itself. It was merely a road pitted by water erosion. Their presence in a very real sense only contributed to the character of the road in that they made it a bad road. They there differ from milestones, poles, bridges and such other things which, although part, in a legal sense, of the road, are distinguishable from the general character of the road and are capable of comprehension as having an independent existence.

If striking a pothole is an impact with an object in terms of the policy, then, as use upon a rough and broken surface must in the end result in breakage which will occur when one ultimate rough and broken surface is met, the policy would extend to cover deterioration in use—in other words, maintenance. That is a meaning I imagine no one would suggest the policy was intended to bear. I conclude, therefore, that there was no such " impact with any object " within the meaning of the policy. I do not—it is unnecessary—advert to the question whether the word " accidental " in the phrase " accidental collision or impact " attaches to the word " impact ". The disjunctive " or " suggests it does not and, in any case, the respondent, if it seeks the benefit of such a construction, should make it clear. The *contra proferentem* rule is against it there.

As some argument turned upon it, I say, in passing, that in my view the damage was the result of an accident in that the results of striking the pothole were unexpected. But that has no relation to the primary question as to whether the vehicle struck an object within the meaning of that word in the policy.

For the reasons given, I am of opinion that the appellant failed to establish a case in respect of the first contingency insured against under the policy. If I am wrong as to that, then I agree with the learned Judge that the appellant failed to prove that the breaking of the piston which provoked all the rest of the damage was due to any impact. The evidence of the appellant's expert made it clear that damage to the piston from contact with the pothole was improbable, if not impossible, under the circumstances. He also makes it clear that no excessive stress or strain was put upon the piston by reason of the position of the vehicle when the driver tried to reverse. The Judge concluded, in consequence, that the piston, it being defective, failed in the usual course of events just at the moment the driver " revved up " the engine.

The accident, if I may use that term a little inaccurately, merely created the occasion for the break. It would presumably have broken soon enough anyhow, and certainly when the vehicle was next put into reverse.

I am not unconscious of the body of authority which throws the burden of loss upon a party where something for which he is responsible causes the ultimate result which gives rise to loss. Many of these cases arise under the Workers' Compensation Acts. The typical case is the case of a worker with a diseased heart who suffers a trifling accident and dies. The employer pays the full measure of compensation. But that, apart from any reference to statutory provisions, is because he is responsible for the consequences of what caused the ultimate result. Equally, a tort feasor takes his victim as he finds him. But there too the tort feasor is responsible for the tortious act which caused the ultimate damage. Here there is no proof—the proof is to the contrary—that the piston was damaged when the vehicle met the pothole. The appellant can, in consequence, get no benefit from the suggestion that the piston was damaged when the vehicle met the pothole and that the final break when the driver tried to reverse on to the road, was in consequence, an integral part of one incident so that the same result accrues as if the piston were fractured by the striking of the pothole. On the contrary, the appellant's own witness testified that the piston would not be damaged by the vehicle meeting the pothole and, in effect, that the breaking of the piston was in normal use.

I reject the suggestion that in the circumstances disclosed by the evidence there was anything in the nature of an explosion. There is no suggestion of anything of the kind and certainly none of any such explosion as is made the subject of cover by the policy. What I have said covers all the grounds of appeal.

I would dismiss the appeal with costs.