JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL No. 84/84

BEFORE: The Hon. President
The Hon. Mr. Justice Carberry, J.A.
The Hon. Mr. Justice Campbell, J.A.

BETWEEN - CENTRAL FIRE & GENERAL INSURANCE COMPANY LIMITED - DEFENDANT/APPELLANT

AND - SYLVESTER HYLTON - PLAINTIFF/RESPONDENT

Enos Grant and Gareth Stewart instructed by Orrin Tonsingh for Appellant

Allan Wood instructed by Douglas Brandon of Messrs. Livingston, Alexander & Levy for Respondent

May 9, 10, 22 & July 10, 1985

ROWE, P.:

The appellant is an authorised and approved insurer under the Motor Vehicles Insurance (Third Party Risks) Act, (the Motor Vehicle Insurance Act). By a private-comprehensive policy of insurance MV 36654/4/75C made between the appellant and one Leonard Davis, the appellant undertook in Section II thereof to indemnify the insured as follows:

> "1. The Company will subject to the Limits of Liability indemnify the Insured in the event of accident caused by or arising out of the use of the Motor Vehicle against all sums including claimant's costs and expenses which the Insured shall become legally liable to pay in respect of -

> "(a) death of or bodily injury to any person except where such death or injury arises out of and in the course of the employment of such person by the Insured and excluding liability to any person being a member of the Insured's household who is a passenger in the Motor Vehicle unless such person is being carried by reason of or in pursuance of a contract of employment with a person insured by the Policy."

Various Limits of Liability were set out in the Schedule to the Policy but so far as is material the Limits were:

> "Limit of the amount of the Company's liability under Section II - 1(a) in respect of death of or bodily injury to any one person ..... $250,000."

A certificate of insurance was issued by the appellant to Leonard Davis which conformed to the provisions of section 5 (4) of the Motor Vehicles Insurance Act and in consequence the Policy of Insurance issued on April 10, 1975, and due to expire on April 9, 1976 was in full force and effect on August 17, 1975 when the respondent suffered severe injuries as a result of the negligent driving of the Insured Vehcile by Leonard Davis.

On March 17, 1976, the respondent brought proceedings in the Supreme Court against Leonard Davis to recover damages for negligence and a final judgment was entered for the plaintiff on September 24, 1981 for a total sum of $270,000 with interest. That judgment was not satisfied and by Writ C.L. H118 of 1981, the respondent brought action against the appellant to recover the sum of $302,988.87 being the balance of the judgment and interest thereon. In defence the appellant pleaded that its liability was limited under the policy to $250,000; which it was willing to pay. That brought forth a Reply from the respondent, paragraph 6 of which is material:

"The Plaintiff says that the Defendant is estopped and precluded from saying that its liability to the Plaintiff is limited to the sum of $250,000.00 because the Defendant who had knowledge of the said limitation did not disclose same to the Plaintiff despite the fact that the following events transpired:

(a) That Judgment was entered in favour of the Plaintiff and damages assessed in the Supreme Court on the 23rd day of April, 1980 for the sum of $204,777.02.

(b) That the Plaintiff appealed from the said assessment of damages and the Court of Appeal on the 17th day of December, 1980 allowed the appeal and made an order that damages be re-assessed.

(c) That the re-assessment of damages came on for hearing on Thursday the 24th of September, 1981 before Mr. Justice Harrison.

(d) That the hearing of the re-assessment of damages the Defendant's Counsel, Mr. Crafton Miller, negotiated with the Plaintiff's Counsel Mr. R.N.A. Henriques and Mrs. Angella Hudson-Phillips and agreed to the sum of $270,000.00 as damages for the Plaintiff.

(e) That the Defendant's Counsel informed the Plaintiff's Counsel that this figure of $270,000.00 was subject to the Defendant's Counsel obtaining the approval of the Defendant to settle the matter at this figure.

(f) That the Defendant's Counsel after a telephone communication with the Defendant, informed the Plaintiff's Counsel that confirmation was given to settle the matter at the figure of $270,000.00.

(g) That as a consequence a Consent Judgment was entered for the Plaintiff for the sum of $270,000.00.

(h) That at no time either when the matter first came on for hearing in the Supreme Court or in any of the events which transpired subsequent thereto and even before, at/or when the Consent Judgment was being entered for the sum of $270,000.00 did the Defendant's Counsel disclose to the Plaintiff's Counsel or Attorneys that the Defendant's liability was limited to $250,000.00."

Alexander J. (ag) heard the case on November 27, 1984 and delivered a terse oral judgment in which he held:

(a) that the appellant was entitled to take over the defence of the action between the respondent and Leonard Davis;

(b) That the appellant did so for the benefit of itself and of its insured;

(c) that the principle in Hansen v. Marco Engineering (Aust.) Pty. Ltd. [1948] V.L.R. 198 was applicable to the case before him;

(d) that the right conferred by the policy cannot and does not mean that the Insurance Company can settle for a sum larger than it is liable to pay nor can it subject the insured to a liability more than they are entitled to pay;

(e) that because the insurance company is presumed to be protecting itself and the insured,when it agreed to a judgment in excess of the policy limit, the insurance company cannot rely upon the provisions of section 6 of the Policy of Insurance which provides, inter alia, that "the company shall be entitled if it so desires to take over and conduct in his name the defence or settlement of any claim" to say it was merely doing what it had power under the Policy to do;

(f) that the insurance company having agreed to a settlement of $270,000.00 they had put themselves in a position where they must indemnify the respondent for $270,000.00 and must be estopped from saying otherwise."

The defendants appealed and relied upon some nine separate grounds. In essence these grounds complained that the decision in Hansen's case does not represent the law of Jamaica, that where an insurance company takes over and conducts a defence in a suit against its insured, it acts as an agent for the insured and not as a principal, and that if the insurance company agrees to a settlement of the claim, there is no automatic estoppel as would render it liable to pay to the successful plaintiff the amount of the settlement.

Section 18 (1) of the "Motor Vehicles Insurance Act" provides that:

> "If after a certificate of insurance has been issued under subsection (4) of section 5 in favour of 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 paragraph (b) of subsection (1) of section 5 (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 the provisions of 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."

It was by virtue of this section that the instant action was brought. Mr. Grant submitted that the respondent's action must fail as it is grounded upon the doctrine of equitable estoppel and it is established law that such an estoppel acts only as a shield to protect and not as a sword to create a right of action. In his view the alleged representations relied upon by the respondent would not be out of place in an action for deceit or for negligent mis-statement of facts which are actions founded in tort but could not be relied on in a contract situation. Mr. Grant submitted further that equitable estoppel related only to contractual situations. For these propositions Mr. Grant relied on the decision in Central London Property Trust Ltd. v. High Trees House Limited [1947] 1 K.B. 130 and the views expressed by the learned authors of Chitty on Contracts 25th Edition [1983] at para. 204 and Cheshire and Fifoot on Contract, 8th Edition [1972] at p. 84. We agree with the submissions of Mr. Wood that section 18 (1) of the Motor Vehicles Insurance Act gives a statutory cause of action to a successful plaintiff to sue the insurance company to recover the fruits of a judgment obtained against its insured. Consequently, the action is not founded upon

an estoppel or upon contract but is maintainable because the statute gives the insured party who has a judgment in his favour the right to collect directly from the insurance company. Support for this view can be found in the decision of the Privy Council in Free Lanka Insurance Co. Ltd. v. Ranasinghe, [1964] 1 All E.R. 457; [1964] A.C. 541 (Pr.C.).

This case arose in the courts of Ceylon on a claim in negligence for damages caused in a motor vehicle accident. The Ceylon Motor Car Ordinance of 1900 contained a provision similar to section 18 (1) of the Motor Vehicle Insurance Act of Jamaica. An action was filed by the injured party against the insured but before the judgment was delivered the Motor Car Ordinance was repealed and replaced by a new Ordinance which did not contain any transitional provisions. It was accepted on both sides that the right of the injured party to sue the insurance company only existed by virtue of statutory provisions and the Privy Council relied upon provisions in the Interpretation Ordinance of Ceylon to hold that notwithstanding the fact that a judgment had not been obtained against the insured before the repeal of the Ordinance, the advanced steps taken by the injured party to obtain judgment against the insured were sufficient to invest in him a right although inchoate or contingent which had survived the repeal and consequently the injured party could recover from the insurance company.

The editor in reporting the decision in Beacon Insurance Co. Ltd. v. Langdale, [1939] 4 All E.R. 204 drew attention to the fact that the effect of a clause giving the insurance company complete control over proceedings arising out of a policy of insurance has been much discussed by those interested in these

matters, but has not often been before the courts. He was there reporting a case in which the insurance company on a clause in all respects similar to that in clause 6 of the Insurance Policy in the instant case, settled a claim by payment of money with denial of liability without any reference whatever to the insured and then called upon the insured to pay the £5 which was the "excess" payable by him under the policy. The insured refused to pay on the ground, firstly, that the insurance company was not entitled to settle the claim without notice to him and secondly, that the insurance company had not acted reasonably in the exercise of their authority. The Court of Appeal, (U.K.) held that the policy gave the insurance company the power to settle the claim in their discretion and without consulting the insured and once they exercised that discretion competently, the insured was bound to pay his excess. Of course, there was no question there of the insurance company settling for a sum in excess of the amount limited by the policy, but this case is authority for the proposition that in a clause in the form of Clause 6 of the instant insurance policy, the insurance company has authority to settle the claim without the prior approval of the insured.

Halsbury's Laws of England 4th Edition, Vol. 25 at para. 702 deals with "Policy conditions as to conduct of proceedings." Mr. Grant relied heavily upon the statement of the law in that paragraph which is:

> "The policy usually empowers the insurers to take over, in the name of and on behalf of the assured, the conduct and control of the defence of proceedings within the ambit of the policy brought against him. This power enables the insurers to settle the proceedings without consulting the insured, and they can then recover from him any portion of the agreed damages which under the policy he has to bear. The exercise of this power does not involve the

> "insurers in any liability to the third party, and they do not make themselves responsible to him for payment of the amount at which the liability of the assured has been assessed."

This statement of the law takes the matter beyond Beacon's case as it stated categorically that in undertaking the conduct of the defence, the insurance company does not make itself responsible to pay the damages assessed against the assured.

Nairn v. South-East Lancashire Insurance Company Limited, [1930] S.C. 605 is authority for three general propositions: Firstly, when the insurance company instructs counsel to defend a suit on behalf of its insured under powers contained in an insurance policy, the counsel acts as counsel for the insured and not as counsel for the insurance company and underscores the fact that judgment when given is not given against the insurance company but against the insured; secondly, that although the insurance company has the conduct of the defence they do not act as principals but rather as agent for the insured; and thirdly, that although their counsel exercises complete control over the litigation they do not thereby make themselves responsible for the debt u sued for. (See the judgment of Lord Anderson at pages 613 - 615 of the Report).

Nairn's case is cited by Macgillivray on Insurance Law, at para. 2254 as authority for the proposition that if a policy provides that all claims or legal process served upon the assured shall be immediately forwarded to the insurers and that the insurers shall be entitled to defend, and settle if need be, claims brought against the insured, then if the insurer exercises his rights under such a clause and makes an offet which is accepted by the third party he will not himself be liable to pay the third party the agreed sum.

Mr. Wood challenged the decision in Nairn's case that that insurance company acts as the agent of the insured when it defends an action in the name of the insured, by reliance on dicta in the case of Groom v. Crocker, [1938] 2 All E.R. 394. The insured

brought an action against the insurance company and their solicitors for breach of duty, negligence and libel arising out of the manner in which the insurance company settled a claim in negligence brought against the insured and another party. Although the insured was in no way negligent, the solicitors for the insurance company filed a defence admitting that the insured was solely to blame for the accident, and wrote a letter to the solicitors for the injured party to the same effect. Neither the insurance company nor the solicitors had communicated with the insured in any way before the filing of the defence and the writing of the letter. But the insurance company promptly paid the amount of judgment and costs.

The insured was incensed that he was made to appear as being blameworthy in circumstances where he clearly was not. At that time some insurance companies had adopted a pooling arrangement to avoid the onerous costs of defending negligence suits when it was clear that one company or the other would have to pay and this was the motivation for the insurance company in the Groom v. Corcker case to admit liability rather than defend. The Court of Appeal,(U.K.) held that the solicitor was bound to act bona fide in the common interest of the insurers and the insured and as upon the facts of that case he had not done so, the solicitor was liable in negligence. Only nominal damages were awarded on that ground. Sir Wilfred Greene, M.R. in delivering the judgment of the court said at p. 400:

> "Was the admission of negligence one which, in the circumstances, the insurers were entitled, under the policy, to require the insured to make? In my opinion, clearly not. The right given to the insurers is to have control of the proceedings in which they

> "and the insured have a common interest - the insured because he is the defendant and the insurers because they are contractually bound to indemnify him. Each is interested in seeing that any judgment to be recovered against the insured shall be for as small a sum as possible. It is the insured upon whom the burden of the judgment will fall if the insurers are insolvent. The effect of the provisions, is, I think, to give to the insurers the right to decide upon the proper tactics to pursue in the conduct of the action, provided they do so in what they bona fide consider to be the common interest of themselves and their insured. However, the insurers are, in my opinion, clearly not entitled to allow their judgment as to the best tactics to pursue to be influenced by the desire to obtain for themselves some advantage altogether outside the litigation in question, with which the insured has no concern."

Far from supporting the contention of Mr. Wood, it seems to me that the Master of the Rolls in the passage quoted above was at pains to show that the insured is principally liable to the injured party and although he has no power to interfere with or give instructions to the solicitor having the control of the defence, if a judgment is obtained against the insured, he is liable to pay, if due to insolvency, the insurance company cannot indemnify him. How could the insured be an agent in those circumstances, as it is incontrovertible law that an agent is not responsible for the default of his principal? To say that because the insurance company has an interest to protect, it is acting as a principal when it takes over the defence of the action against the insured, would be to rewrite the contract as between the parties. MacKinnon L.J. was clearly of the view in Groom v. Crocker supra, that the solicitor selected by the insurance company was the solicitor for the insured when he said.

> "As the insured is the litigant, the solicitor is his solicitor, on the record, and owes him the duty of a solicitor to his client."

The law seems settled that an insurance company acting bona fide in its own interest and in the interest of its insured can defend an action to judgment or settle such an action and whether it defends to judgment or settles the case it does not make itself liable to the injured party to satisfy the judgment. The injured third party cannot be in a better position vis-a-vis the insurance company than would be the insured except there is statutory provision to that effect or if the doctrine of estoppel precludes the insurance company from denying liability to the injured third party. Mr. Wood did not rely upon any statutory provision to support an argument that if an insurance company settles a claim it thereby makes itself liable to satisfy the judgment. Neither did he argue that by defending the action to judgment the insurance company would be liable to satisfy the whole judgment notwithstanding any limitation contained in the policy of insurance.

As I understand his argument, it is this. An insurance company only has an interest to the extent of its liability under the policy. If, therefore, knowing the policy limitation, it enters into direct negotiations with the injured third party and does not disclose the extent of that limitation, the inescapable inference to be drawn from such conduct is that the policy covers the amount for which the insurance company is prepared to settle and in those circumstances once the injured party accepts the settlement the insurance company should be estopped from claiming that its liability is limited under the policy of insurance. He said further that in the instant case there was an additional ingredient in that the attorney for the insurance company having negotiated a settlement figure, reserved his position until he got confirmation to the settlement, and that that attorney informed

the attorneys for the respondent that the insurance company had agreed to the settlement.

The headnote to Greenwood v. Martin's Bank Ltd.,[1932] All E. Rep. 318; [1933] A.C. 51, succinctly sets out the legal bases for an estoppel by representation as follows:

> "The essential factors giving rise to an estoppel by representation are (i) a representation, or conduct amounting to a representation, intended to induce a course of conduct on the part of the person to whom the representation is made; (ii) an act or omission by the person to whom the representation is made resulting from such representation or conduct; and (iii) detriment to such person as a consequence of the act or omission. Mere silence cannot generally amount to a representation, but when there is a duty to disclose deliberate silence may become significant and amount to a representation."

Mr. Wood says that the insurance company had the policy in their possession and they knew that their liability was limited to $250,000 and provided they entered into negotiations for settlement they should have disclosed this limit. Non-disclosure, he said led the respondent to act to his detriment in that there were two courses open to the respondent, either to go on to assessment and take his chances of getting an award in excess of $270,000 or accept the settlement of $270,000 with the prospect of full recovery from the insurance company. If said Mr. Wood, the respondent cannot now recover from the insurance company on their presentation of the case, then the respondent would clearly have acted to his detriment. He relied upon Brikom Investments Ltd. v. Carr and Others, [1979] 2 All E.R. 753. That was a case in which landlords in offering long leases to prospective tenants promised that the landlord would at their expense repair the roof of the building. When the leases were signed they contained a clause that the landlord would be able to recoup from the tenants sums expended for roof repairs. Some of the original

tenants and assignees of original tenants refused to pay.

Lord Denning M.R. described the situation thus at p. 756:

> "In all strictness of law, neither the tenants nor their assigness have any answer to the claim for contribution. The covenants in the lease are clear. But the tenants and their assigness rely on various representations or promises made by the landlords before and after the leases were executed. These were to the effect that the landlords would themselves repair the roof at their own cost without making any charges against the tenants. The tenants and their assignees claim that, on this account, it would be inequitable and unjust for the landlords to insist on their paying a contribution. They rely on the High Trees principle."

At page 758H he continued:

> "Counsel for the landlords submitted that Mrs.Dufton (now Mrs. Carr) could not rely on the principle in the High Trees case, because it was essential that she should have acted on the representation; and here she had not acted on it. On her own admission, he said, she would have gone on and taken the lease even if she had not been told about the roof. In all the cases, said counsel for the landlords, the courts have said that the parties must have acted on the promise or representation in the sense that he must have altered his position on the faith, of it, meaning that he must have been led to act differently from what he would otherwise have done. See Allan & Co. v. El Nasr Export and Import Co. [1972] 2 All E.R. 127 at 140. This argument gives, I think, too limited a scope to the principle. The principle extends to all cases where one party make a promise or representation, intending that it should be binding, intending that the other should rely on it, and on which that other does in fact rely, by acting on it, by altering his position on the faith of it, by going ahead with a transaction then under discussion or by any other way of reliance."

Roskill L.J. did not agree with Lord Denning M.R. that the principle of promissory estoppel applied while Cumming-Bruce L.J. was prepared to apply that principle only as an alternative to the primary reason that there was a collateral contract between the landlords and the tenants.

Let us examine the facts in the case before us to see what were the representations alleged. There is no evidence as to who instituted the process of negotiation. There is no evidence that in negotiating the figure of $270,000, the respondent reduced any claim beyond an amount he felt he was likely to obtain from the trial judge. There is no evidence that the attorneys for the respondent asked the attorney on the record for the insured who had the conduct of the defence on the instructions of the insurance company, to produce the insurance policy or to divulge the limit of the cover. Apart from the fact that the attorney for the defendant on the record said that settlement figure of $270,000 was subject to the approval of the insurance company, there is no allegation that he said anything to give the impression that the policy was for unlimited cover.

If there is a duty to disclose the limit of the insurance policy, in what circumstances would that duty arise? Would it arise only in cases where the insurance company contemplates a settlement and if so at what stage of the negotiations? If the legal advisers for the injured party knew the exact limit of the insurance cover, would that be an inducement to inflate the damages to exhaust the cover? And if a duty of disclosure existed in relation to settlements, why should this duty not logically be extended to defended cases? Where it is clear that damages, if any, would exceed the indemnity to be provided by the insurance policy, why should an insurance company be entitled to prolong the trial and cause the injured person to incur additional costs which it would have no duty to satisfy?

Alexander J. (ag.) held that the principle enunciated in Hansen v. Marco Engineering (Aust.) Pty. Ltd., [1948] V.L.R. 198 applied and that an insurance company cannot settle for a sum larger than it is liable to pay nor can the insurance company subject the insured to a liability more than they are entitled to

pay. In Hansen's case, the insured had two policies for insurance with an insurance company, one being a statutory policy under the Motor Car (Third Party Insurance)Act, 1939 which limited the liability of the insurer in respect of any claim made by a passenger in the insured's vehicle to $2,000 and the other being a comprehensive policy which insured against liability to third parties in connection with the same vehicle, without limit of amount, but which expressly excluded liability for injury to passengers. A passenger in the vehicle of the insured was injured and he brought an action against the insured and others, the defence of which was taken over by the insurance company. Counsel assigned by the insurance company settled the case for a sum in excess of $2,000 and the action was discontinued.

At all material times up to the time of the settlement the insurance company and the insured were of the opinion that the insurance company was liable to the injured party without limit of amount under the comprehensive policy. Shortly after the settlement was arrived at the insurance company discovered its mistake and refused to pay more than the $2,000. The injured party sued the insured under the settlement and the insured joined the insurance company claiming indemnity to the full amount of the settlement.

Fullagar J. in giving judgment referred to the provisions of section 19 (1) of the Motor Car (Third Party Insurance) Act of 1939 that:

> "19 (1) For the purposes of any contract of insurance under this Part the authorized insurer -
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> (a) may undertake the settlement of any claim against the owner or against any driver insured under the contract of insurance;

"(b) may take over during such period as it thinks proper the conduct and control on behalf of the owner or such driver of any proceedings taken or had to enforce such claim or for the settlement of any question arising with reference thereto;

(c) may defend or conduct such proceedings in the name of the owner or such driver and on his behalf and if need be may without the consent of such owner or driver to the extent of the liability of the authorized insurer but no further or otherwise, admit liability;

(d) subject to this Part shall indemnify the owner or such driver against all costs and expenses of or incidental to any such proceedings while the insurer retains the conduct and control thereof."

And at pages 207-208, decided that:

"On the whole I am of opinion that paragraph (a) should be construed as not authorising the settlement of any claim for an amount in excess of the indemnity which the contract of insurance provides. My principal reason for so thinking is that the authority given by paragraph (a) is given only "for the purpose of the contract of insurance" and I am unable to see how any purpose of the contract of insurance can be fulfilled or furthered by a power to an insurer by its own voluntary act directly to commit the insured to a liability in respect of which he is not covered. The insured has an interest in the amount which may be payable whether within or without the policy limit (see per Greene M.R. in Groom v. Crocker, [1939] 1 K.B. 194 at p. 203), but I cannot see that the insurer has any interest beyond the policy limit."

Greene M.R. did say in Groom v. Crocker, supra, that the insurance company had an interest to see that damages awarded were at the lowest level but he did not say, that the insurance company should only protect the insured to the extent of its own liability and then be free to withdraw from the case and leave the

insured to his own devices. Fullagar J. admitted that he regarded the question of the effect of section 19 (1)(a) as "ultimately the critical question in the whole case" and it might very well be that his interpretation of that section was a correct statement of the law in the State of Victoria. In the instant appeal Mr. Wood freely admitted that there was no similar legislative provision to section 19 (1) quoted above and that the insurance policy contained no similar clause. To this extent, therefore, Hansen's case was decided on the peculiar statutory provisions then extant in Victoria.

At the time when Hansen's case was decided Fullagar J. referred to a passage in the then edition of Macgillivray on Insurance Law, that "If an insurer undertakes the defence of a claim he thereby admits liability in respect of it and cannot afterwards say that the loss was not covered by the policy." It is noteworthy that there is no similar statement in the current edition of the Macgillivray treatise and at para 2254 of the Sixth Edition, the learned authors say that if the insurers receive notice of a claim on their assured and decline to take over the defence, they will be precluded from contesting the quantum of any bona fide settlement, although the assured must still establish that there was a liability.

It appears from the judgment of Fullagar J. that in the United States there is an automatic estoppel if the insurance company assumes the conduct of the defence. An example which he gave was that of Malley v. American Indemnity Corporation, [1929] 297 Pa. 216 p.224 where Sadler J. said:

> "Where an insurance company, under an indemnity contract, takes charge of the defence of an action on which liability rests, it will be estopped from thereafter questioning the claim either because it was beyond the terms of the policy or because the latter was procured by a breach of some warranty."

Fullagar J. thought that the general principle of law that one cannot approbate and reprobate at the same time applied to insurance cases, as this influenced him to the decision at which he arrived. As Mr. Wood adopted for the purpose of his submissions the portion of Fullagar J's decisions at pages 210-211, I set it out in full:

> "If the only policy requiring consideration in the present case had been the comprehensive policy, I should have thought that an estoppel arose on this principle. Arguments to the contrary could be based on various analyses of estoppel which are to be found in the reports. In the first place, it could be said that the insurer could not be estopped unless it knew that Hansen was a passenger and knew that the risk was not covered by the comprehensive policy. But it had been told that Hansen was a passenger, and a copy of its own policy was in its own hands. And in my opinion in this particular class of case it is not essential that the party sought to be estopped should assert something which it knows to be false or does not believe to be true. In Ferrier v. Stewart [1912] 15 C.L.R. 32, at pp. 44-5, Isaccs J. said:
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> > 'The real ground of estoppel is the injustice of allowing repudiation in such a case, even though the inducement was given under an innocent misapprehension. The matter is to be regarded from the standpoint of the person who acted on the assumption upon which the other intended he should act.'
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> "Ferrier v. Stewart, [1912] 15 C.L.R. 32, was not an insurance case, but here, as there, I think that liability of the party acting was 'the conventional basis on which the parties acted, and so far as they are concerned it must be taken to be the true one' (15 C.L.R. 32, at p. 46). If the defence to a claim on the policy were a misrepresentation or breach of warrnty by the insured, the presence or absence of actual knowledge would, of course, be a very material matter. In the second place, it could be said that the insurer did not intend the insured to act upon any assumption. But it asserted a right, and the insured, because it believed itself to be regarded as indemnified,

Company Ltd. was a case in which a prospective developer acquired property for the purposes of development. His neighbour intimated his intention to object on the ground that the development would be in breach of a restrictive covenant for which he had the benefit. The purchaser obtained insurance protection for indemnity in the event, that within 30 years from May 10, 1965 any person claimed to enforce the restrictive covenant. One H had intimated before May 10, 1965, the commencement date of the policy, that he was claiming the benefit of the restrictive covenant, and on May 28, 1965, he instituted proceedings against the insured. Acting under a clause in the policy which provided that:

> "In the event of any claim being made against the Insured which is covered by this Policy, the Company shall be entitled at its own expense and in the name of the Insured to take or defend legal proceedings;"

the insurance company took over the conduct of the legal proceedings. An injunction was eventually granted prohibiting the purchaser/insured from pursuing the development and he claimed an indemnity from the insurance company. They rejected the claim on the basis that on a proper construction of the policy the event on which the action was founded arose before the date of the commencement of the policy and was therefore not covered. One of the arguments put forward by the insured was that in controlling the defence of the earlier action between the insured and H, the insurance company represented as a fact that the insurers were accepting H's claim as falling within the ambit of the policy and the insured in reliance on that representation, forebore to take other courses of action open to him to mitigate the loss which would ensue if he were prevented from carrying out the projected development. Shaw J. held that the words in the policy "any claim which is covered by the policy" refers to claims of the class or character

in respect of which the indemnity was given; even though the claim litigated may for one reason or another be outside its scope.

He said that:

> "The assumption of control of the proceedings is equivocal. It does not necessary imply a representation by the insurers that they regard the claim which is the subject matter of those proceedings as one which must give rise to a liability to indemnify the insured. It indicates no more than it appears that it might give rise to such liability. Hence the insurers would not be estopped from asserting that the particular claim was, in the event, never within the ambit of the policy. The defendant company's conduct would not, in those circumstances, be unequivocal, definite, clear and cogent so as to indicate that they regarded themselves as inevitably liable under the policy of insurance."

(See pages 399-400 of the Report).

Macgillivray on Insurance Law, Sixth Edition at para. 2259 expresses the view that the decision in Soole's case correctly represents the English law and that in so deciding Shaw J. correctly disregarded Hansen's case, supra, as there was no case in English law for applying an automatic estoppel. However, Macgillivray went on to say that Hansen's case could be distinguished from Soole's case as in the former there was a settlement while the latter was fought to trial.

I am of the view that in the absence of legislation, it would be burdensome, unreal and illogical to say that if an insurance company defends a case at every step on liability and on quantum right up to judgment and if needs be, through all the appellate stages, that conduct does not inevitably give rise to an estoppel, but that if in order to save costs, it agrees, on an assessment, the quantum of damages, that agreement necessarily means that it is estopped from relying on a condition of the policy limiting its own liability to indemnify the insured.

To borrow the language of Shaw J. in Soole's case, there was in the instant case no unequivocal, definite, clear and cogent conduct on the part of the appellant to give rise to the estoppel argued for by the respondents. Counsel on the record for the insured would have been imprudent in the extreme to have agreed a settlement to the tune of more than a quarter million dollars without the approval of his client. If counsel for the respondent had a certain understanding it was not as a result of anything said or done by the counsel for the appellant and indeed Mr. Wood did not persuade us that in agreeing the settlement the respondent acted to his detriment, giving that term the most favourable definition adumbrated by Lord Denning M.R. in Groom v. Crocker, supra.

I am of the opinion that this appeal must be allowed. In the circumstances of the instant case the insurance company was not estopped from relying on the amount limited by the policy. There will be judgment for the appellant with costs both here and in the court below to be agreed or taxed.

CARBERRY, J.A.:

At least 60 per cent of the actions filed and tried in the Supreme Court of Jamaica relate to what are called "negligence actions", i.e. actions in which motor vehicles have been involved in accidents causing damage to persons, whether pedestrians, or passengers, and to other vehicles or property. Due to the Motor Vehicles Insurance (Third Party Risks) Act, (hereinafter referred to as the Act), almost all of them will involve an insurance company, on one side or the other, sometimes on both, and in at least 90 per cent of such cases a portion of the damages and costs involved are met by insurance companies. For all that, though the act came into effect in 1941, there have been only three reported local cases in which the extent of the liability of the insurance company has been at issue; two of them are not relevant to this case: Dillon v Jamaica Co-operative Fire & General Insurance Coy. Ltd. [1970] 11 J.L.R. 566 (re who is an authorized or qualified driver); and English and American Insurance Coy v. McDermott & Motor & General Insurance [1974] 12 J.L.R. 1675 (Overlap of insurance covers). The third case Jamaica Co-operative Fire and General Insurance Coy Ltd. v. Sanchez, a decision of this court reported at [1968] 13 W.I.R. 138; 11 J.L.R. 5 (on appeal from Douglas J. [1965] 9 J.L.R. 126) does explore the problems raised in this case. The Act is long overdue for the anxious consideration of the Legislature and the Law Reform Committee and I will explain the cause of and the nature of the problem.

Jamaica, in common with a great many Caribbean and Commonwealth countries, borrowed this Act from the United Kingdom, and in particular from three U.K. Statutes: The Road Taffic Act,

1930 (sections 35-43); The Third Parties (Rights against Insurers) Act, 1930; and the Road Traffic Act, 1934 (sections 10-17).

The United Kingdom provisions have been subject to many revising acts since the three listed above: they have added refinements of detail, but have not altered the basic scheme. The history of the English legislation is lucidly set out by Lord Denning MR. in Harker v. Caledonian Insurance Co. (in his dissenting judgment) [1979] 2 Lloyds R. 193, at pages 195-196. (Unfortunately the only copy of these reports appears to be that in the Library of the Norman Manley Law School!)

The problems that have arisen with regard to this legislation, (and they have arisen in several other Caribbean territories) are two fold: (a) we departed from the U.K. model by introducing into the Act a minimum limit for the cover required to be compulsory: we set the figure at £1,000 or $2,000.00; (b) that figure, whether it was ever realistic or not has long since ceased to be so; it has been overtaken by the massive devaluation that has taken place with gathering momentum since 1941, and is ridiculous judged by today's standards. As to the reasons for the departure from the English legislation which requires unlimited cover for all motor vehicles Lord Denning in Harker's case ascribes it to a draftsman in the Colonial Office or his counterpart in the colony; Lord Diplock in the House of Lords judgment in Harker's case [1980] 1 Lloyds R. 556 at 559 said:

> "It is not for this House to speculate what reasons of policy lay behind the decision in British Honduras in 1953 to impose monetary limits upon the liability to third parties against which users of motor vehicles were to be compelled to insure. An obvious

> "consequence of monetary limits would be that the premiums for such insurance as was compulsory before a vehicle could be used upon the road in British Honduras, would be much smaller than if the insurer's liability were unlimited; and the policy may have been to keep the cost of compulsory insurance down to a figure that the average motorist in British Honduras in 1958 could afford. To limit the insurer's liability to his assured to a modest figure but to leave them with unlimited liability to the victim of the assured's negligence would make a similar reduction of premium commercially impossible ..... "

I should note that the Act in Jamaica is substantially the same as that in British Honduras, and several other Caribbean Territories, and was substantially the same as that in Ceylon, or Sri Lanka as it is now called.

At least one consequence of fixing a statutory minimum of the cover required, is that the unfortunate victim of the motorist's negligence is left at the mercy of whether he is hit by a car with the minimum act policy only, or whether the car in question has got more cover than that: what he receives may be dependent not on the seriousness of his injury but on the type of policy that his assailant had!

The original scheme of the Act was to obviate or mitigate just this situation, and to see that behind every motorist or user of a vehicle (and their own personal capacity to pay for injury inflicted might vary from nothing to full compensation) there stood an insurance company willing and able to meet claims for damage inflicted. Every motor vehicle was required to be insured, and to use a vehicle on the road which was not insured was made a serious criminal offence:

Section 4 (1) of the Act provides:

> "Subject to the provisions of this Act, it shall not be lawful for any person to use, or to cause or permit any other person to use a motor vehicle on a road, unless there is in force in relation to the user of the vehicle by that person or that other person, as the case may be, such a policy of insurance or such a security in respect of third-party risks as complies with the requirements of this Act."

Subsections (2) and (3) provide for the sanction for breach, the most serious being disqualification from holding or obtaining a driving licence for a period of twelve months.

Section 5 (1) of the Act proceeds to lay down the requirements of the policy of insurance which must be secured to comply with the Act. In particular attention must be directed to the "provisoes" which declare that such a policy shall not be required to cover various matters, and fix limits to the minimum liability that must be covered. The section reads:

> "In order to comply with the requirements of this Act the policy of insurance must be a policy which -
>
> (a) is issued by a person who is an insurer; and
>
> (b) insures such person, persons, or class of persons, as may be specified in the policy in respect of any liability which may be incurred by him or them in respect of the death of, or bodily injury to, any person caused by, or arising out of, the use of the motor vehicle on a road:
>
> Provided that such a policy shall not be required to cover -
>
> (i) liability in respect of death arising out of, and in the course of his employment of a person in the employment of a person insured by the policy, or of bodily injury sustained by such a person arising out of, and in the course of his employment; or

(ii) except in the case of a motor vehicle duly licensed for the purpose in which passengers are carried for hire or reward, and except in the case of a motor vehicle in which passengers are carried by reason of, or in pursuance of a contract of employment with a person insured by the policy, liability in respect of the death or, or bodily injury to, persons being carried in or upon, or entering or getting onto or alighting from, the vehicle at the time of the occurrence of the event out of which the claims arise; or

(iii) any contractual liability; or

(iv) liability in respect of the first ten dollars of any claim by any one person; or

(v) liability in respect of any sum in excess of two thousand dollars arising out of any claim by any one person; or

(vi) liability in respect of any sum in excess of twenty thousand dollars arising out of the total claims for any one accident for each motor vehicle concerned.

(emphasis supplied)

Subsections (3) and (4) are also relevant:

"(3) Notwithstanding any rule of law or anything in this or any other enactment to the contrary, a person issuing a policy of insurance under this section shall be liable to indemnify the persons, or classes of persons, specified in the policy, in respect of any liability which the policy purports to cover, in the case of those persons or classes of persons.

(4) A policy shall be of no effect for the purposes of this Act unless and until there is issued by the insurer in favour of the person by whom the policy is effected, a certificate (in this Act referred to as a "certificate of insurance") in the prescribed form and containing such particulars of any conditions subject to which the policy is issued and of any other matters as may be prescribed, and different forms and different particulars may be prescribed in relation to different cases or circumstances."

Subsection (3) of section 5 set out above speaks of the duty of the insurer to indemnify the persons or classes of persons specified in the policy in respect of any liability which the policy purports to cover: this appears to cover as "persons" the insured, or those driving the car with his permission. So far as I know it has never been argued that this duty to indemnify could apply to the victims of the driver's negligence. Subsection (5) required a certificate of insurance to be issued.

Section 8 of the Act provides that certain conditions often found in such policies are not to be effective against injured third parties who have claims against the insured, but consequential on that they may give the insurer a right to recover from the insured.

Further sections are aimed at preserving the rights of injured third parties in the event that the insured should die or become bankrupt. They also provide in that event for the giving of information as to the insurance cover of the insured to the third party on his request.

Section 18 gives to the injured third party a direct right of action against the insurer to recover, within limits, any judgment obtained against the assured. The relevant subsections read as follows:

> "18 (1) If after a certificate of insurance has been issued under subsection (4) of section 5 in favour of the person by whom a policy has been effected, judgment in respect of such liability as is required to be covered by a policy under paragraph (b) of subsection (1) of section 5 (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 the provisions of 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."

(emphasis supplied)

"(2) No sum shall be payable by an insurer under the foregoing provisions of this section;

(a) liability for which is exempted from the cover granted by the policy pursuant to any of the provisos to section 5 subsection (1); or

(b) in respect of any judgment, unless before or within ten days after the commencement of the proceedings in which the judgment was given, the insurer had notice of the bringing of the proceedings; or

(c) in respect of any judgment, so long as execution thereof is stayed pending an appeal; or

(d) in connection with any liability, if before the happening of the event which was the cause of the death or bodily injury giving rise to the liability, the policy was cancelled by mutual consent or by virtue of any provision contained therein and either -

(i) before the happening of the said event the certificate was surrendered to the insurer or the person in whose favour the certificate was issued made a statutory declaration stating that the certificate had been lost or destroyed; or

(ii) after the happening of the said event, but before the expiration of a period of fourteen days from the taking effect of the cancellation of the policy the certificate was surrendered to the insurer or the person in whose favour the certificate was issued made such a statutory declaration as aforesaid; or

(iii) before or after the happening of the said event, but within the said period of fourteen days, the insurer has commenced proceedings under this Act in respect of the failure to surrender the certificate.

"(3) No sum shall be payable by an insurer under the foregoing provisions of this section, if, in an action commenced before, or within three months after, the commencement of the proceedings in which the judgment was given he has obtained a declaration that, apart from any provision contained in the policy, he is entitled to avoid it on the ground that it was obtained by the non-disclosure of a material fact or by a representation of fact which was false in some material particular, or if he has avoided the policy on that ground, that he was entitled so to do apart from any provision containted in it:

Provided that an insurer who has obtained such a declaration as aforesaid in an action shall not thereby become entitled to the benefits of this subsection as respects any judgment obtained in proceedings commenced before the commencement of that action, unless before or within ten days after the commencement of that action he has given notice thereof to the person who is the plaintiff in the said proceedings specifying the non-disclosure or false representation on which he proposes to rely, and any person to whom notice of such an action is so given, shall be entitled, if he thinks fit, to be made a party thereto.

(4) If the amount for which an insurer becomes liable under this section to pay in respect of a liability of the person insured by a policy exceeds the amount for which he would, apart from the provisions of this section, be liable under the policy in respect of that liability, he shall be entitled to recover the excess from that person.

(5) In this section the expression 'material' means of such a nature as to influence the judgment of a prudent insurer in determining whether he would take the risk, and if so, at what premium and on what conditions, and the expression 'liability' covered by the terms of the policy' means a liability which is covered by the policy or which would be so covered but for the fact that the insurer is entitled to avoid or cancel, or has avoided, or cancelled the policy.

(6) In this Act references to a certificate of insurance in any provision relating to the surrender or the loss or destruction of a certificate of insurance shall, in relation to policies under which more than one certificate is issued be construed as references to all the certificates and shall, where any copy has been issued of any certificate be construed as including a reference to that copy."

> "acquiesced in the assertion of that right. That, in my opinion, is sufficient. In the third place, it could be said that nothing done by the insurer induced the insured to do or abstain from doing anything. But the insurer in effect invited the insured to leave the whole matter of Hansen's claim to its discretion, and the insured accepted the invitation. Lastly, it could be said that no prejudice is shown to have resulted to the insured from the acceptance of the invitation. But such an argument would, I think, misunderstand the nature of the 'acting to prejudice' which is so often mentioned when an estoppel is in question (see, e.g., Newbon v. City Mutual Life Assurance Society Limited, [1935] 52 C.L.R. 723, at pp. 733-5). Estoppel is not a cause of action and need not depend on proof of actual damage. Here it may well be, and I think the probability is, that the insured, if it had had an opportunity of itself directing the proceedings, would not have achieved a more favourable settlement and would not, refusing to settle, have secured a verdict for a smaller amount than 4,000L. But there is no certainty about this and in my opinion, for the purposes of an estoppel as distinct from an action for damages, there was sufficient prejudice in being deprived of an opportunity to do better. To put the matter shortly, if somewhat loosely, the insured was entitled, if it was not indemnified, to see what it could do for itself. This is the view taken in the United States. In the case, already cited, of W. Moore Construction Co. Inc. v. United Fidelity & Guarantee Company, [1944] 293 N.Y. 119, at p. 124, Conway J. quotes with approval a passage from a Missouri case:
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> > "It is immaterial whether plaintiff could or would have compromised the action had it been left free to act, or whether it could have achieved any better results had it controlled the defense.' "

This decision was not followed by Shaw J. in Soole v. Royal Insurance Company Ltd., [1971] 2 Lloyds Report 332, where Shaw J. said he found it a little difficult to follow the reasoning in Hansen's case. He was of the view that the assumption of control of the defence of the proceedings was equivocal and did not necessarily imply a representation by the insurance company that they regarded the claim as one which must inevitably give rise to a liabilty to indemnify the insured. Soole v. Royal Insurance

It will be seen that section 18 (1) which gives the injured third party the right to sue the insurers speaks somewhat ambiguously. It speaks of a judgment having been recovered "in respect of any such liability as is required to be covered by a policy under section 5 (1)(b)(being a liability covered by the terms of the policy)" but lower down speaks of the insurer being required to "pay to the persons entitled to the benefit of the judgment any sum payable thereunder in respect of the liability ..... "

A policy issued under section 5 (1) (b) may do one of three things: (1) It may exactly follow the Act, and provide for cover for liability of $2,000.00 (for any one claim) and $20,000 (for a total of all claims from one accident);

(2) It may improve on the minimum requirements set by the Act and offer coverage up to sums which greatly exceed those minimum figures; or

(3) the policy may offer unlimited coverage (as do the English policies under their acts).

The problem raised is how to interpret the ambiguous language used in section 18 (1) with reference to each of the three possible policies above?

What is the injured third party with a judgment recovered against the insured entitled to recover? If the judgment is under the statutory minimum of $2,000.00 no problem arises, he recovers that sum under any of the three policies. If the judgment exceeds the statutory minimum is he to recover the entirety of the judgment, or only the Statutory minimum? or perhaps only up to the actual coverage of the actual policy? (if the actual coverage in the policy exceeds the statutory minimum?) Not only is the language in section 18 (1) at least

potentially ambiguous, but section 18 (4) contemplates the possibility of an insurer having to pay to the injured third party a sum that exceeds the amount that he would have to pay "apart from the provisions of this section" and recovering that sum from the insured. Those who argue that the insurer is required to pay the entirety of the judgment rely on subsection (4) as supporting their argument. Those who argue that the amount recoverable is limited to the minimum prescribed as "being the liability required to be covered" are concerned to point out that subsection (4) applies to several situations other than a judgment exceeding the minimum in the Act.

This problem could not of course arise in the original model of the Act in England; for there there was no possibility of a statutory minimum, the insurance was required to be unlimited, and thus the U.K. original of the Jamaican 18 (4) had other situations to which it could apply. There are so far as we know only three cases which have ever canvassed this position, and they were cited to us.

The first was Free Lanka Insurance Co. Ltd. v. Ranasinghe [1964] A.C. 541; [1964] 1 All E.R. 457 (P.C.) an appeal to the Privy Council from Ceylon. In this case the policy of insurance issued followed the Act: it provided cover to the minimum prescribed the the Ceylon version of the Act. The Ceylon equivalent to our section 18 (1) contained however the same ambiguous phrasing. Two points were at issue, the first which is not relevant arose from the repeal and re-enactment of the legislation, with no transitional provisions in the second version. The second point however was directly in point. The injured third party recovered, (after a successful appeal on quantum), a judgment against the insured for a sum in excess of the statutory limit in the Act and the coverage in the policy. (He recovered

Rs 30,000 as against the statutory minimum and the coverage in the policy of Rs 20,000). He sought, apparently unsuccessfully, to recover his judgment by execution on the defendant, and failing that sued the insurers for the full amount of the judgment: the insurers contended that if they were liable, it could only be to the extent of Rs 20,000, the statutory minimum and the limit of the actual cover in the policy. The trial judge and the Court of Appeal of Ceylon both found in favour of the third party, and held the insurers liable for the entire judgment. That judgment is reported at [1961] 63 N.L.R. 529 and is not available here. On appeal to the Privy Council, a strong bench, consisting of Lord Evershed, Lord Morris, Lord Guest, Lord Devlin and Lord Pearce, after disposing of the point with regard to the survival of the cause of action created by the earlier repealed statute, went on to consider the question of what was recoverable: They had exactly the same ambiguous wording to deal with, a statutory right of recovery expressed in the first instance in Ceylon's section 133 (1) as "a decree in respect of any such liability as is required by section 128 (1) (B) [which corresponds to our section 5 (1)(b)] to be covered by a policy of insurance (being a liability covered by the terms of the policy) is obtained against any person insured by the policy" ..... "The insurer shall pay to the person entitled to the benefit of the decree any sum payable thereunder in respect of that liability ....." and this was followed in Ceylon's section 138 by a section equivalent to our own section 18 (4), giving the insurers a right to recover from the insured in certain circumstances. Their Lordships' judgment was delivered by Lord Evershed. The judgment noted that it would be:

> "as a matter of principle unlikely that a third party having no contract with the insurers should yet be entitled to recover from the insurers a sum greater than the limit imposed by the insurer, properly in accordance with the Ordinance, in the policy of insurance."

The judgment also notes that the "liability" referred to is a "liability as is required by section 128 (1) (b) to be covered by a policy of insurance"; it was also noted that coverage in excess of the statutory limit was not one "required to be covered" by the policy. The rest of the judgment dealt with the question of when, if ever, could section 128 apply, and various suggestions were made. Their Lordships concluded that that section did not render the insurers liable to pay a greater sum than that for which they were liable (in due accordance with section 128 of the Ordinance to the assured.

I venture three comments: The Ceylon Statute, like our own, had made no adjustment in the section permitting action against an insurer by the third party for the fact that the act had introduced a statutory minimum to the cover required; nor for that matter did either act deal with the position that would arise if the policy issued in fact had a coverage greater than the statutory minimum. This can be put another way: apart from the statutory remedy to the injured party so provided, that party would have had no direct way of proceeding against the insurers. They could try to execute on the actual defendant, and he might claim an indemnity from his insurers, but what if he were killed? or went bankrupt? Having provided a new statutory remedy to the injured third party it was necessary to state what exactly could be recovered under it, and it is clearly arguable that all that could be recovered under it was what had been made

compulsory under the Statute, regardless of whether or not the terms of the actual cover exceeded that amount. The section should have provided for the possibility of the policy containing a coverage greater than that required to satisfy the statutory minimum, if it was meant that a larger sum than the statutory minimum could be recovered from the insurers by the third party.

The judgment in the Free Lanka case does not resolve that problem, because the coverage of the policy issued was exactly the same as the minimum coverage fixed by the Act. But it is to be noted that the concluding words of Lord Evershed's speech (judgment) state that what is recoverable is what has been prescribed by the statute.

The ambiguity of the situation has occurred because we borrowed from the United Kingdom the exact words that they had used, without adjusting them to the new situation we created by providing for a statutory minimum.

In Jamaica Co-operative Fire and General Insurance Co. Ltd. v Sanchez [1968] 13 W.I.R. 133; 11 J.L.R. 5, on appeal from Douglas J. [1965] 9 J.L.R. 126 our own Courts were faced with the problem posed by an insurance policy which in fact provided unlimited cover. The plaintiff recovered a judgment for personal injuries in the sum of ₰3,513.1.6 and costs against the insured. The judgment remained unsatisfied, and the plaintiff or injured third party sued the defendant's insurance company which had issued a policy described as comprehensive and with unlimited liability. The insurance company inter alia defended on the ground that their liability to the plaintiff was limited to the sum of ₰1,000 the amount of minimum cover fixed by the Act. The Free Lanka case was not cited to Douglas J. and after wrestling with the problem, and noting that no guidance could be expected from English cases

as their Acts required unlimited liability, Douglas J. decided that the legislature of Jamaica had been formulating minimum standards, and that unless the policy was expressed in terms of those minimum standards the insurers could not rely on them. Douglas J. did not address his mind to the construction of the recovery section, now section 18 (1) but then section 16 (1). Instead he pointed to the provisions of what is now section 18 (2) then 16 (2) which says that no sum shall be payable by an insurer under the foregoing provisions of this section -

> "liability for which is exempted from the cover granted by the policy pursuant to any of the provisoes to section 5 subsection 1;"

in other words he assumed a right of recovery by the injured third party, and asked whether the insurer could avoid it. Because the Free Lanka case was not cited, he had no opportunity to apply his mind to the construction of the plaintiff's statutory right of recovery. He did however rule out claims made in respect of damage to the plaintiff's property, e.g. repairs to his motor bike.

On appeal to this court,(Henriques P. Moody and Luckhoo JJ.A.) this court affirmed the judgment. The Free Lanka case was cited, and the judgment of Luckhoo J.A. carefully reviewed it. He came to the conclusion that in that case the limit of liability derived not only from the statute, but also from the policy itself, and he says at page 143:

> "It seems clear that the Privy Council in the Free Lanka case went no further than to hold that the insurer's liability to the third party under s 133 was to be determined by the limitation of liability actually imposed in the policy itself, such limitation having been imposed pursuant to the provisions of s 128 (1)."

This observation is then followed by a passage at page 144 which is, with respect, difficult to follow. In it he assumes that had the actual policy in the Free Lanka case provided cover in excess of the statutory minimum, the plaintiff would have recovered the cover provided in the policy, and so too should the plaintiff in Jamaica. The learned judge also drew attention to provisions of similar statutes in Guyana, Trinidad, and Barbados. Moody J.A. observed that the cover in the policy exceeded that provided for in the Act, but he saw nothing objectionable in that. None of the judgments really addressed the problem of how to interpret what is now section 18 (1), but the case clearly established for Jamaica that if the coverage in the actual policy exceeded the minimum prescribed in the Act, the statutory remedy would allow recovery to the extent of the policy coverage.

The third case dealing with this problem is an English case, Harker v Caledonian Insurance Co. [1977] 2 Lloyds 556 (Donaldson J.); [1979] 2 Lloyds 193 (C.A.: Denning MR. (diss.) Roskill and Cummings Bruce LJJ); [1980] 1 Lloyds 556 (H.L.: Lords Diplock, Edmund-Davies, Fraser, Keith and Kinkel). In this case a young British soldier stationed in British Honduras was walking along the road in Belize when he was hit down by a car driven by the insured. He received very severe injuries: was reduced to a cabbage, and died shortly before the Court of Appeal hearing some six years after the accident. In an action brought against the insured he recovered a consent judgment for $175,000.00 (BH) plus interest and costs. The insured's policy however was an Act policy: in compliance with the relevant statute in British Honduras it provided only for the minimum coverage of $4,000.00 in respect of any one claim by any one person.

The insured could pay none of the balance due, and an action was brought in England to recover from the insurers the balance of $171,000.00. The provisions in the British Honduras Motor Vehicles Insurance (Third Party Risks) Ordinance 1958 were for all practical purposes identical to those set out earlier in the Jamaican Act. The plaintiff claimed that the insurance company was liable for the entire judgment: the insurers claimed that they were liable only for the $4,000.00 prescribed by the Act and laid down in the policy.

At first instance Donaldson J. referred to the Free Lanka case. He observed that the provision in subsection 4 was necessary to give the insurers a right of recovery from the insured in cases where the policy was voidable, but they had been required to pay. However he held that the construction of sub-section (1) of section 20 [Jamaica section 18] was clear: "underwriters were liable 'in respect of any such liability as is required to be covered by a policy under' s.4 (1) [Jamaica section 5 (1)]. All that was recoverable was the $4,000.00.

Before the Court of Appeal in addition to the Free Lanka case, our own case of Sanchez was cited. Roskill and Cumming-Bruce LJJ affirmed the decision of Donaldson J. Roskill LJ. observed that the section, the equivalent of Jamaica s. 18 (1), had to be construed in its context, i.e. in a scheme in which the statute permitted a minimum coverage, and he accepted the Free Lanka decision though certain passages contained errors. Reviewing the Sanchez case, he found the reasoning in it at page 144 difficult to follow, but thought it might be supported on other grounds: interestingly enough it appears that Sanchez

was attacked by counsel on both sides. Cumming-Bruce LJ was more cautious in his approach to Sanchez, but he too thought it clear that the third party's right of recovery was limited by the minimum coverage fixed in the Act. Lord Denning MR dissented: after tracing the development of the legislation in England, he would have held the third party or plaintiff entitled to recover the entirety of the judgment, and he expressed support for the decision in the Sanchez case. In the event then the Court of Appeal confirmed Donaldson J. and held the plaintiff third party entitled to recover only the statutory minimum, which also happened to be the actual coverage of the policy. Their reaction to the decision in the Sanchez case was mixed, it was approved only in the dissenting judgment of Lord Denning.

In the House of Lords their Lordships, in a single speech delivered by Lord Diplock, approved the decision of Donaldson J. and the majority judgment in the Court of Appeal. Lord Diplock said with reference to the construction of the equivalent of Jamaican section 18 (1); and its relation to the equivalent of Jamaican section 5 (1)(b)(v):

> "In a sentence the question of construction is: Is 'liability in respect of any sum in excess of Four Thousand dollars arising out of any one claim by any one person' which by proviso (v) to sub-s (1) (b) of s. 4 a policy is not required to cover, nevertheless included in 'such liability as is required to be covered by a policy under paragraph (b) of subsection (1) of section 4' where that expression is used in s. 20 (1)?"
>
> So stated, the only possible answer is, in my view, 'no'. "

Lord Diplock did not comment on the Sanchez case, and as to the Free Lanka case seems to have approved the result though not all of the reasoning that appeared in Lord Evershed's opinion.

Both the Free Lanka case and Harker's case were cases in which the insured's policy was an Act policy, that is it was in terms limited to the minimum amount prescribed by the Act. In view of this it is not possible to predict with any degree of certainty how the Privy Council or the House of Lords would react to a case in which the coverage of the policy exceeded the statutory minimum: it seems likely that in construing the recovery section, section 18 (1), they would hold that in the context of the statute what the third party is allowed to recover from the insurer is the minimum sum which the insured is required to insure for; that is to hold that the remedy provided only by the statute is limited to what the statute properly construed permits to be recovered.

If that is so, then it follows that our own decision in the Sanchez case may be open to question elsewhere. The decision has however stood for some seventeen years and countless settlements must have been made on the basis that the actual coverage of the policy represents the ceiling of the liability of the insurer. What is necessary as a matter of urgency is for the Legislature to review the Act, to decide if the insurance cover should be unlimited, as in England (and now in the Bahamas and Barbados); or if it is desirable to retain a limit, then to re-examine the existing limit and also to consider the desirability of amending section 18 (1) to clearly permit recovery of more than the minimum if in fact the insurance policy provides a coverage in excess of the minimum.

Having examined, I fear at some length, the unsatisfactory features of our present legislation in the Motor Vehicles Insurance (Third Party Risks) Act, I turn to the claim in the present case, which arises out of the Act.

No evidence was taken in this case, and the parties were satisfied to present their arguments on the basis of assuming the facts set out in the pleadings. The pleadings disclose that the plaintiff respondent, Sylvester Hylton, hereinafter called the third party, was at some time prior to 1976 apparently seriously injured in a motor vehicle accident, and recovered a judgment against Leonard Davis, hereinafter called the insured, in the Supreme Court on the 23rd April, 1980 for the sum of $204,777.02. The plaintiff or third party was not satisfied with this amount, and appealed, and secured an order that the damages should be re-assessed. That re-assessment came on for hearing on the 24th September, 1981. It appears that during the re-assessment or prior to the actual hearing, negotiations took place between counsel for the third party (the plaintiff) and counsel for the original defendant, the insured. It is not disputed that the present defendants, Central Fire and General Insurance Coy. Ltd., hereinafter called the insurers, had exercised their rights under the insurance policy and had assumed the conduct of the defence. It is of course clear that the insurers were vitally concerned with the outcome of the re-assessment of damages. They might have to pay some or all of it. The pleadings and the argument of the respondent seem to suggest that the insurers were because of this the real defendants in the negligence case. This of course is quite wrong. Though having a vital interest, the case was still that of the insured, and the judgment when delivered would be in a sum of damages for which the insured was primarily liable. Even though the insurers may take

over the conduct of the action, the suit in a very real sense is still that of the insured, and counsel - even if paid by the insurers - remain counsel for the insured and owe him a duty to exercise skill and care on his behalf: see Groom v. Crocker [1939] 1 K.B. 194 (C.A.).

Further, when counsel for the insured, even though paid by the insurers, and owing duties to them also, settles a case, he does so on behalf of the insured, and it is the insured who is primarily liable: the judgment is that the insured do pay to the plaintiff the sum awarded et cetera.

The pleadings allege, and it is not contradicted, that counsel agreed the settlement of the damages in the sum of $270,000.00. It is further alleged that, presumably when the then counsel for the plaintiff indicated that he would accept this figure, the then counsel for the insured indicated that he would need approval of that figure, and that it appears that he then telephoned the insurers and came back and announced agreement to that figure. A consent judgment was then entered for the plaintiff in the sum of $270,000.00.

It is not disputed that the insurance policy in this case covered the insured only up to the sum of $250,000.00 for bodily injury sustained by any person in any one claim. The insurers therefore dispute that they are liable to pay any more: the third party however claims that he should be paid the entirety of the consent judgment of $270,000.00 plus costs and interest. This action concerns the difference. In argument before us it was said that the sum now in dispute was agreed at $109,421.61.

The action is brought under section 18 (1) of the Act. In so far as the proper interpretation of that Act goes, both parties apparently have largely ignored the provisions of the Act. The injured third party does not claim that he is entitled to the entirety of the consent judgment on the basis that this is what he is entitled to under the Act. Instead he bases his claim on an allegation that the insurers are estopped by the conduct of the insured's counsel (who they say was really the insurer's counsel). It is alleged that the insured's counsel ought to have told the then plaintiff's counsel that the insurance policy cover extended only to $250,000 and that having failed to do so during the negotiations, the insurers should not be permitted to set up that limit now, after the third party or plaintiff has changed his position, by accepting the settlement.

The insurers apparently accept the position in the Sanchez case. They are content to argue that they are not liable in an action under the Act for a greater sum than the amount of the cover in the insurance policy. It might be noted in passing that they have made no attempt, as was done in the Sanchez case, to subtract sums awarded for damage to property, if any. It is not suggested in the argument that the then counsel for the insured at any time in the settlement discussions ever made any specific representation other than to confirm acceptance of the final figure. There was no discussions, at least none is pleaded, fixing the dates of payment and so forth.

Speaking for myself I must confess that quite apart from authority I found the whole case unusual, to put it mildly. The third party's claim here must necessarily involve a suggestion that in without prejudice discussions aimed at settling a negligence action the counsel for the defendant owes a duty to volunteer to the other side information as to the terms of any insurance policy

that his client holds. I know of no authority for this suggestion. The only duty of disclosure that I know of is that laid down in section 14 of the Act. It arises only in cases where the insured has become bankrupt, or made a composition with his creditors, or his estate is being dealt with under the Bankruptcy Act (and similarly for companies), and it is a duty to provide such information on request. No such request was made here. I should have thought that these negotiations were "adversary" proceedings, thought it is true that in the course of them one side or the other may choose to make disclosures that it thinks may assist in securing settlement. Further, I should have thought that such attempts to settle a case were in essence "without prejudice" negotiations and as such that no evidence could be given about the content of the discussions, save in the exceptional case where it is alleged that a binding agreement has been arrived at and it may be necessary to review the negotiations to ascertain exactly what that agreement was. See for example Tomlin v Standard Telephones & Cables Ltd. [1969] 3 All E.R. 201.

Again looking at the matter before considering the authorities I must say that I can find nothing more natural than that counsel for the defendant in a negligence action, or any other for that matter, should wish to get the consent of his client (or his client's insurers) before finally accepting a settlement figure. I fail to see how announcing an acceptance of the suggested figure after consultation can amount to a representation as to the ability of the client to pay, or as to the extent of the cover in his insurance policy. While I can appreciate the disappointment of a plaintiff who has suffered serious injury and waited years to get a satisfactory settlement, I think that one should be slow to come to a decision which would "strip the veil"

from settlement negotiations, always excepting allegations of fraud.

During the argument all the members of the Court at one time or the other asked "What were the representations?" and "How did the third party change his position for the worse?" I should have thought myself that if any one had reason to complain that the counsel for the insured had accepted a settlement figure greater than the amount of the insurance cover, that person would be the insured, who after all remains liable for the difference.

As to the content of the "representations" made to the third party and relied on to "estop" him, in neither the pleadings nor the argument did we hear anything further than what has been set out above, that is that counsel for the insured announced acceptance of the suggested settlement of the figure of $270,000.00. This may have aroused in the minds of counsel on the other side an expectation that the insurance company would pay that figure, but as far as we are aware no such promise was made, nor - subject to what the authorities may show - is it possible to imply one in these circumstances.

As to how did the third party (plaintiff) change his position for the worse I think that there were equal difficulties here: he would have had two courses, to proceed with the trial or assessment of damages, or to accept the settlement. Had he decided to proceed with the assessment it may be that he might have got a better or bigger award, but he might have got less. Even had he got a better award would he be in any better position? The limit of the coverage in the policy would still have been $250,000.00, and as to recovering the difference he would not have been able to argue 'estoppel', and at no time has he argued

that section 18 (1) requires that he should be paid the entirety of the judgment. In fact he cited and relied on the Free Lanka case and that of Sanchez.

Turning to the authorities, the argument on behalf of the third party involved an exploration into the field of 'promissary estoppel'. In the note we have of the oral judgment of the learned trial judge he rejected two cases relied on by the appellants, (Nairn v S.E. Lancashire Ins. Coy. and Soole v. Royal Insurance Co.), and founded his judgment in favour of the respondents (the third party - plaintiff) on an Australian case, Hansen v Marco Engineering Ltd. [1948] Vict L.R. 198.

Vol. 25 of the 4th Edition Halsbury's Laws of England, dealing with insurance, discusses at paras. 701 and 702 the rights of insurers to take over the conduct of proceedings, and para. 702 reads thus:

> "Policy conditions as to conduct of proceedings.
>
> The policy usually empowers the insurers to take over, in the name of and on behalf of the assured, the conduct and control of the defence of proceedings within the ambit of the policy brought against him. This power enables the insurers to settle the proceedings without consulting the assured, and they can then recover from him any portion of the agreed damages which under the policy he has to bear. The exercise of this power does not involve the insurers in any liabilities to the third party, and they do not make themselves responsible to him for payment of the amount at which the liability of the assured has been assessed."

(emphasis supplied)

The authority cited for the proposition underlined above is Nairn v South East Lancashire Insurance Coy. Ltd. [1930] S.C. 606. It supports the proposition for which it is cited, and was I think clearly applicable here. There the insurance company had intervened and taken over the conduct of the suit. Further the counsel appointed by them to represent the insured had on

comprehensive policy which was unlimited as to coverage, but which did not cover passengers. At the time of the settlement the insurers did not appreciate that the Plaintiff had been a passenger, while for his part the insured (who played no part in the settlement) did not appreciate that the second policy was not involved. When the limited nature of the coverage was discovered only subsequently the insurers refused to pay more than the £2,000. The settlement had been for £3,705. The plaintiff sued the **insured** on the settlement. The insured joined the insurance company as a third party, claiming to be indemnified. The case proceeded in two quite distinct stages. In the first the plaintiff got his judgment against the insured for the settlement figure.

The insured in this first stage had sought to set aside the settlement, arguing that the insurance company, acting as his agents, and conducting the defence on his behalf, had no authority to negotiate a settlement figure that was greater than the cover sum assured. It was held that his counsel, (though appointed and paid by the insurers) had authority to settle and that the settlement bound the insured.

The second stage was now reached, could the insured recover from the insurance company the difference between the settlement figure and the cover on the operative policy? It was arguable that the settlement was a reasonable one, and that had the matter proceeded to trial the plaintiff might have recovered more. Fullagar J. however held that in the circumstances the insurance company which had been originally mistaken as to the amount of cover or which policy was involved, were obliged to the insured to indemnify him for the settlement figure. It was possible (even if unlikely) that had he himself taken over the conduct of the action he might have been able to get a lower figure

awarded to the plaintiff. What was at issue was that by taking over the conduct of the defence and conducting it as it did it was said that the insurance company were thereby estopped from denying, as against the insured, that they were liable to indemnify him. In reliance on a number of American authorities Fullagar J. decided that issue in favour of the assured. That is not the position that obtains in the English authorities, as is shown in the Beacon Insurance Co. case (supra) where it was held that, under the terms of the policy, the insurance company could not only settle as it though best, but recover from the insured any sum due from him as being the difference between the cover and the settlement figure. That this is the prevailing view in English insurance cases was shown in Soole v Royal Insurance Co. Ltd. [1971] 2 Lloyds R. 332. In this case a developer anxious to develop some land he had bought, took out an insurance policy against certain restrictive covenants (which his neighbours claimed barred him from developing the land), proving to be enforceable. Both he and the insurers had the benefit of opinions from leading counsel suggesting that the covenants were unenforceable. The developer was sued by his neighbours, the insurers took over the conduct of the defence, they lost. The insurers now sought to argue that they were not liable on the insurance policy in the circumstances in which he originally insured. He replied that by taking over the conduct of the defence they were now estopped from denying that the claim was covered by the policy. Shaw J. held on the main issue that the developer was entitled under the policy. The claim based on estoppel was therefore obiter, but he nevertheless considered it and found in favour of the insurers that they were not estopped by taking over the control of the defence. Shaw J. said: (pp. 339-340) -

> "In order to give rise to an estoppel there must be an unequivocal representation of fact made in circumstances in which another may reasonably be expected to, and does, rely upon that representation, and in so relying upon it changes his position to his detriment.....
>
> ..... the assumption of control of the proceedings is equivocal. It does not necessarily imply a representation by the insurers that they regard the claim which is the subject matter of those proceedings as one which must give rise to a liability to indemnify the insured. It indicates no more than it appears that it might give rise to such liability. Hence the insurers would not be estopped from asserting that the particular claim was, in the event, never within the ambit of the policy. The defendant company's conduct would not, in those circumstances, be unequivocal, definite, clear and cogent so as to indicate that they regarded themselves as inevitably liable under the policy of insurance."

Shaw J. went on to consider Hansen's case (supra) and I think disapproved of it. I do not find it necessary to express any final view of the Hansen case. It was as I have indicated a case between the insured and his insurers; it was not, so far as estoppel is concerned, a case between the third party and the insured and I do not think it is of assistance in the case now before us. For the rest, this was said to be a case of promissary estoppel involving the principle laid down by Denning J. (as he then was) in Central London Property Trust Ltd. v High Trees House Ltd. [1947] 1 Q.B. 130. As to that principle in Coombe v Coombe [1951] 2 K.B. 215 (C.A.) Lord Denning himself said: (at p. 219) -

> "That principle does not create new causes of action where none existed before. It only prevents a party from insisting upon his strict legal rights, when it would be unjust to allow him to enforce them, having regard to the dealings which have taken place between the parties .....
>
> (Speaking of some cases in which the principle had been applied, he said:) (at p. 220)
>
> In none of these cases was the defendant sued on the promise, assurance, or assertion as a cause of action in itself: he was sued for some other cause, for example, a pension or a breach of contract, and the promise, assurance or assertion only played a supplementary role - an important role, no doubt, but still a supplementary role. That is, I think, its true functions. It may be part of a cause of action, but not a cause of action in itself."

What then was the cause of action here? The answer must be it is the right given by the Act under section 18 (1) for the injured third party to sue the insurers, having shown that the statutory conditions have been satisfied: that a certficiate of insurance has been issued, that he has recovered a judgment in respect of such liability as is required to be covered by a policy under s. 5 (1)(b) issued in favour of the person against whom he has recovered the judgment. But that right or cause of action, putting the matter at its highest and accepting as we must the correctness of the Sanchez case, is to recover up to the amount of cover in the policy in question. It is clearly not a right to recover the entirety of the judgment, That being so, I do not see how the alleged promissary estoppel, assuming that it did exist (and I have formed the opinion that it did not) could give the third party the right to recover a sum which the Act itself does not give to him.

In Low v Bouverie [1891]3 Ch. 82, speaking it is true of the traditional type of estoppel, Bowen L.J. remarked (at p.105) -

> "Estoppel is only a rule of evidence; you can not found an action upon estoppel. Estoppel is only important as being one step in the progress towards relief on the hypothesis that the defendant is estopped from denying the truth of something which he has said ....."

Bowen L.J. added at p. 106) -

> "Now an estoppel, that is to say, the language upon which the estoppel is founded, must be precise and unambiguous ..... "

Not only is there no cause of action here to which the alleged estoppel can form a helpful adjunct, there is also no statement here which can be said to be precise and unambiguous, and the truth of which the defendant is to be held unable to deny, nor any promise to which he can be said to be bound. I must confess that even making allowances for the natural disappointment of the third party, the plaintiff, I continue to think that it was unfortunate to bring this action founded on the mere acceptance by counsel for the insured of a suggested settlement figure for damages in a negligence action.

I have had the opportunity of reading the draft judgment of Rowe P. in this matter, and I agree with it, and with the Order that he proposes, that the appeal be allowed, and that there be judgment for the appellant with costs both here and in the court below. Costs to be agreed or taxed.

CAMPBELL, J.A.:

I have had the benefit of reading in draft the judgment of Rowe P. I agree with his reasoning and conclusions. There is nothing further I can respectfully add.

behalf of the insured offered to settle for ₹150, an offer accepted by the injured third party. Subsequent to the settlement they learnt of facts which entitled them to repudiate the policy, and did so. The third party sued them. The allegation of a contract by the insurers to pay the agreed damages to the third party was dismissed. It was pointed out that the counsel for the insured (even though appointed by the insurers) was the agent of a disclosed principal, namely the insured, and it was the insured against whom the consent judgment had been entered. There was no contract between the insurers and the third party; nor had the insurers ever themselves undertaken to pay the agreed damages. The case precedes and is entirely consistent with Groom v Crocker (supra) as to the relationship between the insurance company conducting a suit on behalf of the insured, and the insured and the third party or plaintiff.

Further, Beacon Insurance Co. Ltd. v Langdale [1939] 4 All E.R. 204 (C.A.) also cited in the passage from Halsbury showed that such a settlement, depending on the terms of the powers given in the insurance policy, bound the insured himself. He was held liable to repay to the insurers the 1st ₹5 due on any claim.

Turning to Hansen v Marco Engineering (Aust) Pty. Ltd. [1948] Vict L.R. 198 relied on by the learned judge and the respondents, I am of opinion that the case does no really assist them. The issue here arose, not between the injured third party andth the insurers, but between the insurers and their insured. The insurers had taken over the conduct of the insured's defence, and had purported to settle it for a sum larger than that in the actual cover of the policy. The insured had in fact two policies, an Act policy that covered passengers but only up to ₹2,000, and a second