Published on e-First 28 July 2018

18. INSURANCE LAW

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18.1 In August 2016, the UK Insurance Act 2015 took effect in the UK. The Singapore Academy of Law formed a Law Reform Subcommittee (Insurance) in 2017 to study the changes introduced by the UK Insurance Act and to evaluate if Singapore ought to adopt these changes. The subcommittee has targeted to release a paper towards the end of 2018. In the meantime, in 2017 only two cases have been reported, both of which make for interesting reading.

Personal accident insurance – Death by mixed drug intoxication – Accident or suicide?

18.2 The first reported case is the Court of Appeal decision of *Quek Kwee Kee Victoria v American International Assurance Co Ltd*.[1] Briefly, the deceased ran a successful family business manufacturing and selling popiah but years of carrying loads of flour needed to manufacture popiah and a number of falls left him with chronic back pain; he also developed insomnia, depression and anxiety. As a result, he consulted a pain specialist as well as a psychiatrist. Between 2009 and 2012, he was hospitalised on various occasions for treatment of his physical and psychological ills. In early 2012, the deceased commenced legal proceedings against his brother who he felt had cheated his uneducated siblings, which proceedings the deceased's physicians assessed to have added stress on the deceased. During his last hospitalisation between 2 and 31 July 2012, the deceased was treated for his back pain and his depression. Yet, during that time, he purchased two second-hand luxury cars. Upon discharge, he was prescribed 14 different types of medicine by his doctors.

18.3 On the morning of 4 August 2012, the deceased was found lying unresponsive on his bedroom floor. He was rushed to the hospital and pronounced dead shortly thereafter. The pathologist concluded that the cause of the deceased's death was "multi-organ failure with pulmonary haemorrhage, due to mixed drug intoxication" and that the death was "not due to a natural disease process". Four psychiatric drugs prescribed

1 [2017] 1 SLR 461.

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by Dr Ang, namely, bromazepam, duloxetine, mirtazapine and olanzapine, were also found with "elevated" concentrations in the deceased's post-mortem blood. After preliminary investigation, the state coroner concluded that the deceased had, in all probability, taken an overdose of his prescription drugs with the intention of ending his life.

18.4 The appellants were the executors of the deceased's estate and the respondents were insurance companies. The deceased had purchased two insurance policies with the first respondent under which the first respondent agreed, subject to certain conditions, to pay the total sum of $1.2m if the deceased sustained an injury in an accident that resulted in the loss of his life ("the Insurance Policies"). These policies were later transferred to the second respondent. After the deceased's death, the appellants presented their claim under the Insurance Policies. The second respondent declined to pay the assured sums, taking the position that the deceased's death was not caused by injury sustained in an accident. The appellants sued the respondents.

18.5 In *Quek Kwee Kee Victoria v American International Assurance Co Ltd*,[2] the trial judge dismissed the appellants' claim, holding that the deceased had consumed overdoses of at least three drugs, and that as a result, his death was not an accident entitling the estate to payment under the Insurance Policies. The appellants appealed.

18.6 The Court of Appeal allowed the appeal and in its written judgment took the opportunity to set out the preferred approach the Singapore courts will adopt when faced with construction of insurance policies.

18.7 Noting that this was the first time that the Singapore court was called upon to construe the term "accident" in the context of personal accident insurance policies, the Court of Appeal embarked on a review of decisions across the Commonwealth, and opined that beyond the definition postulated by Mustill LJ in *Kathleen De Souza v Home and Overseas Insurance Co Ltd*:[3]

> The word 'accident' involves the idea of something fortuitous and unexpected, as opposed to something proceeding from natural causes; and injury caused by accident is to be regarded as the antithesis to bodily infirmity by disease in the ordinary course of events …

there is limited scope for precision of the contractual nature of an insurance policy given that the entitlement of the insured to the assured sum generally depends on the precise way in which the insured risk has

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2 [2016] 3 SLR 93.
3 [1995] LRLR 453.

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been defined in the policy and on how that is applied to the facts of the case. Moreover, courts have arrived at differing conclusions even when similar language has been used in different policies.

18.8 Over time, the UK courts settled on an approach that drew a distinction between intended means and unintended results – in *Clidero v Scottish Accident Insurance Co*,[4] the insured had, while putting on his stocking, caused his colon to slip and distend, which then led to his death. In an action under a personal accident insurance policy, the Scottish Court of Session (First Division) unanimously held that the insured's injury was not caused by "violent, accidental, external and visible means" as set out in the policy, because the insured's conduct in putting on his stockings was intentional and voluntary and there was no other external factor that affected the insured's movement which resulted in the injury. The court reasoned thus:

> The question, in the sense of this policy, is not whether death was the result of accident in the sense that it was a death which was not foreseen or anticipated. That is not the question. The question is, in the words of this policy, whether the means by which the injury was caused were accidental means. The death being accidental in the sense in which I have mentioned, and the means which lead to the death as accidental, are to my mind two quite different things. A person may do certain acts, the result of which acts may produce unforeseen consequences, and may produce what is commonly called accidental death, but the means are exactly what the man intended to use, and did use, and was prepared to use. The means were not accidental, but the result might be accidental. Now, if that is so, where does the question of accident come in here? There is no evidence, as your Lordship pointed out, that anything unusual or exceptional occurred as to the means or cause of this death. The man was just doing what he meant to do, and apparently a most unfortunate and unexpected result happened, the man's death.

18.9 Another instance of such a distinction is seen in *Landress v Phoenix Mutual Life Insurance Co*,[5] where the Supreme Court of the US held that a man who died of heatstroke while playing golf had not died of accidental means because he had voluntarily exposed himself to the sun's rays.

18.10 The Court of Appeal noted that the courts in the Commonwealth have rejected this distinction between intended means and unintended results, for instance, in New Zealand,[6] Scotland,[7]

4 (1892) 19 R 355.
5 291 US 491 (1934).
6 *Groves v Amp Fire & General Insurance Co (NZ) Ltd* [1990] 1 NZLR 122.
7 *MacLeod v New Hampshire Insurance Co Ltd* 1998 SLT 1191.

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Australia[8] and Canada.[9] In *Martin v American International Assurance Life Co*,[10] McLachlin CJ, delivering the judgment of the Supreme Court of Canada, said:

> 10 The insurers argue that the category of deaths caused by accidental means is narrower, in that it excludes accidental deaths that are the natural effects of deliberate actions. In their view, a death is only caused by *accidental means* when both the death and the actions that are among its immediate causes are accidental.
>
> …
>
> 12 This view seems to me, however, to be problematic. Almost all accidents have some deliberate actions among their immediate causes. To insist that these actions, too, must be accidental would result in the insured rarely, if ever, obtaining coverage. Consequently, this cannot be the meaning of the phrase 'accidental means' in the policy. *Insurance policies must be interpreted in a way that gives effect to the reasonable expectations of the parties … A policy that seldom applied to what reasonable people would consider an accidental death would violate this principle.*
>
> 13 In my view, the phrase 'accidental means' conveys the idea that the *consequences* of the actions and events that produced death were unexpected. Reference to a set of consequences is therefore implicit in the word 'means'. 'Means' refers to one or more actions or events, seen under the aspect of their causal relation to the events they bring about.
>
> 14 It follows that to ascertain whether a given means of death is 'accidental', we must consider whether the consequences were *expected*. *We* cannot usefully separate off the 'means' from the rest of the causal chain and ask whether they were deliberate … Hence, to determine whether death occurred by accidental means, we must look to the chain of events as a whole, and we must consider whether the insured expected death to be a consequence of his actions and circumstances.
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> [emphasis added]

18.11 On this basis, the court held that the phrases "accidental death" and "death by accidental means" had essentially the same meaning and connoted a death that was in some sense unexpected. The Court of

8 Australian Casualty Co Ltd v Federico [1986] HCA 32.

9 *Martin v American International Assurance Life Co* [2003] SCC 16; see also the US case, *Wickman v Northwestern National Insurance Co* 908 F 2d 1077 (1st Cir, 1990).

10 [2003] SCC 16.

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Appeal agreed with the observation of McLachlin CJ and added, by way of illustration:[11]

> [We] prefer the view that the use of phrases such as 'accidental means' would not restrict the situations covered by a personal accident insurance policy to those where the proximate cause of the insured's injury or death was not a deliberate or voluntary action on the part of the insured. For example, if a person inures himself by driving off a cliff in the mistaken belief that the road continued, that person would have met with an 'accident' just as much as one who slips and factures his leg while walking on a slippery surface. It would, in our views, accord with ordinary experience to hold that the injury suffered by an insured in such cases would be a result of 'accidental means'.

18.12 The Court of Appeal also agreed with McLachlin CJ when she stated "the accidental nature of a particular means of death depends … on the consequence that the *insured* had or did not have in mind" [emphasis underlined in original]. As such, the inquiry as to whether a particular injury is to be characterised as having been caused by an "accident" is assessed from the insured's subjective perspective, not the insurer's. It therefore followed that death does not cease to be accidental merely because the insured could have prevented death by taking greater care, or because of mishap was reasonably foreseeable in the sense used on the tort of negligence, or because that person was engaged in a dangerous or risky activity. To McLachlin CJ, "the pivotal question is whether the insured expected to die"; however, she recognised that such a test of "expectation of death" suffers from two drawbacks. The first was difficulty in determining the insured's actual expectations – here, McLachlin CJ offered a solution, in that the court would engage in an objective consideration of the insured's likely or probably expectations (in other words, whether a reasonable person in the insured's circumstances would have expected to suffer injury resulting in death). The second drawback is the inability to exclude cases where an insured's expectations are found to be patently unreasonable – for instance, those participating in Russian roulette – a legal game of chance – in the fanciful expectation that fate would favour them. The imperfection of the expectation test thus lies in its inability to exclude, from the proper ambit of "accidents", those cases that one would intuitively recognise as not being such; as McLachlin CJ said:[12]

> When someone takes a risk that most people would expect to cause death, it is common to say of the death 'That was no accident'. To say

11 *Quek Kwee Kee Victoria v American International Assurance Co Ltd* [2017] 1 SLR 461 at [43].

12 *Martin v American International Assurance Life Co* [2003] SCC 16, cited in *Quek Kwee Kee Victoria v American International Assurance Co Ltd* [2017] 1 SLR 461 at [47].

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> this is not to speak metaphorically, but to express a common view of where the category of accidents ends.

18.13 However, McLachlin CJ was not overly concerned that such focus on the expectations of the insured could result in conduct carrying a high risk of death being deemed an accident and should warrant a narrower definition of "accident", since it would often be the case that the court would not be able to ascertain the insured's subjective expectation in undertaking such risky and dangerous behaviour, and would instead apply the objective expectations of a reasonable person. The Court of Appeal agreed with the analysis of McLachlin CJ, and formulated a framework to address the drawbacks which she had identified. The Court of Appeal stated in its decision:

> 51 Expectation in this context goes beyond awareness of possible risks that could transpire thus causing injury. Anyone who participates in a potentially hazardous activity, say white-water rafting or scuba-diving, and for that matter, even driving a motor-car, should be aware of the possibility of injury ensuing; but the vast majority of those who do participate in such activities, do so expecting that such injury will *not* occur. Hence, 'expectation' in this context, connotes the actual belief of the insured that the injury is more likely than not to occur.
>
> 52 We are cognisant in this context of the two drawbacks that affect this test as noted in *Wickman ([42] supra)*. In our judgment, these two drawbacks may be ameliorated by the application of the following framework relating to the parties' burden of proof:
>
> > (a) As the legal burden of proving that the insured's injury or death was caused by 'accident' lies on the claimant, the burden of proving that the insured did not subjectively intend or expect to be injured lies on the claimant as well. Where the insured's subjective intentions or expectations are unclear or impossible to ascertain, it would be open to the claimant, in the alternative, to advance a case based on the intentions or expectations of a reasonable person in the position of the insured in terms of what is known of his personality, circumstances and characteristics.
> >
> > (b) Once it is established on a *prima facie* basis that the insured did not intend or expect to suffer the injury, the evidential burden shifts to the insurer to demonstrate the converse.
> >
> > (c) The ability of the claimant to demonstrate the insured's intention or expectation on a *prima facie* basis would likely vary according to the circumstances in which the insured's injury results. Where the insured's injury is an extraordinary or unusual result of the deliberate action taken, it will often be the case that the claimant will readily be able to demonstrate on a *prima facie* basis that the insured's injury

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> was not within the insured's intention or expectation. The evidential burden then shifts to the insurer to demonstrate special circumstances that would nevertheless allow the court to arrive at the conclusion that the injury or death was not caused by 'accident'. On the other hand, where the insured's injury is a natural consequence of the deliberate actions of the insured, the claimant must do more to satisfy the court even on a *prima facie* basis that the insured had no expectation or intention that injury would ensue, for instance, by proof of mental incapacity or special expertise at performing a particularly dangerous task. The question of whether a consequence is natural or extraordinary must be assessed from the perspective of common-sense and everyday experience.
>
> 53 This approach, in our judgment, maintains fidelity to the idea that whether the acts of the insured gave rise to an 'accident' remains an essentially subjective inquiry that is undertaken from the perspective of the insured, whilst, at the same time, having in place appropriate safeguards which, in the words of the court in *Wickman* (at 1088), should prevent 'unrealistic expectations from undermining the purpose of accident insurance'. These safeguards lie in the ability of the claimant to discharge its burden of proof. In short, the more incongruous the claimant's case appears on its face, the more the claimant will be required to do to prove its case on a balance of probabilities.
>
> 54 These are only *general* principles that ought to guide a court in construing the scope of a personal accident insurance policy. These principles would naturally be subordinated to the express language used in each personal accident insurance policy. In this regard, it remains theoretically open to the insurer, being the party that drafts the insurance contract, to stipulate the type of risk that it would accept by means of appropriate inclusion or exclusion clauses.
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> [emphasis in original]

Having outlined the approach to be taken in construction, the Court of Appeal proceeded to construe the Platinum and PA Policies.

18.14 Beginning with the Platinum Policy, the Court of Appeal rejected the respondent's argument, inspired largely by the reasoning in Clidero, that because the deceased intended to consume the medication, the accident was not caused by an "involuntary event". Using the analogy of a pedestrian who is hit by a negligent driver at a zebra crossing, the Court of Appeal opined that the act of crossing the road would be a deliberate and voluntary act in the part of the pedestrian, but being hit by a car whilst doing so would not be something which the pedestrian expected or intended – hence this would be an unforeseen and involuntary event or an accident within the meaning of the Platinum Policy. Here, the Court of Appeal agreed with the judge below that upon

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proper construction of the Platinum Policy, it is the proximate event causing the injury which must be involuntary.

18.15 As for the PA Policy, the respondent thereunder undertook to pay the assured sum where the "bodily injured [is] effected directly and independently of all other causes by accident" and results in the subsequent loss of life. With the policy omitting any definition of the term "accident", the Court of Appeal applied the outlined approach and took the view that the injury would be an accident under the PA Policy if it occurred in circumstances where the deceased did not intend or expect to suffer the injuries that led to death when he ingested the medication.

18.16 On construction of both the Platinum and PA Policies, the key factual issue to be decided was the same – whether, on the evidence that was adduced, it may be concluded that the deceased had intended or expected to die when he consumed the medication. The inquiry would begin with the deceased's subjective intentions and only shifts to the objective perspective of a reasonable person with the deceased's attributes if the available evidence was insufficient to reveal the deceased's subjective viewpoint.

Assessing the evidence

18.17 In the court below, having found that the deceased deliberately consumed an overdose of medication, the trial judge held that the deceased "must be deemed to have expected to die" because he had been warned that the consequences of overdosage included death. The Court of Appeal disagreed and preferred to review the evidence and ask whether in all the circumstances, the deceased's death was the result of an injury caused by an "accident". The anterior question that followed was whether the deceased had indeed consumed more than the prescribed dosage of medication. Thereafter, finding out what the deceased did before his death would then form the context and backdrop against which the deceased's intentions as to why he did what he did may be assessed.

18.18 The Court of Appeal felt that the question of the dosage that was consumed by the deceased was best answered by the scientific and medical evidence, which would provide the most objective assessment. At the same time, the Court of Appeal cautioned against reliance on expert testimony that is based on general or statistical probabilities to make findings in the particular case, without sufficient consideration of the other aspects of the matrix of facts that might bear on the finding. A total of seven medical doctors and experts gave evidence. After analysing the evidence, the Court of Appeal found that while the

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deceased's *post mortem* blood samples contained elevated levels of medication, that did not lead to the conclusion that the deceased had overdosed because there were other possible explanations for the elevated levels – the Court of Appeal considered it significant that Prof Teo, the forensic pathologist who examined the deceased's body, did not state in the FCOD Report that the deceased's cause of death was mixed drug intoxication as a result of drug overdose, but rather that the cause of death was the presence of the combination of drugs and their interactions in the deceased's body, irrespective of whether they had been ingested at therapeutic levels. Prof Teo was equivocal as to whether the elevated levels of drugs indicated an overdose at all.

18.19 The Court of Appeal treated with circumspect the evidence given by the deceased's treating doctors (pain specialist and psychiatrist), who had prescribed the combination and dosages of drugs to begin with and who had supported the overdose theory: "[faced] with the question whether this could have killed their patient, it is improbable that they would have said anything other than 'no'".

18.20 From the scientific and medical evidence, the Court of Appeal concluded that the quantity and variety of drugs prescribed to the deceased were such that even if these had been taken in their prescribed dosages (which were at the high end to begin with), this could have resulted in the adverse reactions that led to death.

18.21 The Court of Appeal took a step further to also consider the deceased's habits when it came to consumption of his medication. The available showed that the deceased may not have exceeded his prescribed dosage, but that the deceased had also consumed other medication – the Court of Appeal found the evidence inconclusive and did not assist in the question whether the deceased had overdosed.

The deceased's state of mind

18.22 To the extent and given that the scientific and medical evidence did not sufficiently reveal the likely character of the deceased's actions immediately prior to his death, other evidence that related to the deceased's state of mind became all the more pertinent. If the evidence showed that the deceased's state of mind was positive rather than negative, optimistic rather than pessimistic, and constructive rather than destructive, this would tend to indicate that the deceased did not intend or expect to end his life.

18.23 The Court of Appeal noted and agreed with the trial judge that the overall psychiatric evidence led at trial showed that the deceased did not present a suicide risk. Evidence of the circumstances prior to the

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deceased's death, for instance, his conduct of his affairs and plans for the future, did not show that he harboured any intention to commit suicide. He had a legal suit against his brother but he could have discontinued and ended the suit instead of his life. He had back pain and depression, but these have plagued him for years and he appeared to be able to cope. On the other hand, whilst not having owned a motor car before, the deceased purchased not one but two pre-owned luxury cars. He was wealthy, as further seen from his prolonged stays in private hospitals. He moved out into a new home that was more conducive to his rehabilitation. The Court of Appeal had no difficulty concluding that the deceased's circumstances tended to be more positive than negative; but the most telling was a CCTV clip showing the deceased at his new home just prior to his death.

18.24 The CCTV clip showed the deceased tending to his plants and speaking to someone on the phone. A certain Mdm Chee had testified that between 8 and 9pm on 3 August 2012 she had a light-hearted conversation with the deceased. He then moved, with the help of a friend, a large and heavy wooden cupboard up the stairs to his bedroom. He displayed a positive mood throughout. The trial judge had noted that the clip showed the deceased in a good mood and apparently pain-free, but she placed little weight on it because it had been extracted from a longer 38-minute recording, which left some doubt as to what the remaining footage might have shown. Suggestions were put forward that perhaps his back pain had recurred from carrying the heavy wooden cupboard, such that he had to take pain medication that added to the elevated levels of medication, and there was evidence that the deceased was warned of consequences of overdosage of such pain medication. The Court of Appeal rejected this as speculative, particularly since the elevated levels of medication were of the psychiatric medication, and there was no evidence that the deceased had been similarly forewarned. The Court of Appeal accepted that while it might have been more useful had the clip not been shortened, it was nevertheless evidence of the deceased's cheerful demeanour the day before he died, with no evidence to the contrary. The Court of Appeal in fact found that "the Deceased's circumstances and attitude towards life strongly suggests that the Deceased was a resilient man who, at the material time, had made plans for the future and who had no lack of desire to carry on with life".[13]

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13 *Quek Kwee Kee Victoria v American International Assurance Co Ltd* [2017] 1 SLR 461 at [110].

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Was the deceased's death caused by an "accident" within the scope of the insurance policies?

18.25 There were only three broad scenarios that can account for the deceased's actions and intentions prior to his death:[14]

> (a) The Deceased took an overdose of his medication with the intention or expectation of suffering injury that would result in death.
>
> (b) The Deceased took an overdose of his medication without intending or expecting thereby to suffer any injury resulting in death.
>
> (c) The Deceased took his medication in accordance with the prescription and harboured no intention or expectation of suffering injury resulting in death.

18.26 Under scenarios (b) and (c), the deceased's death would have been caused by an "accident", and the respondent would be liable to pay the assured sums under the Insurance Policies. Under scenario (a), the deceased's death would not be an "accident", and the respondent would not be liable to pay the assured sums under the Insurance Policies. Given the weight of the psychiatric evidence and the evidence concerning the deceased's outlook on life, the Court of Appeal found that on a balance of probabilities, what occurred on the night of 3 August 2012 was either scenario (b) or (c) rather than scenario (a). Indeed, on the weight of all the evidence, the Court of Appeal adjudged that scenario (c) offered the best explanation of all the surrounding circumstances. Hence, the Court of Appeal found that the deceased died even though he took his medicine in accordance with the prescribed dosage.

18.27 The Court of Appeal added that it is not necessary for the court to find that the deceased had consumed his medication in accordance with prescription in order for the appellants to be entitled to the assured sums under the Insurance Policies. This is because even if the deceased had deviated from his prescription, this would not take him outside the scope of the insured risk if he had done this without intending or expecting to suffer injury. Indeed, it was not possible to establish, based on the scientific and medical evidence, just how much medication the deceased did ingest on the fateful night in question, or if the deceased did overdose, by how much. Nor was there any evidence to warrant a finding that the natural or usual consequence of doing so would be injury or death, let alone that the deceased knew this to be the case. Moreover, there was no evidence that the deceased was made aware of the potential dangers of exceeding the prescribed dosage of the

14 *Quek Kwee Kee Victoria v American International Assurance Co Ltd* [2017] 1 SLR 461 at [111].

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psychiatric medication, much less that he held a *belief* that an overdose of such medications would lead to injury or even death.

18.28 In the circumstances, applying the framework that was outlined, the Court of Appeal was satisfied that the appellants had raised a *prima facie* case that that the deceased had no intention or expectation of suffering injury or death when he consumed his medication on the night of 3 August 2012. The Court of Appeal also found that the respondent had not discharged its evidential burden of proving otherwise. In the Court of Appeal's judgment, there was virtually *no evidence* which demonstrated that the deceased consumed his medication with such a belief or intention.

Concluding remarks

18.29 The Court of Appeal did agree with the trial judge's findings of fact in key aspects, but disagreed with the manner in which the trial judge applied the general statistical probabilities of expert scientific and medical evidence to arrive at findings on particular factual issues, and the weight that the trial judge accorded to the factual evidence. As would be typical in cases of this nature, the insurer would have little factual evidence to counter the claimant's and would rely more on expert evidence, in this case scientific and medical. Could a claimant suppress evidence? The trial judge appeared to have had that in mind after assessing the demeanour of relevant witnesses during trial.

18.30 The Court of Appeal was aware and made it a point to explain how and why it arrived at differing conclusions. In any event, this decision is significant in that it has outlined the approach the Singapore courts will take in future when encountered with similar cases.

Proper notice of proceedings under section 9(3)(*a*) of Motor Vehicles (Third-Party Risks and Compensation) Act – Writ amended to add insured driver as defendant

18.31 The second case that is noteworthy is *Muhammad Faizal Bin Mohd Aris v AXA Insurance Singapore Pte Ltd*,[15] where the plaintiff, injured in a motor car accident, sued AXA in MC Suit No 16878 of 2015 to recover on a judgment he had obtained in MC Suit No 12756 of 2012 against AXA's insured driver. The central issue was the construction and application of s 9 of the Motor Vehicles (Third Party Risks and Compensation) Act[16] ("the Act"), in particular, s 9(3)(*a*).

15 [2017] SGMC 4.
16 Cap 189, 2000 Rev Ed.

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18.32 The Act was enacted to provide against third-party risks and for the payment of compensation in respect of death or bodily injury arising out of the use of motor vehicles and for matters incidental thereto. As noted by the district judge: "Even when an insurer may have basis to avoid or cancel an insurance policy, it is nonetheless required to pay compensation to or for the benefit of the victim of an accident involving an insured motor vehicle. See s 4(1)(*b*) and s 9(1) of the Act." In fact, s 9 appears under the section headed, "Duty of insurers to satisfy judgments against persons insured in respect of third party risks" and places such a duty on insurers. It is, however, not the case that the insurer has to satisfy every judgment – s 9(3)(*a*) of the Act reads:

> (3) No sum shall be payable by an insurer under subsections (1) and (2B) —
>
> > (*a*) In respect of any judgment unless before or within 7 days after the commencement of the proceedings in which the judgment was given the insurer had notice of the bringing of the proceedings …

18.33 The intention behind this provision is readily apparent – if an insurer is to be liable on a judgment, it ought to be notified of the proceedings which would result in that judgment so that it may take steps to defend its interests, and such notice is to be given before or within seven days after the commencement of the proceedings.

18.34 On a plain reading of s 9(3)(*a*) of the Act, it would have been straightforward for a plaintiff's lawyer to serve notice of the proceedings on the insurer within seven days of the commencement of such proceedings. However, the reality is often more complicated, certainly in Muhammad Faizal's case. Briefly, here are the facts. On 22 June 2011, the plaintiff sustained injuries when he was the driver of the second car in a four-vehicle chain collision, with the fourth and last vehicle being a lorry insured by AXA. AXA had repudiated liability under the policy because the owner and the driver of the lorry, one Salahuddin, had failed to report the accident to AXA. The plaintiff's lawyers sent a letter of demand on 21 October 2011 to the owners of the lorry seeking damages and threatening legal action, but this was not sent or copied to AXA. On 13 December 2011, the plaintiff's lawyers sent a letter to AXA in which they referred to a telephone conversation between themselves and an AXA officer, and asked for an offer of settlement within three days, failing which proceedings would be commenced against AXA's insured, the owner of the lorry, and Salahuddin pursuant to s 9(3) of the Act. As it turned out, the plaintiff did issue a writ on 14 May 2012 but only against the driver of the third car – Johari bin Abdullah, not the owner of the lorry or Salahuddin – which the district judge noted was a peculiar feature of the case.

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18.35 In turn, Johari issued a third-party notice against Salahuddin on 11 January 2013; however, Johari's lawyers confirmed that they did not serve the notice on Salahuddin, but had instead served it on AXA's lawyers when the latter advised that they had instructions to accept service of the notice. Subsequently and until the end of the proceedings, AXA maintained that it had instructed lawyers to act only for AXA, and not Salahuddin, lawyers not having entered appearance or filed any notice of appointment to act for Salahuddin. Reference was made to a letter dated 6 February 2013 from AXA's lawyers to the lawyers for the plaintiff and Johari's lawyers clarifying that they acted for AXA. Nevertheless, AXA's lawyers attended a court dispute resolution ("CDR") hearing on 7 March 2013 when directed to do so by the CDR judge.

18.36 There is no information as to what transpired at the CDR, except that, apparently, on the advice of the CDR judge, the plaintiff applied and on 6 August 2013, obtained leave of Court to amend his writ and statement of claim to add Salahuddin as the second defendant. The plaintiff's lawyers did not serve the application for amendment on AXA or its lawyers, but after amendment of the writ, sent a letter dated 19 September 2013 to AXA's lawyers informing them of the addition of Salahuddin as the second defendant and asking if they had instructions to accept service of the amended writ on Salahuddin's behalf. AXA's lawyers replied on 24 October 2013 instead to merely ask for a copy of the amended writ so as to take instructions on service of process. The plaintiff's lawyers took the reply to be an acceptance of service and purported to serve the amended writ on AXA's lawyers on the same day under a letter of service dated 24 October 2013. On 13 January 2014, AXA's lawyers wrote to the plaintiff's lawyers stating they did not have instructions to accept service and further asked for a copy of the plaintiff's notice under s 9(3)(*a*) of the Act, to which the plaintiff's lawyers replied that they would proceed without further reference to AXA.

18.37 The plaintiff's lawyers served the amended writ on Salahuddin on 20 January 2014 at Admiralty West Prison.

18.38 On 28 November 2014, the hearing for assessment of damages in MC Suit No 12756 of 2012 took place in the presence of lawyers for the plaintiff and Johari. AXA's lawyers attended only to inform the learned deputy registrar that as the plaintiff had failed to give notice under s 9(3)(*a*) of the Act, AXA would not be taking part. The court entered judgment in favour of the plaintiff, with Salahuddin bearing 90% of liability of the assessed quantum.

18.39 When the plaintiff sued AXA in MC Suit No 16878 of 2015, AXA's argument in relation to s 9(3)(*a*) of the Act was that the letter sent by the plaintiff's lawyers dated 13 December 2011 did not qualify as a

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notice thereunder because when the plaintiff did commence proceedings on 14 May 2012, it was against Johari and not AXA's insured (neither the owner of the lorry nor the driver, Salahuddin) – as such, the proceedings was not those that were referred to or contemplated in the letter dated 13 December 2011; and when the plaintiff did add Salahuddin as a defendant in those proceedings later on 6 August 2013, he failed to give notice of the same within seven days as stipulated in s 9(3)(*a*) of the Act – his letter to AXA giving notice of the same was dated 19 September 2013.

18.40 AXA relied on *Wake v Page*.[17] In *Wake v Page*, the plaintiff was the rear seat passenger in a car driven by the (uninsured) first defendant, the son of the car-owner who was the insured, when the car was involved in a collision on 29 December 1993. The plaintiff sustained serious injuries and the first defendant was convicted of driving without due care and attention. On 26 June 1995, the plaintiff's solicitors wrote a letter of claim to the insurer under ss 151 and 152 of the English Road Traffic Act 1988[18] – equivalent to s 9 of the Act, to which the insurer responded by seeking more information and medical evidence. A preliminary medical report was furnished to the insurer on 11 April 1996 and on 28 November 1996, to avoid any action from being time-barred, the plaintiff issued a writ on 28 November 1996, in which the insurer was named as the second defendant. The insurer instructed solicitors to accept service of the writ, pleadings were exchanged and the matter proceeded towards trial, with parties locked in at the discovery stage when the insurer, in June 1999, raised the lack of service of notice as required under s 152(1)(*a*) and applied to amend its defence as well as for a declaratory relief on a preliminary issue that the insurer was not liable.

18.41 The first issue the English Court of Appeal dealt with was what would be considered a proper notice of proceedings. After reviewing the relevant authorities, Kennedy LJ drew the following conclusions:

> (a) To show that the insured had notice of the bringing of the proceedings, there must be more than evidence of a casual comment to someone who at times acted as an agent for the insurers.[19]
>
> (b) Any notification relied upon must not be subject to a condition which may or may not be fulfilled[20] but if the only

17 [2001] RTR 20.
18 c 52.
19 See *Herbert v Railway Passenger Assurance Co* (1938) 60 L1LR 143.
20 See *Weldrick v Essex & Suffolk Equitable Insurance Society Ltd* (1950) 83 L1LR 91 and *Harrington v Pinkey* [1989] RTR 345.

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condition is one which requires action from the recipients which they choose not to take then, by making that choice, they render the notice unconditional and thus effective.[21]

(c) The notice can be oral, and it need not even emanate from the claimant.[22] It can be given before proceedings have commenced, and it need not be specific as to the nature of the proceedings,[23] or the court.[24]

(d) Whether in any given case it is shown that the insurer had notice of the bringing of the proceedings (as opposed to the making of a claim) is a matter of fact and degree.[25]

(e) The essential purpose of the requirement of notice is to ensure that the insurer is not suddenly faced with a judgment which he has to satisfy without having any opportunity to take part in the proceedings in which that judgment was obtained.[26]

18.42 Despite the insurer having been "kept in the picture from the start", and having actively litigated such that they were never in danger of being faced with a judgment they had to satisfy without having had the opportunity to take part in the proceedings, the English Court of Appeal held that the insurer was entitled to the declaration it sought because they had not received notice of commencement of the proceedings within seven days. Kennedy LJ began with the question of whether s 152(1)(*a*) was merely procedural or was it more than that, and held that he could not ignore the statutory requirement in s 152(1)(*a*) that made the service of the notice a condition precedent to the insurer's liability. *Per* Kennedy LJ, "everything would depend on the facts of the case, but a prudent solicitor would be well advised to ensure that the insurer received written notice within 7 days after the commencement of proceedings. There can then be no room for argument". Kennedy LJ did in fact reach his conclusion with reluctance, as he said in his judgment, "the unattractiveness of their [the insurer's] behaviour cannot be determinative of the outcome of the case".

18.43 The plaintiff, on the other hand, contended that relevant notice was served and that in any event, the insurer had notice of the proceedings.

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21 See *Ceylon Motor Insurance Association Ltd v P P Thambugala* [1953] 3 WLR 486.
22 See *Harrington v Pinkey* [1989] RTR 345 and *Desouza v Waterlow* [1999] RTR 71.
23 *Desouza v Waterlow* [1999] RTR 71.
24 See *Ceylon Motor Insurance Association Ltd v P P Thambugala* [1953] 3 WLR 486 and *Harrington v Pinkey* [1989] 2 RTR 345.
25 *Desouza v Waterlow* [1999] RTR 71.
26 *Desouza v Waterlow* [1999] RTR 71.

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18.44 The plaintiff relied on the Singapore High Court decision *of Sim Jin Hwee v Nippon Fire & Marine Insurance Co Ltd*[27] ("*Sim Jin Hwee*"). In this case, the plaintiff sustained extensive bodily injuries whilst travelling as a passenger in a motor car that was involved in an accident on 5 December 1991. He sued the owner and driver of the motor car he was in and proceedings in Suit No 2355 of 1993 were commenced on 13 December 1993. About a year before the said commencement of proceedings, on 1 October 1992, the plaintiff's lawyers had sent a letter to the insurers, Nippon, asking them to admit liability, failing which proceedings would be commenced. Nippon responded to ask for information and documents in support of the claim, appointed lawyers and later in a letter dated 31 May 1993, repudiated liability under the policy but asked to be, nevertheless, kept informed of the progress of the proceedings.

18.45 On 24 November 1993, the plaintiff's lawyers sent a letter to Nippon's lawyers asking whether Nippon would agree to the commencement of proceedings in the District Court instead of the High Court. On 25 November 1993, the plaintiff's lawyers contacted Nippon's lawyers over the phone and asked if they would accept service of the writ and statement of claim that were about to be filed against Nippon's insured owner and driver, despite Nippon having repudiated liability under the policy. Nippon's lawyers verbally replied that they "had no instructions to receive the statement of claim". By a letter dated 26 November 1993, Nippon's lawyers replied re-affirming Nippon's earlier position that the policy had been repudiated.

18.46 The plaintiff obtained judgement against Nippon's insured in Suit No 2355 of 1993 and sued Nippon in Suit No 1128 of 1996 when Nippon refused to pay on the said judgment. One of Nippon's defences was that the plaintiff had failed to serve notice of the institution of proceedings in Suit No 2355 of 1993 before or within seven days of commencement thereof. Rubin J, as his Honour then was, found Nippon's contention to be entirely ill-conceived and disingenuous when:

(a) Before the commencement of Suit No 2355 on 13 December 1993, the plaintiff's lawyers had sent a letter dated 1 October 1992 to Nippon's lawyers asking Nippon to admit liability, failing which proceedings would be commenced against their insured, to which Nippon's lawyers had in fact responded by asking for evidence in support of the claim.

(b) Nippon's lawyers had sent a letter dated 31 May 1993 to the plaintiff's lawyers advising that they had repudiated liability

27 [1997] SGHC 260.

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under the policy but nevertheless requested to be kept informed of the proceedings.

(c) The plaintiff's lawyers had again written on 24 November 1993 asking if Nippon would agree to proceedings being taken in the District Court instead and had called Nippon's lawyers on 25 November 1993 seeking confirmation that they would accept service of process on behalf of their insured.

18.47 It is clear that Nippon had adequate notice of the proceedings that were eventually commenced against their insured. It is also clear that Nippon, or their lawyers, had been informed by way of letters dated 1 October 1992 and 24 November 1993 as well as verbally on 25 November 1993, before the commencement of proceedings such that the time requirement of notice under s 9(3)(*a*) of the Act was met. *Wake v Page* was decided in 2000 after the judgment *in Sim Jin Hwee*, thus Rubin J did not have the benefit of the reasoning in *Wake v Page*; but even if he had, it is submitted that on the facts in *Sim Jin Hwee*, it would not have assisted Nippon.

18.48 The district judge rejected AXA's counterclaim and the approach of strict construction adopted by the English Court of Appeal in *Wake v Page*, and preferred that of purposive interpretation as the "encompassing approach of statutory interpretation that is in currency".

18.49 Embarking on a purposive interpretation, the district judge made two observations of s 9(3)(*a*) of the Act:

> (1) Notice of the bringing of proceedings can be given whether before action is started, if after action has been started before the giving of notice, within seven days from the time it is started.
>
> (2) The provision does not in fact say that anyone has to give any notice. It only states that the insurer should have notice of the proceedings within the timeline indicated, i.e. at any time before the expiry of seven days of the commencement of proceedings.

18.50 Whilst noting the peculiar feature, the district judge was of the view that:[28]

> [The] proceedings were in essence, and, as a matter of procedural reality, one proceedings. That it morphed from one defendant (Johari) to the (Salahuddin) did not render the proceedings a different proceedings from that contemplated by [s 9(3)(*a*) of the Act]. While there was *prima facie* an initial change of heart about whether or not

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28 *Muhammad Faizal Bin Mohd Aris v AXA Insurance Singapore Pte Ltd* [2017] SGMC 4 at [56].

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> to sue Salahuddin, the plaintiff had reverted to its original intention as intimated by the letter of 13th December 2011, which was that action would be started against Salahuddin.

As such, by virtue of the letter dated 13 December 2011, AXA had notice of the proceedings "before … the commencement of proceedings" within s 9(3)(*a*) of the Act.

18.51 The district judge added, "I should think that in the sum of all the relevant circumstances, the defendant did have notice of the proceedings through all of the events leading up to the judgment in the proceedings within the meaning of the provision", and identified the relevant circumstance as follows:

> (a) The defendant knew that the writ had been amended and that assessment of damages was afoot, which was a step in the very proceedings of which the letter dated 13 December 2011 should be deemed to have referred to in future.
>
> (b) The letter dated 19 September 2013 was not another letter that came too late for the purpose of the provision; it was an invitation to take part in the proceedings of which notice had been given prior.[29]

Concluding remarks

18.52 Was Muhammad Faizal's case correctly decided? On the facts and in the context of Singapore with a limited number of courts in the judicial hierarchy and an electronic database of litigants and proceedings access to which is readily available, it is submitted that the answer ought to be yes. In the context of the UK, where proceedings may have been commenced in any of the far-flung county courts, the approach in *Wake v Page* is the more attractive.

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29 *Muhammad Faizal Bin Mohd Aris v AXA Insurance Singapore Pte Ltd* [2017] SGMC 4 at [63].

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