

## “ARISING OUT OF THE USE OF A MOTOR VEHICLE”

### I. INTRODUCTION

In the scheme of compulsory motor insurance in Singapore, imposed by the Motor Vehicles (Third-Party Risks and Compensation) Act<sup>1</sup>, the determination of the respective rights and liabilities of the drivers of the vehicles and any victims revolve around the construction of the phrase “caused by or arising out of the use” of a motor vehicle.<sup>2</sup> Questions of the respective rights or liabilities which may arise are, *inter alia*, whether the victim of the party at fault would be able to sue not just the tortfeasor but also the insurer directly.<sup>3</sup> There may also be the issue of what will happen should the tortfeasor be uninsured. Would criminal liability follow and would the victim be thereby left without any remedies?

Insofar as “caused” is concerned, it is clear that the normal rules of causation would apply. However, there still remains questions as to what is the ambit of the word “use” in relation to a motor vehicle. Is it restricted only to a vehicle which is in running order? Is it restricted only to a person who is driving the vehicle, thereby excluding anyone else? The use of the phrase “arising out of” also presents problems. It is probably true to say that it must mean something other than “caused” since it is used in the alternative, but beyond that it is a matter of conjecture as to how much further it does extend.

<sup>1</sup> Cap 189 (Rev Ed, 1985). Hereafter, the Act will be referred to as the “MVA”.

<sup>2</sup> S 3 of the MVA provides that

(1) 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* unless there is in force in relation to the use of the motor 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. (emphasis my own)

(2) If a person acts in contravention of this section, he shall be guilty of an offence and shall be liable on conviction to a fine not exceeding \$1,000 or to imprisonment for a term not exceeding 3 months or to both ...

S 4(1) further provides that:

In order to comply with the requirements of this Act, a policy of insurance must, subject to subsection (2), be a policy which —

(a) is issued by an insurer who at the time the policy is issued is lawfully carrying on motor insurance business in Singapore; and

(b) insures such person, persons or classes 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*. (emphasis my own)

<sup>3</sup> S 9 gives the injured third party, who has successfully obtained judgment against the tortfeasor but who has not been satisfied, the right to sue the insurers directly provided all the procedural steps have been complied with. However, s 9 only gives the third party such right to sue for the loss as is required to be insured under the MVA, which is in turn circumscribed by ss 3 and 4 of the Act.

The interesting thing, of course, is that these issues have never come before the courts in Singapore even though the MVA has been with us since 1960. In fact, they do not seem to have cropped up in the reported cases in Malaysia either. Recently, there has been some significant case law development in the United Kingdom on the meaning of these two phrases. So, it is an appropriate time to examine the pertinence and ambit of this statutory language.

## II. STATUTORY FRAMEWORK

The natural place to begin with, before considering the case law development on the words mentioned above, is to consider the statutory framework behind those words. An understanding of the statutory scheme will help in the understanding of the legislative aims behind the MVA as well as show the relevance of the phrase in the context of this framework.

Motor insurance against third party risks is compulsory in Singapore by virtue of the MVA. Of course, this statutory provision for compulsory insurance is limited only to third party risks which relate to compensation for death or personal injury; it does not pertain to property damage. In fact, it is an offence under the MVA for any person to “use or to cause or to permit any other person to use” a motor vehicle without such insurance cover.<sup>4</sup>

In order for this requirement for compulsory insurance to be satisfied, the policy in question must be one which

insures such person, persons or classes 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*. (emphasis my own)<sup>5</sup>

Section 4(1)(b) is important because although section 9 of the MVA gives the right to the third party to sue the insurer directly upon obtaining judgment against the tortfeasor driver, it only does so if the liability in question is something which is covered by the MVA.

What section 9 of the MVA does is to give the third party the right to sue the insurer directly in the event that he has successfully obtained judgment against the insured driver and he has not been able to obtain satisfaction on that judgment. This is a statutory assignment of contractual rights.<sup>6</sup> Thus, one must draw a distinction between the rights of the parties

<sup>4</sup> See s 3, reproduced in *supra*, note 2.

<sup>5</sup> S 4(1)(b).

<sup>6</sup> Prior to this statutory assignment of contractual rights, the victim could not sue the insurer of the tortfeasor directly since there was no privity of contract between the victim and the insurer: see *King Lee Tee v Norwich Union Fire Insurance Society Ltd* [1933] MLJ 187, at 188.

(to the insurance contract) *inter se* and the rights between the injured third party and the insurer. The first is dependent upon the terms of the contract only, while the second is based upon the statutory rights given by the MVA. As such, the right of the third party to sue the insurer directly must be limited and circumscribed by the enabling statute. Section 9(1) of the MVA reads as follows:

If after a certificate of insurance has been issued under section 4(5) to the person by whom a policy has been effected judgment for a sum exceeding \$5,000 *in respect of any liability as is required to be covered by a policy under section 4(1)(b)* (being a liability covered by the terms of the policy) is obtained against any person insured by the policy then, notwithstanding that the insurer may be entitled to avoid or cancel or may have avoided or cancelled the policy, the insurer shall, subject to this section, pay to the Public Trustee as trustee for the persons entitled thereto to 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 written laws relating to interest on judgments.

(emphasis my own)

Section 9(2) further provides that:

Notwithstanding subsection (1) providing for the payment to the Public Trustee, the right of action thereby created shall vest to the persons entitled to the benefit of the judgment payable thereunder.

An illustration of this point is provided by the decision of *QBE Insurance v Thuraisingam*<sup>7</sup>. Here, the insured was involved in an accident with a third party, whose car was damaged. Judgment in default was obtained in respect of the cost of repairs. The insurers refused to pay the judgment sum, whereupon the third party instituted proceedings against them. It was held by the Malaysian High Court that a third party right given under the Act<sup>8</sup> to seek satisfaction of a judgment sum against the insured from the insurers is circumscribed by reference to liabilities in respect of which insurance is compulsory. Hence, since it is not required by the Act that property damage has to be insured against, it necessarily follows that the right granted by the Act to sue the insurers directly does not extend to a claim for such property damage.

Thus, it becomes apparent that in order for a right of action to be vested in the third party against the insurer directly, the cause of action must be something which arises out of “in respect of the death of or bodily injury to any person *caused by or arising out of the use of the motor vehicle*”.

<sup>7</sup> [1982] 2 MLJ 62.

<sup>8</sup> The Malaysian Act, the Road Transport Act 1985, contains *in pari materia* provisions.

Another important relevant issue is whether the Motor Insurers' Bureau would be liable. By a memorandum of agreement made in 1975, the Motor Insurers' Bureau of Singapore has agreed to implement a scheme to "secure compensation to third party victims of road accidents where, notwithstanding the provisions of the Motor Vehicles (Third-Party Risks and Compensation) Act ... relating to compulsory insurance, the victim is deprived of compensation by the absence of insurance, or of effective insurance"<sup>9</sup> as well as to implement "a scheme to secure compensation for third party victims of road accidents when the driver responsible for the accident could not be traced."<sup>10</sup> It has to be noted that the MIB would only be liable if the liability is one for which it is compulsory to be insured under the MVA.<sup>11</sup>

Thus, it was held in *Buchanan v Motor Insurers' Bureau*<sup>12</sup> that the use of a "motor vehicle" within the limits of the Port of London Authority was not a "use" as is covered by the ambit of the UK Road Traffic Act 1930.

<sup>9</sup> See preamble of the agreement made between the Motor Insurers' Bureau and the then Minister of Finance on the 22nd of February, 1975.

<sup>10</sup> *Ibid.*

<sup>11</sup> See clause 3 of the Agreement:

If judgment in respect of any liability *which is required to be covered by a policy of insurance under the Act* is obtained against any person or persons in any Court in Singapore and either at the time of the accident giving rise to such liability there is not in force a policy of insurance as required by the Act or such policy is ineffective for any reason (including the inability of the insurer to make payment) and any such judgment is not satisfied in full within twenty-eight days from the date upon which the person or persons in whose favour such judgment was given became entitled to enforce it then the Bureau will, subject to the provisions of this Part of this Agreement, pay or cause to be paid to the person or persons in whose favour such judgment was given any sum payable or remaining payable thereunder in respect of the aforesaid liability including taxed costs (or such portion thereof as relates to such liability) or satisfy or cause to be satisfied such judgment.

(emphasis my own)

See also clause 8(1) of the same Agreement which provides for compensation of victims of untraced drivers:

Subject to paragraph (2) of this clause, this Part of this Agreement applies to any case in which an application is made to the Bureau for a payment *in respect of the death or bodily injury to any person caused by or arising out of the use of a motor vehicle on a road in Singapore* and the case is one in which the following conditions are fulfilled, that is to say —

...

- (d) the liability of the untraced person to pay damages to the applicant is one which is required to be covered by insurance or security under the Act, it being assumed for this purpose, in the absence of evidence to the contrary, that *the vehicle was being used in circumstances in which the user was required by the said Act to be insured or secured against third party risks.*

(Emphasis my own)

<sup>12</sup> [1955] 1 All ER 607.

It was found, as a fact, that the road in question was not one to which the public had access since only authorised persons were allowed to enter into the port area. Under the UK Act, “use” is defined as “use on any road” and “road” is defined as “any public road and any other road to which the public has access”.<sup>13</sup> Since this use was not required to be covered by insurance under the Act, the MIB successfully denied liability to compensate for the injuries in question.

Thus far, we have only been looking at the implications of compulsory insurance insofar as civil claims are concerned. However, section 3(1), read with section 4(1)(b), of the MVA should also be of concern as it imposes criminal liability in relation to any “use” of any vehicle without the necessary insurance covering such use. Section 3(1) reads as follows:

Subject to the provisions of this Act, it shall not be lawful for any person *to use or cause or permit any other person to use a motor vehicle* unless there is in force in relation to the use of the motor 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.  
(emphasis my own)

Springing from this statutory offence<sup>14</sup> is also the question of whether the injured third party would be able to sue for a breach of the passenger’s statutory duty to ensure that his “use” of the vehicle is covered by a policy. Here, the injured third party would be able to sue the passenger for using the vehicle without there being the requisite insurance cover.<sup>15</sup> The Court of Appeal in *Monk v Warbey*<sup>16</sup> has decided that the fact that it has been made an offence to fail to comply with compulsory insurance does not in any way limit the common law remedies of the third party. In fact, in line with the fact that the imposition of compulsory insurance is to ensure that injured third parties should have a remedy, there is no reason why this aim should be defeated merely because this compulsory insurance has not been complied with.

Of course, these days, with the Motor Insurers’ Bureau Agreement to cover certain situations where a third party has been injured or killed by

<sup>13</sup> These definitions correspond to that found under s 2 of the MVA.

<sup>14</sup> S 3(2) provides for the punishment:

If a person acts in contravention of this section, he shall be guilty of an offence and shall be liable on conviction to a fine not exceeding \$1,000 or to imprisonment for a term not exceeding 3 months or to both ...

<sup>15</sup> See further, *MacGillivray & Parkington on Insurance Law* (8th Ed, 1988), at paras 2105–2108.

<sup>16</sup> [1935] 1 KB 75.

an uninsured driver, the third party is more likely to look towards the MIB for satisfaction, rather than take out an action against the uninsured “user” for the breach of his statutory duty to insure.<sup>17</sup> As pointed out earlier, the MIB has only agreed to compensate victims where the liability in question would have required cover by a policy.<sup>18</sup> Thus, the issue whether any claim could be made by such a victim would still depend on whether the “use” is within the meaning attributed to the word within the framework of the statute.

### III. “ARISING OUT OF ...”

The phrase “arising out of” is one which the courts have not had the opportunity to consider the exact ambit of. In most cases, the issue revolves around whether there was indeed “use” of the vehicle, or if the “use” was on a “road” as defined by the relevant legislation. Thus, the recent case of *Dunthorne v Bentley*<sup>19</sup>, which was heard by the Court of Appeal, offered an invaluable opportunity for the court to offer guidance in construing this phrase.

The deceased, Bentley, was driving her car on a road one evening when she ran out of petrol. The deceased then parked her car along the side of the road, turned on her hazard lights and stood behind her car wondering what to do. About ten minutes later, her colleague, who was driving on the opposite side of the road, spotted her there. The colleague stopped his car and some shouted conversation ensued. The deceased then unexplainably decided to dash across the road to where her colleague was. She never made it. She was hit and killed by an oncoming vehicle driven by Dunthorne. The plaintiff did not escape unscathed either. He suffered serious head injuries. He claimed against the estate of the deceased for his injuries. The action was not challenged and negligence was admitted by the estate. Judgment in default of defence was obtained. The motor insurers of the deceased was then joined as defendants.

The action was then stayed pending the decision on a preliminary point which was raised by the insurers as to whether they should be liable under the terms of their motor policy. The crucial issue was whether the plaintiff’s injuries could be characterised as having been “caused by or arising out of” the use of the car by the deceased. If the issue was

<sup>17</sup> However, the mere existence of this means of claiming from the MIB does not, of itself, absolve the person in breach of his statutory duty to insure of his civil liability. The injured third party still has a right to sue for breach of statutory duty, although, of course, he cannot claim from both the “user” of the vehicle as well as the MIB: see *Corfield v Groves* [1950] 1 All ER 488.

<sup>18</sup> See Cl 3 of the MIB Agreement, *supra*, note 11.

<sup>19</sup> [1996] RTR 428.

answered in the affirmative, then the insurers would find themselves liable to satisfy the judgment obtained against the estate of the deceased pursuant to section 151 of the Road Traffic Act 1988.<sup>20</sup>

At first instance, Law J held that the insurers were indeed liable under the policy. The insurers appealed against this decision. As pointed out by Rose LJ, the issues before both the High Court and the Court of Appeal, *inter alia*, were:

[F]irst, what use of the car was being made by Mrs Bentley at the time or immediately before the accident occurred? Secondly, was the accident caused by or did it arise out of that use?<sup>21</sup>

Law J had inferred from the facts which were agreed between the parties that the deceased had run across the road to obtain help to restart her car. The conclusion which he then came to was that this was closely and causally connected to her use of the car and, thus, the accident arose out of such use.

The Court of Appeal dismissed the appeal and affirmed the decision of Law J. It was held that the phrase “arising out of” covered a more remote consequence that which would be covered by the phrase “caused by”. The court also held that it was entitled to take into account the reason for the deceased being on the road when the collision occurred in determining if the accident in question was caused by or arose out of her use of the car. Since this was one of the factors which the court could take cognisance of, the Court of Appeal held that the court of first instance was entitled to infer that the deceased was probably crossing the road in order to obtain assistance so that she could resume her use of her car and thus, the accident did arise out of the deceased’s use of her car.

Rose LJ delivered the leading judgment in the case. His Lordship, in answering his own questions, began by holding that in light of *Elliot v Grey*,<sup>22</sup> the deceased was using her vehicle even if at the time when she was crossing the road she was not driving the car, since it followed from *Elliot v Grey*<sup>23</sup> that “a person uses a vehicle on a road if he has the use of it on a road.”<sup>24</sup>

20 Which is *in pari materia* with s 9 of the MVA. The policy issued by the insurers was in compliance with s 145(3)(a) (which is *in pari materia* with s 4(1)(b) of the MVA) which imposes an obligation on the user of a motor vehicle to insure against liability to third parties for death or bodily injury “caused by or arising out of, the use of a vehicle on a road in Great Britain”.

21 *Supra*, note 19, at 430.

22 [1960] 1 QB 367.

23 *Ibid.*

24 *Supra*, note 19, at 431.

Rose LJ then moved on to opine that the phrase “arising out of” contemplates a more remote consequence than is embraced by “caused by”. He relied on the views of the High Court of Australia in *Government Insurance Office of New South Wales v RJ Green and Lloyd Pty Ltd*<sup>25</sup> where the court held the same view of the relationship between the two phrases. Although his Lordship accepted that *Elliot v Grey*<sup>26</sup> may show that the intention of the owner of the car is irrelevant to the question of whether the car was being used at the pertinent time frame, it does not necessarily follow that intention or motive of the owner is irrelevant when considering the different question of whether something has arisen out of such use. To disregard the reason behind the act of the owner would be “an unwarranted disregard of common sense and close one’s eyes to potentially important information as to the origins of the act of crossing the road”.<sup>27</sup> As pointed out by Rose LJ, the act of crossing the road cannot be viewed in isolation. It is the motive or intention behind such an act which gives it its characteristics. A person may cross the road for a variety of reasons — he may do it as an end in itself, or he may do it to achieve some other purpose, eg. he may cross the road to go to the neighbourhood store, or he may cross the road because there is a well-lit footpath on which it is safer to walk along. If one were to ignore the reason for crossing the road, then one would be unable to classify it or see the relationship it bears to other factors.

In each case how the fact of crossing the road is to be categorised and, in particular, whether it can be said to arise out of some other activity is to be judged objectively according to all the circumstances of the particular case including the reason why the pedestrian was there.<sup>28</sup>

Rose LJ then accepted the inference drawn, by the lower court, on the facts that the reason why the deceased crossed the road was because she had run out of petrol and had probably crossed the road to obtain assistance to enable her to continue on her journey. Thus characterised, the deceased’s crossing of the road arose out of the use of her car as she would not have been crossing the road if not for the fact she needed to in order to resume her use of the car.<sup>29</sup>

Pill LJ also made reference to the High Court of Australia’s decision in *Government Insurance Office of New South Wales v RJ Green and Lloyd Pty Ltd*<sup>30</sup>. His Lordship characterised the issue as being whether the deceased’s act in crossing the road had a “sufficient nexus” to the use of

<sup>25</sup> (1966) 114 CLR 437.

<sup>26</sup> *Supra*, note 22.

<sup>27</sup> *Supra*, note 19, at 432.

<sup>28</sup> *Ibid*, at 432.

<sup>29</sup> *Ibid*, at 432–3.

<sup>30</sup> *Supra*, note 25.

her motor car.<sup>31</sup> Although his Lordship ultimately held that there was such a nexus and, as such, the crossing was indeed an act arising out of her use of the car, he did express discomfort with the facts of the case:

Had she, for example, been walking to the rear of the vehicle to fetch an emergency petrol can in the boot in order to fill the tank I would have had no difficulty. Walking across the road to seek assistance from a passing friend some time after having properly parked her vehicle gives me more difficulty.<sup>32</sup>

Pill LJ referred to the decision of Windeyer J in *Government Insurance Office of New South Wales v RJ Green and Lloyd Pty Ltd*<sup>33</sup> where he said:

“Arising out of” extends this to a result which is less immediate; but it still carries a sense of consequence. It excludes cases of bodily injury in which the use of the vehicle is a merely causal concomitant, not considered to be, in a relevant causal sense, a contributing factor.”<sup>34</sup>

In using this test, Pill LJ felt that he had to caution that it should not be regarded that, as a general principle, an act performed by a person seeking help when his car has broken down is *ipso facto* conduct which arises out of the use of the car. He also warned that he did not regard the decision on the facts of this case as establishing any general principle.<sup>35</sup> It is pertinent to note that Hutchison LJ, who agreed with Rose LJ as to the reasons why the appeal should be dismissed, echoed the sentiment of Pill LJ that this case was very much a borderline one.<sup>36</sup>

The first point which emerges from the Court of Appeal decision is simply this: the phrase “arising out of” is necessarily broader than “caused by”. It is not controversial nor is it a startling proposition. As a matter of plain language, that much would have been apparent in itself. The problem lies, not so much in recognising that it contemplates a more remote consequence, but exactly how much more remote than that which is encompassed by “caused by”? All the statements by the High Court of Australia, relied upon by the Court of Appeal, although taken as authoritative statements of the legal position in Australia, are merely a matter of words. As courts are fond of saying in the context of causation, it will be determined on a case-by-case basis.

<sup>31</sup> *Supra*, note 19, at 433.

<sup>32</sup> *Ibid*, at 433.

<sup>33</sup> *Supra*, note 25.

<sup>34</sup> *Ibid*, at 447.

<sup>35</sup> *Supra*, note 19, at 434.

<sup>36</sup> *Ibid*, at 434.

How does one first of all determine if there is sufficient nexus between the act, during which the accident occurs, and the “use” of the motor vehicle? Rose LJ seems to suggest that the intention or motive of the user is crucial to this exercise. This motive will colour the act to establish a sufficient nexus with the use of the vehicle. As suggested by Rose LJ, there are all sort of reasons why people do the things they do, and the only way to decipher how a particular act stands in relation to other factors is to determine the reason why a person does this particular act. For example, a person crosses the road to get to the convenience store. In that sense, this act of crossing the road will have a sufficient nexus with the convenience store because that is precisely the reason why he does so. If, however, he crosses the road just because he wants to proceed on his journey along the road, the mere fact that the convenience store is at the other side of the road, and he finds himself in front of the store after he crosses the road, is purely incidental. In a simple scenario like this, one can see how the intention of the person doing the act can cast light on the relationship of the act to surrounding circumstances.

However, once one pushes beyond a simple situation like that, things start getting less clear-cut again. Assume that the deceased in *Dunthorne v Bentley*<sup>37</sup> had crossed the road to get to a convenience store, and her car had not broken down but was simply parked, because she wanted to buy the newspapers on her way home. If the accident had happened as it did, where does her intention or motive in crossing the road leave us? The reason why she crossed the road, on the primary level, was to get the newspapers. Thus characterised, it would have nothing to do really with her “use” of her vehicle, this act being merely incidentally connected with her “use”. However, can one not argue that although her immediate motive in crossing the road was to get the newspapers, part and parcel of her “use” of the vehicle was not just to convey herself and her belongings home after work, but also convey her to other conveniences on her journey home. In that sense, her crossing of the road is connected to her “use” of the vehicle — she “uses” the car to get herself home and so, the journey home is “use” of the car. The journey home would include stops along the way to run errands. Her crossing the road is to carry out the purpose of her stopping along the journey. Characterised in that way, it is not entirely clear that therefore her crossing the road for reasons other than to restart her car would necessarily not have a sufficient nexus with her “use” of the car.

What does become apparent here is that it is ultimately a question of the relationship between the act in question and the “use” of the car. Once one accepts that something is the “use” of the car, then it becomes easier to decide if the first act does “arise out of” such use. Pill LJ expressed some discomfort with the situation which arose in the case. He would

<sup>37</sup> *Ibid.*

have been more comfortable had the act in question been one where the deceased had instead gone to the boot of the car to take out a spare can of petrol. The interesting thing here is that his Lordship, whilst paying lip service to the formula laid down by the Australian courts for deciding if something “arises out of” the use of a motor vehicle, is perhaps subconsciously trying to limit the meaning of “use” in the English context. As will be seen in the discussion to follow, the English courts have arrived at a rather broad understanding of this word i.e. a person can be said to “use” a vehicle even where it is not capable of being operated or driven. In contrast, the Australian courts tend to take a more restrictive view of the word — the “use” in question being qualified by and coloured by “motor vehicle”. The vehicle cannot be said to be in “use” unless it is being so used as a motor vehicle.<sup>38</sup> Since a vehicle can be “used” in so many ways under the English approach, one can perhaps appreciate the discomfort of Pill LJ since it is this issue which will have a direct impact on the already inherently broad notion of “arising out of”, the interaction of which will lead to even broader situations being encompassed by the phrase. The English courts have become prisoners of their own rhetoric.

As pointed out earlier, the Australian courts have devised a much narrower meaning of the word “use” in the context of road traffic legislation. As such, the Court of Appeal is correct in pointing out that it is not particularly helpful to refer to situations where the Australian courts have held that certain acts “arise out of” the use of a motor vehicle.

At the end of the day, *Dunthorne v Bentley*<sup>39</sup> does clarify certain things. Firstly, it is now clear that “arising out of” contemplates a more remote consequence than “caused by”. Secondly, the correct method of analysis is to firstly decide if there was indeed “use” of the motor vehicle, and then determine if the act in question did “arise out of” such “use”. Thirdly, the characterisation of the act under consideration necessarily involves taking into account the motive and intention of the actor. Fourthly, all their Lordships agree that this case is not to be taken as establishing a general rule with regards to conduct subsequent to the breakdown of a vehicle.

However, beyond that, the decision is not particularly satisfactory and raises more questions than it lays to rest. With the Court of Appeal qualifying and limiting the case with such haste, one does wonder if the facts and the holding of the case offers any sort of reliable guidance. Would any subsequent courts accept any analysis based on an extrapolation of the facts of the case? This is especially critical in light of the fact that this is the only English case on this point and also the fact

<sup>38</sup> See Sutton, *Insurance Law in Australia* (2nd Ed, 1991), at paras 18.35–18.44. See also Britts, *Third Party Insurance in Australia* (1973), at 41–46.

<sup>39</sup> *Ibid.*

that the Australian cases are not going to prove to be of much assistance due to the difference in their construction of what constitutes “use” of a motor vehicle.

#### IV. “USE OF A MOTOR VEHICLE”

As suggested by Rose LJ, the logical starting point when considering the question of whether a particular injury which could be said to “arise out of the use of a motor vehicle” is to consider if the car was being used within the meaning contemplated by the Act.

In the UK, there seems to be a bit of confusion in that there seems to be different standards for the main users and passengers. At the same time, there appears to be some disparity between the effect of a car being immobile or falling into disuse. The first distinction drawn between the primary user of the car and the passengers may be justifiable. However, it may be a tad more difficult to justify the other distinction.

##### A. *Elliot v Grey*

The *locus classicus* with regard to what amounts to a “user” of a motor vehicle is the decision in *Elliot v Grey*<sup>40</sup>. It is the case which all subsequent cases invariably look towards for guidance on what constitutes a “user”. In *Elliot v Grey*<sup>41</sup>, the car in question had broken down and could not be driven. It appeared that the carburettor had broke, the self-starter would not work and the starting handle could not fit into the hole meant for it. The appellant, who owned the car, decided to lay it up outside his house. He did not do anything about it for three months. He then decided to fix it. He had to manhandle it to get it to the road running in front of his house since it could not be driven. The car could not be mechanically propelled as the engine did not work and the petrol in the tank had vaporised by then. He then jacked up the car such that its wheels were off the ground, and removed the battery. He worked on the car, cleaned it, oiled the locks and then lowered it to the ground again. He then replaced the broken carburettor with a new one. He also sent the batteries for recharging. Later that day, another car collided with the appellant’s car while it was parked on the side of the road. It was agreed that the car could not be mechanically propelled at all times, nor did the appellant have any intention of driving the car or moving it from its position.

Lord Parker CJ delivered what may seem to be a curious judgment. He held that the car was indeed being used on the road. The first thing which he pointed out was that the word “use” was used in the Road Traffic Act 1930 in contradistinction to the word “drive” as used in other sections, such as those which dealt with dangerous and careless driving.

<sup>40</sup> *Supra*, note 22.

<sup>41</sup> *Ibid.*

As such, he came to the conclusion that the word “use” was a wider term which could include something more than just driving and certainly would include moving.<sup>42</sup>

His Lordship was also particularly influenced by the reason for having compulsory insurance — which was to protect third parties:

I am influenced by the fact that this section appears in Part II of the Act under the heading of “Provision against third-party risks arising out of the use of motor vehicles.” ... It is something for the protection of third parties. Approached that way, it seems to me that the word “use” there is ... really equivalent to “have the use of a motor vehicle on the road.”<sup>43</sup>

Thus, he felt that in the absence of a finding that the car was immovable, the car in question fell within “have the use of a motor vehicle on the road”. He expressed concern that even though the car could not be driven, it could still be moved. He gave the example of a car being on top of a hill and someone releasing the brakes and it could hurtle down that hill.<sup>44</sup>

The decision of Lord Parker CJ is less than satisfactory. To begin with, it may be accidental that the word “use” is utilised in the statute rather than “drive”. In any event, under the MVA, there is no use of the word “drive” which could be used to found a similar argument in the local context. Even if one were to accept that the word “use” was chosen for a purpose, surely it does not necessarily follow that it is of such broad import. Indeed, counsel’s argument that the word was chosen rather than “drive” so that it would include even situations where the car was not being driven, as when the car is parked in between journeys in the car, sounds much more convincing. When one considers the use of a motor vehicle, surely one contemplates the use of a motor vehicle as being one the purpose for which it was built — to be driven around in undertaking journeys from point A to point B. Mayhaps, there might be a stop at point B, after which there might be a journey onwards to point C. During this entire course, it can be contemplated that the car is being used, even when there is a pause in the journey at point B. However, to suggest that a car which cannot be mechanically propelled could also be used must be stretching the English language. One must also not forget that there are criminal sanctions attached if the “use” of a motor vehicle is not covered by insurance as required by the Act. If that is the case, even if one were to concede that there might be some tenuous ambiguity, then surely this is a perfect situation for the penal provision to be interpreted strictly.

<sup>42</sup> *Ibid.*, at 371–2.

<sup>43</sup> *Ibid.*, at 372.

<sup>44</sup> *Ibid.*, at 372.

This point brings us to the next reason relied on by Lord Parker CJ. He seemed to be suggesting that since the relevant statutory provision was enacted to protect third parties, then as long as the car could be moved such that it might inflict death or personal injury to third parties, then as long as the car is not immobilised, it would still constitute a “use” of the car. Here, it really does beg the question of what exactly was Parliament trying to protect third parties against. When cars first became common place, because of the speeds they could travel at as compared to the then traditional means of transport, it is possible to conceive of the legislature being concerned that pedestrians as well as persons travelling in other motor vehicles may be injured and not have any sort of compensation should an accident occur. However, it is difficult to conceive that the legislature were also concerned about runaway cars, careering down the road because someone had pushed it along, or cars that were not capable of being mechanically propelled. What is so extraordinary about a runaway car as compared to, say, a runaway suitcase on wheels? One must remember that the MVA does not just provide for compulsory insurance, it also provides for a direct cause of action against the insurer. Why should one class of injured persons be preferred over another?

#### B. “Use” a question of mobility?

To be contrasted with the *Elliot v Grey*<sup>45</sup> situation is that where the courts have taken a different view with regards to vehicles being towed. *Thomas v Hooper*<sup>46</sup> is an example of this class of cases. In this case, the defendant was sitting in the driving seat of a van which was being towed. The steering wheel was locked and there were no keys to unlock it from that position. The brakes were also seized up so that the wheels were unable to turn around, ie. it was being dragged along by the towing vehicle. The court held that since the van was incapable of being steered or controlled and the wheels were locked into position, it was really an inanimate object being dragged along the road. As such, the defendant was only in the van to give warning if any danger should arise and he could not be said to be using the van in the statutory sense.

What seemed to clinch the argument in this case was the fact that

[t]his car ... was in many ways not what one would regard as a motor car at all. It was in a sense an inanimate hunk of metal and was being towed along the road rather like a sledge. The important point is that it was incapable of being controlled because the mechanisms by which a motor car is normally controlled were all inoperative. That situation is not one that often arises, and it certainly does not arise with a vehicle of which, for instance, the engine is not working but which is being towed along the road by another vehicle with the

<sup>45</sup> *Ibid.*

<sup>46</sup> [1986] RTR 1.

steering being operated and the brakes working. In such a case, ... the vehicle would be being used on the road by whoever was at the steering wheel.<sup>47</sup>

Here, the relevant test was that of control which it failed, and thus the van was not being used on the road. In coming to this conclusion, Glidewell LJ relied on the test laid down by Lord Widgery CJ in *Nichol v Leach*<sup>48</sup> that a person does not use a motor vehicle unless there is an element of controlling, managing or operating the vehicle. In that case, the court was dealing with a scrap car which had been rebuilt for autocross racing. Although the car was not intended for use on the roads, it was capable of being propelled. It could be steered and the brakes worked. So it was a fully equipped and mobile vehicle. Although the only time it was conceived that the vehicle would be on the roads was when it was being towed to the venue of the autocross race, the court nonetheless held that it was being “used” on the road for the purpose of the requirement of insurance, since it could be controlled. As to the argument that the adapted car was no longer a “motor vehicle”<sup>49</sup> for the purposes of the Road Traffic Act 1960, it was pointed out by Lord Widgery CJ:

The car was produced as an ordinary motor car intended to run on roads, and in my judgment it retained that character throughout. It does not cease to be a vehicle intended for use on roads merely because its present owner sees no prospect of driving it on the road under its own power.<sup>50</sup>

It can be seen from the cases above that the question of whether the car is immobilised or whether there could be any control of it is vital to deciding whether the car is being “used”. An illustration of a similar situation to *Elliot v Grey*<sup>51</sup> where the car in question was left parked along the road, but the court came to a different conclusion, is that of *Hewer v Cutler*<sup>52</sup>. In this case, the defendant owned a car which he parked and left unattended along a road for a day. The car was parked there because the car could not be driven away due to the lack of oil pressure in the torque converter. A replacement of an oil seal was needed which could not be obtained on the same day. He took the precaution of disconnecting the linkage in the gear box so that the driving wheels were locked (in that they could not rotate) and, hence, the car could not be driven or moved. The defendant was found guilty of “using” the car by the Magistrate’s Court, whereupon he appealed to the Crown Court. The

<sup>47</sup> *Ibid.*, at 6.

<sup>48</sup> [1972] RTR 476.

<sup>49</sup> S 253(1) provides that “In this Act “motor vehicle” means a mechanically propelled vehicle intended or adapted for use of roads”.

<sup>50</sup> *Supra*, note 48, at 479.

<sup>51</sup> *Supra*, note 22.

<sup>52</sup> [1974] RTR 156.

court distinguished *Elliot v Grey*<sup>53</sup> and confined the decision to its peculiar facts. Although it was not really clear from the decision of Bridge J what was the reason for his decision, it can, perhaps, be assumed that he accepted the arguments of counsel that the car in question was effectively and wholly immobilised.<sup>54</sup> This is to be contrasted with the factual matrix in *Elliot v Grey*<sup>55</sup> where, although the car could not be mechanically propelled, it could still be pushed into motion, whereas in this case, since the rear driving wheels were found to be locked, there could be no such danger.

This view taken by the court in *Hewer v Cutler*<sup>56</sup> that, following *Elliot v Grey*<sup>57</sup>, a car is not being “used” only if the car is completely immobilised, seems to be the one which has been taken by subsequent cases. In *Eden v Mitchell*<sup>58</sup>, Kilner Brown J took the view that a car which had two flat tyres and which was parked on a road still constituted “use” of the car. It was held that whether the defendant intended to use the car was irrelevant. So long as the car had not been totally immobilised, there was such “use”:

Just as in *Elliot v Grey* [1960] 1 QB 367 the court held that there on the facts the vehicle was capable of being used, so in the present case in my view the justices should have found that the vehicle was capable of being used. This was not a case where there had been a complete immobilisation. *The intention of the defendant was really immaterial. The true test which they should have applied was whether or not such steps had been taken to make it impossible for anyone to use this vehicle.*<sup>59</sup> (emphasis my own)

Thus, the position of the cases, which purported to follow the authority of Lord Parker CJ’s decision and reasoning in *Elliot v Grey*<sup>60</sup>, seemed to make a simple distinction between whether the motor vehicle in question was immobilised. If it was, then there could be no “use” of the vehicle. However, if it can still be moved, then it might go careering down the road with some form of assistance from strangers or children, and it was still a “use” within the meaning of the statutory language. It would appear that the intention of the owner or person having control or management of the vehicle is irrelevant. It does not matter if he intended to use the car, as long as the car is available for use by him, ie. it is not totally immobilised.

<sup>53</sup> *Supra*, note 22.

<sup>54</sup> *Supra*, note 52, at 159.

<sup>55</sup> *Supra*, note 22.

<sup>56</sup> *Supra*, note 52.

<sup>57</sup> *Supra*, note 22.

<sup>58</sup> [1975] RTR 425.

<sup>59</sup> *Ibid*, at 428.

<sup>60</sup> *Supra*, note 22.

### C. Immobility not conclusive as to “use” — *Pumbien v Vines*

The test of immobility and that of whether the vehicle could be steered, as laid down in *Thomas v Hooper*<sup>61</sup>, where the steering wheel was locked and its wheels could not turn were all doubted by the recent decision of *Pumbien v Vines*<sup>62</sup>. In this case, the defendant purchased a motor vehicle in full working order. He parked it on a public road and left it there. Since he did not drive the vehicle thereafter, he cancelled the policy of insurance covering the vehicle. The vehicle was left in a neglected state for seven months on the road. By the end of that period, the rear brakes had seized, the tyres were deflated, the handbrake was on and the gearbox had no transmission oil because it had all leaked away. When the defendant was hauled up for using the vehicle without the proper insurance cover, the court held that despite the fact that the vehicle could not be driven or towed (unless it was dragged along the ground) without some repairs being first done to it, the defendant could, nonetheless, be said to be using it on the road. He was thus convicted.

The defendant appealed. Not surprisingly, the defendant relied on the two lines of decisions which would support his case. Firstly, relying on *Hewer v Cutler*<sup>63</sup> and *Eden v Mitchell*<sup>64</sup>, he argued that since the vehicle here was immobilised, there could not be said to be any “use” of it. Secondly, he relied on the Court of Appeal decision in *Thomas v Hooper*<sup>65</sup>, and argued that unless there was an element of control, management or operation of the vehicle in question, there could be no “use” of the vehicle.

Insofar as the second argument was concerned, Mitchell J contented himself with relying on Glidewell LJ’s statement that the case was decided purely on its own peculiar facts.<sup>66</sup> Moreover, he pointed out that in light of the decision in *Elliot v Grey*<sup>67</sup>, the test laid down in *Thomas v Hooper*<sup>68</sup> was either not the true test or that it was not the appropriate test if the conduct said to constitute a “use” of the vehicle comprised of leaving the vehicle parked on a road, as opposed to dragging it along the road as an inanimate object roped to the back bumper of another vehicle.<sup>69</sup>

<sup>61</sup> *Supra*, note 46.

<sup>62</sup> [1996] RTR 37.

<sup>63</sup> *Supra*, note 52.

<sup>64</sup> *Supra*, note 58.

<sup>65</sup> *Supra*, note 46.

<sup>66</sup> See *supra*, note 46, at 4, where his Lordship pointed out that:

However, in saying so I want to emphasise that in my view the facts of this case are most unusual and this is a decision on its own facts. ... On the particular facts of this case I conclude that his submission is right, that the test of control is in the peculiar circumstances the operative test...

<sup>67</sup> *Supra*, note 22.

<sup>68</sup> *Supra*, note 46.

<sup>69</sup> *Supra*, note 62, at 44.

What is important about this decision is the way in which Mitchell J treated the line of cases which drew the distinction between whether the car was immobilised or was still capable of mobility. As far as his Lordship was concerned, the owner of a vehicle has the use of it on the road whether or not the vehicle is, at the relevant time, able to move on its wheels as long as firstly, it is a “motor vehicle” within the definition of the Act and secondly, the vehicle is on a road.<sup>70</sup>

Mitchell J felt that it was impossible to justify the distinction between mobile and immobilised vehicles. This distinction would not be justifiable “in law or in common sense” as it would lead to the conclusion that a motor vehicle, which was otherwise in perfect working order, could be taken out of the ambit of the provisions requiring insurance merely by immobilising it, whereas the requirement for compulsory insurance would be applied to a car in poor or non-working condition if its wheels could rotate.<sup>71</sup>

Such a distinction is both artificial and unfair; all the more so if the insurance obligation can be avoided by simply immobilising the vehicle to the extent that the wheels cannot rotate. The one is neither more or less of a hazard than the other when standing stationary on a road.<sup>72</sup>

The decision of Mitchell J has to be right. At the end of the day, what really matters is that the motor vehicle is on the road. Although it might be said that Lord Parker CJ in *Elliot v Grey*<sup>73</sup> did suggest, albeit in passing, that a motor vehicle, if left on the road, may not constitute “use” if the vehicle was completely immobilised, it must be pointed out that his Lordship did not intend to make any conclusive authoritative statements about that. It was only a suggestion. Moreover, traffic accidents may occur not only when the vehicle is in motion or capable of motion. Even when the vehicle has seized up or its wheels are not capable of rotation, there is still a chance that another vehicle travelling along the same road may crash into it. To construe it any other way would be defeating the legislative intent of requiring compulsory motor vehicle insurance.

## V. “USE” BY A PASSENGER?

Most of the cases have involved the question of whether the person who owns the motor vehicle or who has custody of it in fact “uses” it within the meaning attributed to it under the Road Traffic Acts of England. However, there has emerged a line of cases which suggests that passengers

<sup>70</sup> *Ibid.*, at 45.

<sup>71</sup> *Ibid.*, at 45.

<sup>72</sup> *Ibid.*, at 45.

<sup>73</sup> *Supra*, note 22.

in motor vehicles, may, in certain circumstances, “use” the vehicle as well.

Of course, the relevance of the issue of whether the passenger in question had the “use” of the vehicle brings in similar statutory provisions. However, since most insurance policies only cover authorised drivers other than the insured driver, the most relevant provision would be section 3(1), read with section 4(1)(b) of the MVA, and the consequent criminal liability of the passenger for use of the vehicle without insurance covering such use. As pointed out earlier<sup>74</sup>, the other question would be whether the injured third party would be able to sue for a breach of the passenger’s statutory duty to ensure that his “use” of the vehicle is covered by a policy. This in turn has implications on the obligation of the MIB to compensate the victim for any injuries suffered as a result of the passenger’s “use” of the vehicle since the MIB had only agreed to compensate victims where the liability in question would have required cover by a policy.<sup>75</sup> So, again the right of the third party to claim against the MIB would depend on whether the passenger in question had the “use” of the vehicle within the construction given to the word by the courts in the context of motor insurance.

With regards to the right to claim against the MIB, there is another angle to the issue of when a passenger can be said to “use” a vehicle. Paragraph (2)(b)(ii) of clause 8 of the MIB Agreement (which deals with when compensation can be paid out to victims of untraced drivers) provided that such compensation shall not be paid if the person claiming allows himself to be carried in the vehicle and (being a person using the vehicle) was using the vehicle without there being in force a valid policy, knowing or having reason to believe that no such policy was in force.<sup>76</sup> Again, the construction of the word “use” is crucial. It is not sufficient for the MIB to disclaim liability to compensate the victim only if he allows himself to be carried in the vehicle knowing or having reason to believe that there was no policy cover, but the MIB also has to show that the victim was “using” the vehicle as well.

<sup>74</sup> See the main text corresponding to *supra*, notes 14 to 18.

<sup>75</sup> See Cl 3 of the MIB Agreement, *supra*, note 11.

<sup>76</sup> Cl 8(2)(b)(ii) provides that

This Part of this Agreement does not apply to a case in which

...

- (b) at the time of the accident the person suffering death or bodily injury in respect of which the application is made was allowing himself to be carried in a vehicle and —

...

- (ii) being the owner of or being a person using the vehicle he was using the vehicle, or causing or permitting the vehicle to be used, without there being in force in relation to such use a policy of insurance or such security as would comply with the Act, knowing or having reason to believe that no such policy or security was in force.

### A. *Brown v Roberts*

The *locus classicus* of when a passenger is considered to “use” a car is the decision of Megaw J in *Brown v Roberts*<sup>77</sup>. Here, the facts were quite simple — due to the negligence of the passenger in opening the door of the van, a passing pedestrian was struck and injured. The insurance policy covered the owner and permitted drivers of the van against third party liability arising out of the use of the vehicle by himself or such permitted drivers. It did not, however, cover third party liability of passengers. An action was thus taken out by the pedestrian against the owner of the van for breach of his statutory duty to insure.<sup>78</sup>

Megaw J came to the conclusion that the word “use” in the Road Traffic Act 1930 only applied to a user of the vehicle where there was sufficient control, management or operation of the vehicle. This did not extend to someone who was merely a passenger who only had control of a door when entering or alighting from the vehicle.<sup>79</sup>

Although Megaw J agreed that more than one person may be “using” a vehicle at any one time, and that driving is not an essential element of “using”, he agreed with the arguments of counsel that unless there was a limit laid down such that a passenger does not “use” a vehicle merely by being a passenger

[i]t would mean ... that very many people, probably millions, since 1930, have been committing a criminal offence every time they entered a bus or a taxi-cab, unless it should turn out that there was in force an insurance policy covering the possible liability of passengers to third parties for negligence while the passengers are travelling in, or getting into or out of, the bus or taxi-cab.<sup>80</sup>

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This provision is in *pari materia* with cl 1(1)(a) of the UK 1972 Agreement for “Compensation of Victims of Untraced Drivers”. It may of interest to note that cl 6(3)(c) of the UK 1972 Agreement for “Compensation of Victims of Uninsured Drivers”, which makes the same exclusion from the ambit of the Agreement in the case of uninsured drivers, does not have a corresponding provision in the local MIB Agreement.

<sup>77</sup> [1963] 2 AH ER 263.

<sup>78</sup> The relevant provision in the Road Traffic Act 1930 was s 35(1) [which provides that it will not be lawful to use, or cause or permit to be used a vehicle unless there is a policy as complies with the requirements of the Act], which corresponds to s 3(1) of the MVA, and s 36(1)(b) [which lays down the requirements of the policy insofar as the risks to be insured], which corresponds with s 4(1)(b) of the MVA.

<sup>79</sup> See *supra*, note 77, at 269.

<sup>80</sup> *Ibid.*, at 267. See also *ibid.*, at 269.

**B. “Joint Enterprise” — an alternative to *Brown v Roberts*?**

*Brown v Roberts*<sup>81</sup> has been accepted as the leading authority for the proposition that passengers do not “use” the vehicle they are travelling in unless there is a sufficient element of control, management or operating the vehicle in question. However, after *Brown v Roberts*<sup>82</sup>, there seems to have emerged a line of cases involving passengers and whether they were “using” the vehicle, which seemed to turn on the issue of whether there was a “joint enterprise” with the driver.

The first case is that of *Leathley v Tatton*<sup>83</sup> where the defendant went with two other persons to look at a car which he intended to buy. On finding that the owner was absent, they managed to open the car door, one of them got into the driver’s seat while the rest pushed the car to get it started. Once the car started, the defendant jumped into the passenger seat to see how the car performed. The defendant was charged with using a motor vehicle, in contravention of section 143 of the Road Traffic Act 1972, without there being any policy covering his “use” of the vehicle.

At the trial court, the justices were persuaded that since at no time did the defendant drive or control the car, he did not fall within the definition of “use” as laid down in *Brown v Roberts*<sup>84</sup>. The prosecution appealed. Ackner J felt that looking at all the facts of the case,

there was a clear situation in which the defendant and his friend were acting in concert, a joint enterprise, the purpose of which was to set the car going ... for the purpose of the defendant seeing how the car in fact functioned. ...

[In answer to an argument that since the defendant was not controlling the vehicle, he could not be said to be using it] The defendant was using the car directly for his own purposes. As I have already indicated, he together with his friend set the car in motion for the purpose of trying it out, and the fact that someone in fact sat the driver’s seat while the car was being pushed and thereafter drove it while the defendant saw how it performed is quite irrelevant. He was using the car.<sup>85</sup>

In another case, *B (A Minor) v Knight*<sup>86</sup>, the same test appeared to be used again. The defendant was also charged under section 143(1) of the Road Traffic Act 1972 for using a motor vehicle without the requisite insurance cover. He had taken a lift in a van. At that time, he had not

<sup>81</sup> *Supra*, note 77.

<sup>82</sup> *Ibid.*

<sup>83</sup> [1980] RTR 21.

<sup>84</sup> *Supra*, note 77.

<sup>85</sup> *Ibid.*, at 24.

<sup>86</sup> [1981] RTR 136.

known that the van had been taken by the driver without the owner's consent and that the van was being driven without insurance cover. Later, in the course of the journey, the defendant learnt of these facts. However, he chose to remain in the van as he was not quite taken by the idea was walking home instead. The court of first instance found the defendant guilty. The defendant appealed.

The High Court held that a passenger in a vehicle, who had nothing to do with its initial taking, if he discovers during the course of the journey to have been taken without the owner's consent but who continues to allow himself to be driven in it, could not be said to "use" it within the meaning of section 143 of the Act. As pointed out by Donaldson LJ:

Mr Collins has submitted that this is an exceptional case, in that there was an element of joint enterprise here, and there is no doubt of course that where there is a joint enterprise to use the vehicle, it matters not who is driving. Both are using it. But I am quite unable to detect any element of joint enterprise on the facts of the present case. The vehicle was being used by O'Nion. It was not being used by the defendant. He was simply getting a lift from O'Nion in the course of O'Nion's 'use'.<sup>87</sup>

It is interesting to note that Donaldson LJ seemed to be in agreement that if there had been evidence tending to show a "joint enterprise" between the driver and the passenger, the passenger would also be taken to have been "using" the vehicle.

This use of a finding of a "joint enterprise" between the driver and the passenger was taken up and used by the Court of Appeal in *Stinton v Stinton*<sup>88</sup>. The issue here was not one of criminal liability but rather, a related issue as to whether the MIB were under the obligation to compensate the passenger in the car for injuries which he had suffered. The relevant clause of the MIB Agreement was Clause 6(1) which provided, *inter alia*, that:

MIB shall not incur any liability under clause 2 of this Agreement ... where (c) the person suffering bodily injury in respect of which the claim is made was allowing himself to be carried in a vehicle and ... (ii) ... being a person using the vehicle, he was using ... the vehicle ... without being in force in relation to such use a contract of insurance such as would comply with Part VI of the Road Traffic Act 1972, knowing or having reason to believe that no such contract was in force ...

The plaintiff was a front seat passenger in a car driven by his brother. He suffered injuries when an accident occurred. The plaintiff had gone

<sup>87</sup> *Ibid.*, at 139.

<sup>88</sup> [1995] RTR 167.

out with his brother and another person for a night of drinking. He knew from the outset that he was to be driven by his brother whom he knew was uninsured, as it had just been bought and there had been no opportunity to secure insurance cover for its use as yet. The Motor Insurers' Bureau were joined as second defendants to the action which the plaintiff took out against his brother. The trial court had held that the plaintiff had been a "user" of the vehicle at the relevant time within the meaning of clause 6(1)(c) of the MIB Agreement and thus the MIB was not liable under its Agreement.

The Court of Appeal held that the phrase "being a person using the vehicle" in the context of clause 6(1)(c) of the 1972 Agreement was not restricted to a person driving the vehicle, but also extended to any persons controlling, managing or operating it and was, in fact, wide enough to include a person allowing himself to be carried in pursuance of a joint venture with another. It was held that the plaintiff's intention to travel in the car, together with the plaintiff and another, for a particular purpose (to go out on a drinking binge) was such a joint venture. Beldam LJ dismissed the submission of counsel based on the test laid down in *Brown v Roberts*<sup>89</sup>:

Mr Andrews' principal submission was that in the present case there was no such element of control, management or operation of the vehicle at the relevant time by the plaintiff. Megaw J, in the judgment just quoted, was careful to qualify his statement that there had to be an element of controlling, managing or operating the vehicle by saying it was unnecessary in that case to define the extent of the element. Obviously, however, control or management of the use or operation of a vehicle may be determined before the vehicle is used as well as in the course of its use. For example, where two persons agree on a joint venture to use a vehicle for a particular purpose they will have exercised an element of control, management in its use or operation. ... In my view, therefore the words "being a person using the vehicle" in clause 6(1)(c)(ii) of the Agreement are wide enough to include a person allowing himself to be carried in the vehicle in pursuance of a joint venture with another.<sup>90</sup>

Nourse LJ echoed the views of Bedlam LJ:

Once it is accepted, as on a natural use of language it must be, that someone can use a vehicle without being its driver, there arises a question of fact and degree as to whether, in the circumstances of a particular case, a passenger can properly be described as "a person using the vehicle" within clause 6(1)(c)(ii) of the 1972 Agreement.

<sup>89</sup> *Supra*, note 77,

<sup>90</sup> *Supra*, note 88, at 175.

In the very majority of cases either or both of the tests of control or management or of joint enterprise will be found to apply to a passenger who falls within that provision. But I would wish to guard against its being thought that those two tests are necessarily exhaustive. A case might arise where a passenger could be said to have been using a vehicle without his precisely satisfying either test.<sup>91</sup>

Of course, one of the things that is apparent is that while Nourse LJ purported to express the same view as Bedlam LJ, his statement may well be read as enlarging the ambit of when a passenger may be considered to be “using” the vehicle in which he is travelling. Moreover, Nourse LJ seemed also to suggest that the test of “joint enterprise” is an independent and alternative test from that of control, management or operation as laid down in *Brown v Roberts*<sup>92</sup>. Another perhaps alarming aspect of the pronouncement of his Lordship is his suggestion that these two tests are not exhaustive, leaving the door open to further expansion.

Of immediate concern would be the ambit of the phrase “joint enterprise” or “joint venture”. If this phrase were to be an independent test from that of “control, management or operation”, rather than a manifestation of the latter, then it is critical to determine the exact ambit of the phrase. So long as “joint enterprise” remains part of the *Brown v Roberts*<sup>93</sup> test, the test of “control, management or operation” would work to limit and circumscribe the situations which could qualify as a “joint enterprise”. Once that safety catch is released, one will be concerned with the level of participation or involvement the passenger must have in order to be in a “joint enterprise” with the driver. If this notion is not qualified carefully, it has widespread implications for all passengers. As pointed out by Megaw J in *Brown v Roberts*<sup>94</sup> itself, it could lead to the situation where passengers on public transport may find themselves in trouble for not having insurance cover for their “use” of the vehicle. Taking it to its logical conclusion, these passengers would also be liable if the vehicle in question did not comply with construction requirements.<sup>95</sup> As such, one can understand the concern caused by *Stinton v Stinton*<sup>96</sup>.

### C. Reconciling the tests — *Hatton v Hall*

It was unclear whether the effect of the Court of Appeal decision in *Stinton v Stinton*<sup>97</sup>, was to expand the ambit of “use” by a passenger. The opportunity to clarify this came when the Court of Appeal delivered

<sup>91</sup> *Ibid.*, at 176–7.

<sup>92</sup> *Supra*, note 77.

<sup>93</sup> *Ibid.*

<sup>94</sup> *Ibid.*

<sup>95</sup> *Ibid.*, at 269.

<sup>96</sup> *Supra*, note 88.

<sup>97</sup> *Ibid.*

the decision in *Hatton v Hall*<sup>98</sup>. Here again was a case where the MIB was arguing that the exemption in clause 6(1)(c)(ii) applied to the claim by a passenger. The plaintiff had employed the first defendant to do some work on his home. At the end of the day, the plaintiff invited the first defendant for a drink. The plaintiff decided on a public house about 10 miles away, rather than one which was within walking distance. The first defendant then suggested that they should travel there on his motor-cycle. The plaintiff rode pillion and had to give the first defendant directions as he was not familiar with the area. After drinks bought by the plaintiff, they proceeded on the return journey whereupon they were involved in an accident consequent upon the first defendant's negligence. Since the first defendant was uninsured, the MIB was joined as second defendants.

At the trial, the MIB had relied on clause 6(1)(c)(ii) to dispute liability. The MIB would have had to prove that:

- (i) the plaintiff was a passenger at the time of the accident;
- (ii) he knew or had reason to believe that the first defendant was uninsured; and
- (iii) he was either the owner or a person using the vehicle.

However, the trial judge found that although the MIB had shown that the plaintiff had reason to believe that the first defendant was uninsured, they could not show that he was a "user" within the meaning of clause 6(1)(c)(ii). The MIB appealed to the Court of Appeal on the point of "user".

Waller J relied on *Brown v Roberts*<sup>99</sup> to hold that in this case there was not a sufficient degree of control or management to suggest that the plaintiff was a "user" of the vehicle. The trial judge felt that if the plaintiff had said to the first defendant that he wanted to use the first defendant's motor cycle to take him to the pub and whether the first defendant would ride it there under his instructions, there would have been a sufficient degree of management or control. But (as here) where the suggestion was simply to go for a drink and both were happy to do so, and the suggestion of the means of transport came from the first defendant, the case fell on the other side of the divide. As far as Waller J was concerned, the fact situation was more akin to a passenger accepting a lift. The mere fact that the passenger should appreciate that the driver is uninsured is not, of itself, sufficient for the MIB to disclaim liability.

The MIB argued that this holding of Waller J was wrong in light of the Court of Appeal decision of *Stinton v Stinton*<sup>100</sup>. Counsel for the MIB

<sup>98</sup> [1997] RTR 212.

<sup>99</sup> *Supra*, note 77.

<sup>100</sup> *Supra*, note 80.

suggested that cases after *Brown v Roberts*<sup>101</sup>, culminating in *Stinton v Stinton*<sup>102</sup>, have introduced the concept of “joint enterprise” as a means of deciding if a passenger was “using” a vehicle. The MIB referred to the words of Bedlam LJ in *Stinton v Stinton*<sup>103</sup> where his Lordship suggested that the word “use” in clause 6 of the MIB Agreement was “wide enough to include a person allowing himself to be carried in the vehicle in pursuance of a joint venture with another”.<sup>104</sup> The MIB further argued that, on the facts, since the plaintiff went on the ride as part of a plan, agreed between himself and the first defendant, to go for a drink at the pub, the court would be bound by a holding on similar facts in *Stinton v Stinton*<sup>105</sup> to hold that the plaintiff was a “user”.

Henry LJ, who delivered the judgment of the Court of Appeal, expressed alarm at the width of the suggestion by the MIB on the authority of *Stinton v Stinton*<sup>106</sup>. His Lordship pointed out that any construction placed on “use” under clause 6 of the MIB Agreement would apply equally under the Road Traffic Act 1988. Henry LJ pointed out that section 143<sup>107</sup> creates an absolute offence, regardless of belief of whether there is in fact insurance cover for the “use” of the vehicle, as well as gives rise to a civil action for damages against the user for the breach of the statutory duty to insure.<sup>108</sup> The potential civil and criminal liabilities of a “user” in the context of motor vehicles extend as far as offences in relation to the mechanical state and condition of the vehicles.<sup>109</sup> In light of all these liabilities which may be imposed on a “user” of a vehicle, his Lordship

<sup>101</sup> *Supra*, note 77.

<sup>102</sup> *Supra*, note 88.

<sup>103</sup> *Supra*, note 88.

<sup>104</sup> *Ibid*, at 175.

<sup>105</sup> *Ibid*.

<sup>106</sup> *Ibid*.

<sup>107</sup> Section 143 reads as follows:

- (1) Subject to the provisions of this Part of this Act:
  - (a) a person must not use a motor vehicle on a road unless there is in force in relation to the use of the vehicle by that person such a policy of insurance or such a security in respect of third party risks as complies with the requirements of this Part of this Act, and
  - (b) a person must not cause or permit any other person to use a motor vehicle on a road unless there is in force in relation to the use of the vehicle by that other person such a policy of insurance or such a security in respect of third party risks as complies with the requirements of this Part of this Act.
- (2) If a person acts in contravention of subsection (1) above he is guilty of an offence.

The “requirements” of the Act in relation to the cover provided by the policy of insurance are to be found in Section 145. These are *in pari materia* with section 4 of the MVA.

<sup>108</sup> See *Monk v Warbey*, *supra*, note 16.

<sup>109</sup> Part II of the Road Traffic Act 1988 which deals with Construction and Use of Vehicles and Equipment. Sections 40A to 42 create offences making the “user”

was anxious that the word “use” must be given a more restricted meaning than in its ordinary sense for

while every passenger, in ordinary language, uses the vehicle he is driven in, “use” must be given a more restricted meaning, for if it were not, very many passengers in cars, cabs, and buses have unwittingly but potentially been committing criminal offences in accepting lifts in ignorance of the precise insurance position (or indeed, of the mechanical condition) of the vehicle.<sup>110</sup>

To read *Stinton* in the way suggested by the MIB would

greatly widen the category of “user” as previously understood. In fact it would make the great majority of passengers users, as it must be considerably more common than not for the passenger to share an agreed common purpose with the driver.<sup>111</sup>

After emphasising the reasons why the word “use” would have to be given a restrictive meaning in the context of passengers, Henry LJ went on to show that the authority of *Brown v Roberts*<sup>112</sup> had not been damaged by any of the subsequent decisions. He began by pointing out that Megaw LJ himself did not doubt his own decision in *Brown v Roberts*<sup>113</sup> when he heard the case in the Court of Appeal in *Stinton v Stinton*<sup>114</sup>, nor did the other members of the Court of Appeal.

In dealing with *Leathley v Tatton*<sup>115</sup>, the finding that the defendant had been using the vehicle was clearly right as it was consistent with Megaw J’s test. The only reason why the car was being driven was so that he, as the prospective purchaser, could see how it functioned. Since he was behind starting the car and having it driven by someone else, he was sufficiently controlling or managing the car despite the fact that he was not himself behind the wheel.

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criminally liable for any use of a motor vehicles on the road which does not comply with the Construction and Use Regulations. In Singapore, the Road Traffic Act (Cap 276, 1985 Rev Ed) also contains similar provisions. Section 5 provides that it shall not be lawful to “use” a vehicle which does not comply with the rules:

- (1) Subject as hereinafter provided, it shall not be lawful to use a vehicle or trailer which does not comply with the rules as to construction, weight and equipment applicable to the class or description of vehicles to which the vehicle or trailer belongs...
- (5) If a vehicle or trailer is used ... in contravention of this section, any person who so uses the vehicle or trailer or causes or permits the vehicle to be so used ... shall be guilty of an offence.

Section 6 provides for the making of rules as to the use and constructions of vehicles.

<sup>110</sup> *Supra*, note 98.

<sup>111</sup> *Ibid.*

<sup>112</sup> *Supra*, note 77.

<sup>113</sup> *Ibid.*

<sup>114</sup> *Supra*, note 88.

<sup>115</sup> *Supra*, note 83.

With regards to *B (A Minor) v Knight*<sup>116</sup>, the court suggested that Donaldson LJ did not depart from *Brown v Roberts*<sup>117</sup>, as his Lordship had quoted and approved<sup>118</sup> a passage from *Wilkinson's Road Traffic Offences*<sup>119</sup> which used the formula laid down by Megaw J. It was pointed out that although it may be true that where the passenger does procure the making of the journey, he may be exercising sufficient control or management to be a “user”. But that in itself is not conclusive since it will have to depend on the facts of the case. Since the test in *Brown v Roberts*<sup>120</sup> was not criticised, it would be overstating things to read Donaldson LJ’s approval of the passage to mean that all situations where a passenger procures a lift, he will necessarily be “using” the vehicle. If this were what was meant, then it would necessarily mean that *Brown v Roberts*<sup>121</sup> was “severely qualified, if not reversed” — which was obviously not the case since the passage in question began by citing the test from the same case.

The Court of Appeal then moved on to deal with the difficulties posed by its own previous decision in *Stinton v Stinton*<sup>122</sup>. What Henry LJ did was to emphasise the decision of Bedlam LJ, which admittedly the other two judges did purport to agree with, and chose to ignore the comments of Nourse LJ, which seemed to suggest that the *Brown v Roberts*<sup>123</sup> test was distinct from the “joint enterprise” test, and that the door was open to further situations where there would be “user” even if these two tests were not satisfied.

Henry LJ approved of Waller J’s reason for distinguishing *Stinton v Stinton*<sup>124</sup> where he suggested that although the plaintiff and the first defendant went on a trip together on the motor cycle, the “joint enterprise” here did not involve a sufficient vesting of control or management of the motor cycle in the pillion rider to make him a “user” of the vehicle:

Fundamental to the distinction he made was his assumption that not all plans shared between driver and passenger give the passenger

<sup>116</sup> *Supra*, note 86.

<sup>117</sup> *Supra*, note 77.

<sup>118</sup> *Supra*, note 86, at 138.

<sup>119</sup> 9th Ed (1977), at 368:

“Use” under section 143 means that there must be an element of controlling, managing and operating the vehicle as a vehicle and the term “use” does not include the relationship of a passenger to a vehicle or part of it (*Brown v Roberts* [1963] 2 All ER 263). ... But passengers who had no power of control over the driver would not be users under section 143 and, it is submitted, would not aid and abet his uninsured use merely by letting themselves be driven even if they knew of the lack of insurance unless they had procured the making of the journey.

<sup>120</sup> *Supra*, note 77.

<sup>121</sup> *Ibid.*

<sup>122</sup> *Supra*, note 88.

<sup>123</sup> *Supra*, note 77.

<sup>124</sup> *Supra*, note 88.

sufficient management of the vehicle to make him a “user” of the vehicle. That conclusion seems to us to be good sense as well as good law. If a passenger employs a driver to drive against the clock to catch an aeroplane he clearly has a greater power to control and/or manage the vehicle than would be the case if a father agreed to drive his 18 year old son and 80 year old mother-in-law (neither able to drive) to visit his wife in hospital. Similarly, if a bank-robber is a pillion passenger on a get-away motor cycle, it may be inferred that he has a greater degree of management and control over the driver than the pillion passenger in the instant case. It is a question of fact and degree in each case, but in all cases “user” must be given the restricted meaning found by Megaw J.<sup>125</sup>

Henry LJ pointed out that Bedlam LJ made a similar point where he pointed out that

where two persons agree on a joint venture to use a vehicle for a particular purpose, they will have exercised an element of control or management in its use or operation.<sup>126</sup>

It was noted that Bedlam LJ did not say, nor did he imply, that all such joint ventures would necessarily involve such a degree of control of management to make all such passengers a “user”. Thus, it was agreed that the words in clause 6 were “wide enough to include [a passenger] in pursuance of a joint venture”, but only if there is evidence of a sufficient element of control or management passing to the passenger in order to make him a user. Whether this is case is a question of fact and a question of degree.

At the end of the day, the Court of Appeal suggested that the “joint venture” or “joint enterprise” test was not so much an independent or separate test, but merely an expression of the original test laid down by Megaw J in *Brown v Roberts*.<sup>127</sup> of whether the passenger had a sufficient degree of control, management or operation of the vehicle. It may well be that where there is a joint venture between the driver and the passenger, the passenger may well be such a “user”, but the mere fact of a joint venture is not in itself conclusive. It will all depend on the question of the degree of control or management which the passenger wields.

The Court of Appeal decision in this case and its laying to rest the spectre of “joint venture” forming an alternative ground is to be welcomed. The problem is further limited by the court limiting the situation where it will be held that a passenger is in such a “joint venture” with the driver. As alluded to by the court, to hold any other way would expose passengers

<sup>125</sup> *Supra*, note 98.

<sup>126</sup> *Ibid*.

<sup>127</sup> *Supra*, note 77.

in public transport vehicles to all sorts of liability, criminal as well as civil, arising from the “use” of the vehicle. This is neither desirable nor practical. In any event, none of the *raison d’être* behind the legislation would be met by this stroke of over-inclusion.

## VI. CONCLUSION

It is interesting to see that there are quite a number of developments in the realm of the phrase used in the MVA. However, these developments have met with nary a comment in Singapore and Malaysia. It cannot be that these cases have no significant impact on the realm of compulsory motor vehicle insurance, or in the criminal facet of the same regime which manifests itself in light of a failure to comply with the statutory requirements. Perhaps this account of the problems which have arisen in the UK will spark some interest in the interpretation of the phrase “caused by or arising out of the use of a motor vehicle”.

LEE KIAT SENG\*

\* LLB (NUS); LLM (Lond); Advocate & Solicitor (Singapore); Lecturer, Faculty of Law, National University of Singapore. I would like to express my deepest appreciation to my colleague Dr Poh Chu Chai for his valuable comments and suggestions. All errors are, of course, mine alone.