

01/76

## SUPREME COURT OF VICTORIA

***FYANDERS v SUTHERLAND***

Lush J

4 February 1966

**CIVIL PROCEEDINGS – MOTOR VEHICLE COLLISION – NEGLIGENCE – CLAIM FOR DAMAGES – CLAIM FOR COST OF REPAIRS AND LOSS OF NO CLAIM BONUS – COMPLAINANT INDEMNIFIED BY INSURANCE COMPANY FOR COST OF REPAIRS – DEFENDANT'S LIABILITY NOT AFFECTED BY COMPLAINANT'S INDEMNITY AGAINST LOSS – NO-CLAIM BONUS LOSS CLAIM – CLAIM FOR REPAIRS NOT ALLOWED – CLAIM FOR LOSS OF NO CLAIM BONUS ALLOWED – WHETHER MAGISTRATE IN ERROR.**

In an action for negligence resulting from a motor car collision, the claim for damages was under two heads: the cost of repairs and a claim for the amount of a no claim bonus lost by the complainant as a result of having recourse to his insurers. The Magistrate accepted the evidence of defendant's negligence and of the loss of the no claim bonus but took the view that since the cost of repairs had been paid to the complainant under his insurance policy he could not recover them as damages from the defendant. He seems to have taken the view that having been indemnified the complainant had not suffered any loss. However, the Magistrate allowed the complainant the amount claimed by way of loss of no claim bonus and made an order for that amount only. Upon order nisi to review—

**HELD: Order absolute in relation to the claim for damages for cost of repairs. Order discharged in relation to the order for the no claim bonus.**

**1. The fact that the plaintiff's own insurance company has paid the particular loss was not a thing which the defendant the wrongdoer, could set up in diminution of damages.**

*Morley v Moore* (1936) 2 KB 359; (1936) 2 All ER 79, followed.

**2. The fact that the complainant recovered from the insurance company and subsequently recovered also from the defendant so that at that stage he stood to be more than indemnified, the surplus moneys were held on trust for the insurance company and must be accounted for to it.**

**3. Accordingly, the magistrate was in error in declining to make an order for the damages for repairs.**

**4. The amount of a no claim bonus lost as the result of an accident caused by the defendant's negligence can be recovered by the plaintiff who sustains the loss. In a sense this loss flows from a combination of the defendant's negligence with the terms of a contract made between the complainant and the third party, and it is as a consequence of those terms that the complainant suffers the alleged loss.**

**5. Accordingly, the magistrate was not in error in deciding that the no claim bonus lost as a result of the defendant's negligence would be recovered.**

**LUSH J:** On this Order to Review the complainant challenges the correctness of the Magistrate's decision that the cost of repairs was recoverable because the insurance moneys had been received. The fact that that a plaintiff or complainant in these circumstances receives complete or partial indemnity from an insurer does not affect the liability of the defendant in any way. If, after indemnity, an action is brought against the defendant the Court usually does not know whether the action is brought at the instance of the insurance company for its own benefit or brought by the injured party independently of the insurance company. The Court may often guess that the action is in fact brought at the instance of the insurance company, and in the present case some indication was given to the magistrate that that was so. Whichever origin the action has the defendant's position is the same. Perhaps the simplest way of putting it in business terms is that the insurer is insuring the complainant against damage to his or her vehicle and is not insuring the defendant against liability for damage inflicted.

The law on the subject was clearly stated in the case of *Morley v Moore* (1936) 2 KB 359; (1936) 2 All ER 79 to which Mr Berkeley has referred, at p362 of the report where Sir Boyd Merriman says 'that a long line on authorities establishes that the mere fact that the plaintiff's own insurance

company has paid the particular loss is not a thing which the defendant the wrongdoer, can set up in diminution of damages', and with that statement I respectfully agree.

If, as in this case, the fact is that the complainant has recovered from the insurance company and subsequently recovers also from the defendant so that at that stage he stands more than indemnified, the surplus moneys are held on trust for the insurance company and must be accounted for to it.

In view of the evidence relating to damage which was before the Magistrate in this case I think that it is unnecessary to send the matter back for assessment of the damage, and I propose to make an order which will have the effect of granting the complainant the amount claimed.

Turning to the second head of damages, which perhaps is strictly not the subject matter of this appeal, there is indirect authority in the case cited by Mr Berkeley of *Ironfield v The Eastern Gas Board* (1964) 1 All ER 544 for the proposition that the amount of a no claim bonus lost as the result of an accident caused by the defendant's negligence can be recovered by the plaintiff who sustains the loss. In a sense this loss flows from a combination of the defendant's negligence with the terms of a contract made between the complainant and the third party, and it is as a consequence of those terms that the complainant suffers the alleged loss.

There is, of course, no novelty in the idea that a plaintiff can recover from a defendant in circumstances like this sums which he has lost as the result of the effect of the accident on the terms of the contract between the plaintiff and the third party. Perhaps the commonest instance of this is a claim for loss of a plaintiff's wages, but a different claim of the same type is also encountered in these Courts when a plaintiff is deprived by the defendant's negligence of the capacity for performing a specific contract on which he is engaged, or from entering into other contracts. It seems to me, therefore, that I should not interfere with the Magistrate's decision that the no claim bonus lost as a result of the defendant's negligence should be recovered in these proceedings. I do not regard it as too remote.

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