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RIGHTS OF THIRD PARTIES

IN

INSURANCE LAW IN MALAYSIA

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ABSTRACT

An insurance policy can be used as an instrument to confer benefits to, or to protect, a person who is not a party to the policy. However, at common law, the rights of the third party are hampered by the doctrine of privity and the strict requirement for compliance of the policy terms. To address these issues, the legislature has enacted provisions to confer rights on selected third parties in selected types of insurance policies.

This thesis studies and analyses the rights of third parties in insurance law in Malaysia, particularly the rights conferred by the legislature. Chapters 2 to 4 examine the rights conferred on selected classes of third parties, first, a person who is nominated by the policy owner to receive the policy moneys upon the happening of the insured event; secondly, the assignee of the policy or its proceeds; and thirdly, the beneficiary of a statutory trust. Chapter 5 analyses the rights of third parties in motor insurance, namely, a person who is injured in a motor accident, the hospital that treats him and an authorised driver. Chapter 6 deals with the rights of third parties in a group policy.

This thesis aims to demonstrate that there are many shortcomings in the current laws. Some of the statutory provisions are out-dated. In certain situations, the legislature has eroded the third party rights through the enactment of statutes and the amendment to the existing statutory provisions. There are also instances where a third party claimant is not adequately protected even though there is a compulsory insurance scheme which was established with the intention of protecting him. This thesis will conclude with recommendations for legislative reform to address the shortcomings in the existing laws pertaining to the rights of third parties in insurance law in Malaysia.

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Articles

AALR	:	Anglo American Law Review
Alberta LR	:	Alberta Law Review
ALJ	:	Australian Law Journal
Cambridge LJ	:	Cambridge Law Journal
CLJ	:	Current Law Journal
CLJ Supp.	:	Current Law Journal Supplement
CLP	:	Current Legal Problems
Conv.	:	The Conveyancer and Property Lawyer
Harv. LR	:	Harvard Law Review
ICLQ	:	International and Comparative Law Quarterly
ILJ	:	Industrial Law Journal
JBL	:	Journal of Business Law
JCL	:	Journal of Contract Law
JIBL	:	Journal of International Banking Law
JMCL	:	Journal of Malaysian and Comparative Law
Legal Stud.	:	Legal Studies
LMCLQ	:	Lloyd's Maritime and Commercial Law Quarterly
LQR	:	Law Quarterly Review
Malaya LR	:	Malaya Law Review
MLJ	:	Malayan Law Journal
MLR	:	Modern Law Review
NLJ	:	New Law Journal
Northern Ireland LQ	:	Northern Ireland Legal Quarterly
OJLS	:	Oxford Journal of Legal Studies
Pub. L	:	Public Law
SAcLJ	:	Singapore Academy of Law Journal
SJLS	:	Singapore Journal of Legal Studies

Cases

AC	:	Appeal Cases
All ER (Comm.)	:	All England Law Reports Commercial Cases
All ER Rep	:	All England Reports Reprint
All ER	:	All England Law Reports
ALR	:	Australian Law Reports
AMR	:	All Malaysia Reports
BCLC	:	Butterworths Company Law Cases
Ch	:	Law Reports, Chancery
CLJ	:	Current Law Journal
CLR	:	Commonwealth Law Reports
DLR	:	Dominion Law Reports
ER	:	English Reports
FMSLR	:	Federal Malay States Law Reports
IrC	:	Irish Chancery Reports
KB	:	Law Reports, King's Bench
LJ Ch	:	Law Journal Reports, Chancery, New Series
Lloyd's Rep IR	:	Lloyd's Law Reports: Insurance & Reinsurance
Lloyd's Rep	:	Lloyd's List Law Reports (until 1967) Lloyd's Law Reports (from 1968)
LR Ch App	:	Law Reports, Chancery Appeal Cases
LR Ch	:	Law Reports, Chancery Division
LR ChD	:	Law Reports, Chancery Division
LR CP	:	Law Reports, Common Pleas
LR CPD	:	Law Reports, Common Pleas Division
LR Ex	:	Law Reports, Exchequer
LR ExD	:	Law Reports, Exchequer Division
LR QB	:	Law Reports, Queen's Bench
LR QBD	:	Law Reports, Queen's Bench Division
LT	:	Law Times Report
MLJ	:	Malayan Law Journal
NSWLR	:	New South Wales Law Reports
NZLR	:	New Zealand Law Reports
P.	:	Law Reports, Probate, Divorce and Admiralty Division
QB	:	Law Reports, Queen's Bench
RTR	:	Road Traffic Reports
SLR	:	Singapore Law Reports
SLT	:	Scots Law Times
TLR	:	Times Law Reports
VLR	:	Victoria Law Reports
WIR	:	West Indian Reports
WLR	:	Weekly Law Reports

CHAPTER ONE

INTRODUCTION

The parties to an insurance policy are the policy owner and the insurer. This thesis is concerned with the rights of a person who is not a party to the policy. At common law, the position of the third party is not strong due to the following reasons. First, the doctrine of privity does not permit the third party to sue on the insurance policy even where the policy is effected for his benefit or the policy provides that the insurer is to remit the policy moneys to him. Secondly, a third party's rights against the insurer, if any, are subject to the defences available to the insurer as if the action has been commenced against the insurer by the policy owner. Thirdly, even if the insurer were to remit the moneys to the third party, the third party may have to account for them to the policy owner's estate or creditors.

To confer rights on a third party in an insurance policy, the legislature had enacted provisions pertaining to the nomination and assignment of a policy and the creation of a trust when a person effects a policy on his life for the benefit of specified family members. The legislature had also made it compulsory for a user of a motor vehicle to be insured against his specified potential liability to other road users. A practising advocate and solicitor must be covered under an approved professional liability policy. This is to protect his clients who have legitimate claims for damages against him. An employer is also required to insure his potential liability towards his workmen. The rights of the aforementioned third parties, namely, the nominees, the assignees, the policy owner's beneficiaries, the road users, the solicitor's clients and the injured workmen, are an important area of insurance law.

1.1 Objectives of the Thesis

This thesis analyses the rights of third parties in insurance law in Malaysia, particularly the rights conferred on them by the legislature. The relevant local statutory provisions will be examined in the light of court decisions and developments in the United Kingdom and Singapore. The developments of the relevant statutory provisions in the United Kingdom are considered as most of the Malaysian provisions originated from the United Kingdom. The position in Singapore is also very relevant as Singapore was part of the Federation of Malaysia until 9 August 1965[1] and went through similar developments as Malaysia until then. Singapore has since reviewed and revised her statutes, including statutory provisions pertaining to this area of study. Statutory provisions of other Commonwealth countries are referred to only where it is relevant to a particular issue under consideration.

The proposition of this thesis is that the body of laws conferring rights on third parties in insurance law in Malaysia is inadequate and ineffective. This includes the laws regulating compulsory insurance schemes, namely, motor insurance, solicitors' professional liability insurance and workmen's compensation insurance. It will be shown in this thesis that the position of third parties in these schemes is far from satisfactory and that the laws are in urgent need of reform. Further, this thesis will demonstrate that the Malaysian legislature has moved a few steps backward in the area of third party protection. Certain third party rights were eroded through the enactment of the Insurance Act 1996 (Act 553) and the Road Transport Act 1987 (Act 333). In addition, the legislature is not proactive in reforming out-dated laws which purport to confer rights on third parties.

[1] The Malaysian Act (Amendment) Act 1965 (Act No 54 of 1965) and the Republic of Singapore (Independence) Act 1965 (Act No 9 of 1965).

1.2 Significance of the Thesis

Although the insurance industry in Malaysia, particularly the life insurance industry, is registering tremendous growth, the overall insurance coverage is still low compared with other advanced markets.[2] To increase the public's awareness and appreciation of insurance, the regulator of the insurance industry in Malaysia, Bank Negara Malaysia (the Central Bank of Malaysia), together with the industry launched a 10-year consumer education programme in August 2003. The education programme is generally known as InsuranceInfo. With InsuranceInfo providing and disseminating information on life and general insurance products and services, consumers will definitely gain a better understanding on their rights and obligations under insurance policies. An educated consumer will raise questions on whether the insurance products offered by the insurers meet his needs and requirements. Questions will also be raised whether the present laws recognise a policy owner's intention of effecting an insurance policy to benefit a third party. Likewise, the effectiveness of the respective compulsory insurance schemes in their role to protect third party claimants will also be questioned.

Unfortunately, no substantial and exhaustive research has been done on the rights of third parties in insurance law in Malaysia, other than the studies on the rights of third parties in motor insurance.[3] These studies were conducted based on the law which

[2] Bank Negara Malaysia's press report on 21 April 2004. According to Bank Negara Malaysia's press report on 27 April 2005, the combined premium income for life and general business increased by 17.2% from RM18,812.3million in 2003 to RM22,038.9million in 2004. It accounted for 5.2% of Malaysia's nominal Gross National Product (GNP). The market penetration of life insurance, measured in terms of total number of annual premium policies in force to total population, was 37.9% in 2004, compared to 36.8% in 2003.

[3] P. Balan "Perlindungan Pihak Ketiga Dalam Undang-undang Insurans Motor" in *Fakulti Undang-undang, Makalah Undang-undang Menghormati Ahmad Ibrahim*, (1988), Dewan Bahasa dan Pustaka, Kuala Lumpur, at 86-113; Nik Ramlah, Mahmood, *Insurance Law in Malaysia*, (1992), Butterworths, Kuala Lumpur; Sidhu, Mahinder Singh, *The Motor Insurer, Insured and Third Party Rights*, (1993), International Law Book Services, Kuala Lumpur; and Badayuh bt Obeng, Insurans Motor: Perlindungan Kepada Pengambil Insurans dan Pihak Ketiga, LLM Dissertation, Faculty of Law, UM 1994/95.

existed more than ten years ago. There has been much development since then. In addition, although the Insurance Act 1996 came into force on 1 January 1997, not much legal research has been done on the rights which are conferred by the Act on a third party. Except for a book by Santhana Dass[4] which is on the law of life insurance, and an article by Rafiah Salim,[5] there was no other serious legal writing on the 1996 Act. Further, it appears that there is no published research on the solicitors' professional liability policy even though all practising advocates and solicitors must be insured under it. Similarly, it appears that there is no serious research on the rights of an injured workman or his dependant under a workmen's compensation policy in Malaysia.

This thesis is an attempt to fill the abovementioned gap. It examines the rights of third parties in, among others, a life policy, a personal accident policy, a marine policy, a motor policy, a solicitors' professional liability policy, and a workmen's compensation policy. It concludes with recommendations for statutory reforms to strengthen the third parties' rights.

1.3 Insurance Policy for the Benefit of a Third Party

The rights of a third party in insurance law is generally affected by first, the doctrine of privity; secondly, the defences available to the insurer; and thirdly, the application of laws in other areas. These issues will be briefly explained below.

[4] Dass, S. Santhana, *Law of Life Insurance in Malaysia*, (2000), Alpha Sigma, Petaling Jaya.
[5] Rafiah Salim, "Part XIII of the Insurance Act 1996: Payment of Policy Money Under a Life Insurance Policy or Personal Accident Insurance Policy" [1997] 24 *JMCL* 55.

1.3.1 Doctrine of privity

As an insurance policy is a contract, the general principles of the law of contracts, unless excluded or modified, apply to it. At common law, one of the important principles in the law of contracts is the doctrine of privity. According to the doctrine, a person who is not a party to a contract cannot sue or be sued on the said contract.[6] Some of the arguments for the doctrine are as follows.[7] First, the promisor may be subject to double liability if a third party is allowed to sue him.[8] Secondly, it is unjust to allow a third party to sue on the contract when he cannot be sued on the same contract.[9] Thirdly, the third party is usually a donee. Since the promisee of a gratuitous promise does not have a right to enforce it, it follows that a gratuitous beneficiary should similarly not enjoy such right.[10]

The doctrine of privity is hard to justify, particularly where the contract is made for the sole purpose of granting a benefit on a third party.[11] In fact, the doctrine is contrary to the 'will', 'bargain' and 'protection of expectation' theories on contractual liability.[12] If the contracting parties intend to confer rights on a third party, it is within their expectation that the third party can enforce them if the promisor breaches his promise. Further, the promisor would have received consideration for his promise. Following this, the third party should be allowed to enforce the promise made in his favour,

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[6] *Tweedle* v. *Atkinson* 121 ER 762; and *Dunlop Pneumatic Tyre Company Limited* v. *Selfridge and Company Limited* [1915] AC 847.
[7] See Flannigan, Robert, "Privity – The End of An Era (Error)" [1987] 103 *LQR* 564, for a good discussion on the arguments for and against the doctrine of privity.
[8] Bennet, Edmund H., "Considerations Moving from Third Persons" (1895) 9 *Harv. LR* 233, at 233-234.
[9] Treitel, Guenter, *The Law of Contract*, (11th ed., 2003), Sweet & Maxwell, London, at 588.
[10] *Ibid.*
[11] *Beswick* v. *Beswick* [1966] AC 58.
[12] English Law Commission Consultation Paper No 121, *Privity of Contract: Contracts for the Benefit of Third Parties*, (1991), at 70-72.

otherwise the bargain is defeated. It is "unjust to deny effectiveness to such a contract".[13]

In view of the weaknesses of the doctrine of privity, the courts have given legal recognition to some of the devices which have been created to circumvent the doctrine. Some of the well established devices are, first, an assignment of the promisee's benefits under a contract to the third party even where the promisor has no intention to benefit the third party;[14] secondly, the creation of a trust where the contract is made for the benefit of the third party, provided that all the elements of a trust are present;[15] and thirdly, the concept of agency.[16] In an agency, the third party is actually a party to the contract, for the promisee made the contract as the third party's agent.

In Malaysia, the law governing contracts are found in the Contracts Act 1950 (Act 136, Rev. 1974). Although the Act does not expressly prohibit a third party from enforcing a contract, the Privy Council in *Kepong Prospecting Ltd and Ors* v. *Schmidt*[17] had affirmed the application of the doctrine of privity in Malaysia. Lord Wilberforce who delivered the judgment of the Board, held that s.2(a), (b), (c) and (e) of the Contracts (Malay States) Ordinance 1950 (No. 14/1950) (Repealed)[18] supported the doctrine. This is despite s.2(d) of the Ordinance which allowed consideration to move from a person other than the promisee. The Privy Council held that the doctrines of consideration and privity are distinct.[19] To-date, the doctrine of privity still applies in

[13] Steyn LJ in *Darlington Borough Council* v. *Wiltshier Northern Ltd* [1995] 1 WLR 68, at 76. See also Lord Denning LJ in *Smith and Snipes Hall Farm LD* v. *River Douglas Catchment Board* [1949] 2 KB 500, at 514.
[14] The concept of an assignment in relation to an insurance policy is examined in Chapter 3 of this thesis.
[15] The concept of a trust in relation to an insurance policy is examined in Chapters 4 and 6 of this thesis.
[16] The concept of an agency in relation to an insurance policy is examined in Chapter 6 of this thesis.
[17] [1968] 1 MLJ 170.
[18] The Contracts (Malay States) Ordinance 1950 was the predecessor of the Contracts Act 1950.
[19] *Supra*, note 17, at 174.

Malaysia. It also applies to insurance contracts as was held by the Federal Court in *Capital Insurance Bhd* v. *Cheong Heng Loong Goldsmiths (KL) Sdn Bhd*.[20]

1.3.2 Defences available to the insurer

Apart from the doctrine of privity, a third party's rights in insurance law are also affected by the defences available to the insurer in an action against it by the policy owner. This is because the insurer may avail itself of such defences when the third party sues the insurer. The defences include the following. First, if the claim on the policy is outside the policy's coverage, the insurer is not liable. Secondly, if the policy owner breaches any of the terms in the insurance policy or special rules governing an insurance contract, the insurer may escape liability. The special rules include the requirements that a policy owner must have insurable interest in the subject matter of the policy, fulfil all his obligations and duties towards the insurer, act in utmost good faith towards the insurer, and observe all warranties and conditions in the policy. These defences, if they are effective against a third party claimant, will be detrimental to him if the policy is effected for his benefit. The third party may least expect this where the tortfeasor is required by law to effect an insurance policy to cover his liability. The third party should be granted legislative protection. The scope of the compulsory insurance scheme conferring rights on the third party by the relevant statutory provisions must adequately protect him and ensure that he receives his compensation or indemnity.

Further, some of the special insurance rules may hinder the application of the common law exceptions to the doctrine of privity. For instance, even though the concept of assignment as an exception to the doctrine is well established, an insurance policy may

[20] [2005] 6 MLJ 593.

not be assignable in Malaysia due to two factors. The first is the general requirement that the policy owner must have insurable interest in the subject matter of the policy when the insured event happens. The second is because of the highly personal nature of an insurance contract.[21] Another established common law exception to the doctrine of privity is the concept of agency. It is difficult for the third party to prove his claim that the policy owner is his agent unless the third party has provided consideration for the insurance. Further, the third party's claim that the policy owner incepted the policy as his agent may also be defeated if the third party's identity is a material fact and it is not disclosed to the insurer at the policy's inception.[22]

1.3.3 Application of laws in other areas

An insurer may, if he so wishes, remit the policy moneys to the third party claimant despite the doctrine of privity and the defences available to the insurer stated above. However, the rights of the third party to the moneys may still be defeated by the application of laws in other areas. The policy owner's estate may claim that the third party receives the moneys as an agent of the estate. Further, where the policy owner is insolvent, his creditors may claim that the policy moneys form part of the policy owner's assets for distribution to the creditors.

1.4 Legal Framework in the United Kingdom and Singapore on the Rights of Third Parties in Insurance Law

In view of the uncertain position of a third party claimant, the legislatures in many

[21] These issues will be examined in Part 3.4, *infra*, at 90-91.

[22] Although the Privy Council in *Siu Yin Kwan* v. *Eastern Insurance Ltd* [1994] 1 All ER 213 held that the doctrine of undisclosed principal applied to a contract of insurance, it did not abrogate the requirement that the identity of the policy owner must be disclosed to the insurer if it is a material fact. See Merkin, Robert, *Colinvaux and Merkin's Insurance Contract Law*, (Loose-leaf) (Release 10, September 2004), Sweet & Maxwell, London, at para. A-406 and (Release 11, March 2005), Sweet & Maxwell, London, at para. A-608.

common law countries have intervened to confer enforceable rights on the third party to protect him. Statutes were enacted to modify the application of the doctrine of privity. The insurer is required to satisfy the third party's claim despite the defences available to the insurer. The statutory reforms which have an impact on the third party rights in the United Kingdom and Singapore are briefly examined in this Part, and they will be discussed in detail in the relevant chapters of this thesis.

1.4.1 The United Kingdom

In the United Kingdom, the legislature had enacted provisions pertaining to the assignment of a life policy, a marine policy and a non-marine policy protecting property. It had also enacted a statutory trust device. The Road Traffic Act 1988 (UK) also limited the defences available to the insurer in an action by a third party who is injured in a motor accident. In addition, the European Communities Directives on Motor Insurance had played a role in redefining the scope of the compulsory motor insurance scheme. To implement the Directives, the relevant provisions in the Road Traffic Act 1988 (UK) were amended and new agreements between the Motor Insurers' Bureau and the Minister of Transport were made. Further, in 1999, the United Kingdom's legislature enacted a statute of general application, namely, the Contracts (Rights of Third Parties) Act 1999, to modify the application of the doctrine of privity to contracts. Thus, the position of a third party in insurance law in the United Kingdom has improved, and he may be able to enforce a benefit granted to him by a policy.

1.4.2 Singapore

In Singapore, the legislature was proactive and enacted the Contracts (Rights of Third Parties) Act 2001 (Act 39/2001). This Act is based substantially on the United Kingdom's 1999 Act. The Workmen's Compensation Act (Chapter 354) also confers

on an injured workman or his dependant who is within the ambit of the Act, a direct recourse against the insurer. Similarly, the legislature had enacted the Motor Vehicles (Third-Party Risks and Compensation) Act (Chapter 189) to provide for a user of a motor vehicle on a road to be insured against certain third party risks and to confer enforceable rights on a person who is injured in a motor accident. The legislature had also redefined and widened the scope of the compulsory motor insurance scheme. These steps augur well for third party rights in insurance law in Singapore.

1.5 Legal Framework in Malaysia on the Rights of Third Parties in Insurance Law

In Malaysia, the legislature did not completely abrogate or modify the doctrine of privity in its general application to an insurance policy. Instead, the legislature had intervened to confer rights on selected third parties in certain types of insurance policies. The purpose of this Part is to give an overview of the legal framework in Malaysia. The writer will first list the local statutes which confer or purport to confer rights on third parties in an insurance policy; and secondly, examine the reception of English laws on the subject matter in Malaysia.

1.5.1 Statutory provisions

The statutory provisions in Malaysia which confer or purport to confer rights on third parties in an insurance policy are found in the Insurance Act 1996, the Civil Law Act 1956 (Act 67, Rev. 1972), the Legal Profession Act 1976 (Act 166), the Road Transport Act 1987, and the Workmen's Compensation Act 1952 (Act 273, Rev. 1982). They will be discussed in detail in the various chapters of this thesis. At this stage, a brief reference to the statutes is pertinent.

1.5.1.1 Insurance Act 1996

The main legislation pertaining to insurance law in Malaysia is the Insurance Act 1996. It repealed the Insurance Act 1963 (Act 89) when it came into effect on 1 January 1997.[23] The 1996 Act contains comprehensive provisions for the licensing and regulations of insurers, insurance brokers and adjusters. It also regulates certain substantive aspects of insurance law which have effects on third party rights, such as the requirement of duty of disclosure, the requirement of insurable interest in a life policy, and the consequence of mis-statement of the life insured's age in a life policy. Although the Act does not contain any provision of general application conferring rights on a third party in an insurance policy, there are specific provisions conferring rights on selected third parties in certain types of insurance policies. These provisions are found in Part XIII, Part XIV and s.186 of the Act. Part XIII deals with the payment of policy moneys under an own-life policy and a personal accident policy. The rights of a nominee and a beneficiary of a statutory trust of such policies are governed by this Part. This Part also regulates the priority between certain interest holders of the moneys of an own-life policy and a personal accident policy. Part XIV pertains to the establishment and the role of the Insurance Guarantee Scheme Fund. The position of a third party claimant against the Fund when the insurer is wound-up on the ground of insolvency is thus prescribed in this Part. Section 186 of the Act regulates the position of an insured person of a group life policy or a group personal accident policy.

1.5.1.2 Civil Law Act 1956

The Civil Law Act 1956 is an Act relating to the civil law to be administered in Malaysia. The Act contains a general provision on third party rights which is applicable to an insurance policy or its proceeds. This is s.4(3) which confers

[23] PU(B)580/96.

recognition on an assignment of a debt or a legal chose in action. Apart therefrom, there is a specific provision on third party rights in a life policy, namely s.23. It creates a statutory trust device which may be used by the owner of an own-life policy.

1.5.1.3 Legal Profession Act 1976

The Legal Profession Act 1976 requires every practising advocate and solicitor in West Malaysia to be insured under a professional liability policy which has been approved by the Malaysian Bar Council. Although one of the purposes of the compulsory insurance scheme is to protect members of the public who have legitimate claims for damages against advocates and solicitors,[24] it is unfortunate that neither the Act nor its subsidiary legislation contains any specific provision conferring rights on the members of the public against the insurer.

1.5.1.4 Road Transport Act 1987

The Road Transport Act 1987 requires the user of a motor vehicle on a road to be insured against certain third party risks. The Act also confers rights on an injured third party, the hospital that treats the third party and the authorised driver. However, the current law is not satisfactory and this will be dealt with in Chapter 5.

1.5.1.5 Workmen's Compensation Act 1952

The Workmen's Compensation Act 1952 requires an employer to effect an insurance policy to cover its liabilities to its injured workman or his dependant under the Act. It is a compulsory insurance scheme and the policy issued under the scheme must comply with the requirements of the Workmen's Compensation (Foreign Workers'

[24] Parliamentary Debates, Dewan Rakyat, Official Report, Eighth Parliament, First Session, 19 December 1991, Column 115.

Compensation Scheme) (Insurance) Order 2005 (PU(A) 45/2005). Unfortunately, as will be shown in Chapter 6, there are weaknesses in the 1952 Act and 2005 Order.

1.5.2 Reception of English law

In the absence of a local statute or statutes on a matter, s.3 and s.5 of the Civil Law Act 1956 allow the reception of the relevant English laws in Malaysia under certain circumstances.[25]

Section 3 allows the reception of the common law of England and the rules of equity administered in England provided "the circumstances of the states of Malaysia and their respective inhabitants permit and subject to such qualifications as local circumstances render necessary". The cut-off dates are 7 April 1956 for West Malaysia, 1 December 1951 for Sabah, and 12 December 1949 for Sarawak. The relevant portion of s.3 is reproduced below.

> (1) Save so far as other provision has been made or may hereafter be made by any written law in force in Malaysia, the Court shall –
>
> (a) in West Malaysia or any part thereof, apply the common law of England and the rules of equity as administered in England on the 7th day of April 1956;
>
> (b) in Sabah, apply the common law of England and the rules of equity, together with statutes of general application, as administered or in force in England on the 1st day of December 1951;
>
> (c) in Sarawak, apply the common law of England and the rules of equity, together with statutes of general application, as administered or in force in England on the 12th day of December 1949, ...
>
> Provided always that the said common law, rule of equity and statutes of general application shall be applied so far as the circumstances of the States of Malaysia and their respective inhabitants permit and subject to such qualifications as local circumstances render necessary.
>
> (2) Subject to the express provisions of this Act or any other written law in force in Malaysia or any part thereof, in the event of conflict or variance between the common

[25] Chia, Joseph, "The Reception of English Law under Sections 3 and 5 of the Civil Law Act 1956 (Revised 1972)" [1974] 1 *JMCL* 42; Soon, Choo Hock and Andrew Phang, "Reception of English Commercial Law in Singapore: A Century of Uncertainty" in Chapter 2 of Harding, A.J., (Ed.), *Common Law in Singapore and Malaysia: A Volume of Essays Marking the 25th Anniversary of the Malaya Law Review*, (1985), Butterworths, London, at 33; Wu, Min Aun, *The Malaysian Legal System*, (3rd ed., 2005), Pearson, Petaling Jaya, at 123-138; Sharifah Suhanah, Syed Ahmad, *Malaysian Legal System*, (1999), MLJ, Kuala Lumpur, at 125-133; and Wan Arfah, Hamzah and Ramy Bulan, *An Introduction to The Malaysian Legal System*, (2002), Fajar Bakti, Shah Alam, at 111-118.

> law and the rules of equity with reference to the same matter, the rules of equity shall prevail.

The issue is whether English statutes of general application could also be imported under s.3. The position in Sabah and Sarawak is clear, for s.3(1)(b) and (c) expressly allow their application. Section 3(1)(a) is silent on the position in West Malaysia and the courts have consistently rejected the reception of English statutes in West Malaysia pursuant to s.3(1).[26] Nevertheless, certain English statutes could be imported into Malaysia under another section, s.5 of the Civil Law Act 1956, which reads as follows.

> (1) In all questions or issues which arise or which have to be decided in the States of West Malaysia other than Malacca and Penang with respect to the law of partnerships, corporations, banks and banking, principals and agents, carriers by air, land and sea, marine insurance, average, life and fire insurance, and with respect to mercantile law generally, the law to be administered shall be the same as would be administered in England in the like case at the date of the coming into force of this Act, if such question or issue has arisen or had to be decided in England, unless in any case other provisions is or shall be made by any written law.
>
> (2) In all questions or issues which arise or which have to be decided in the States of Malacca, Penang, Sabah and Sarawak with respect to the law concerning any of the matters referred to in subsection (1), the law to be administered shall be the same as would be administered in England, in the like case at the corresponding period, if such question or issue had arisen or had to be decided in England, unless in any case other provision is or shall be made by any written law.

Section 5 allows the application of English law in commercial matters where there is a *lacuna*. Special mention is made to the laws of marine, average, life and fire insurance. Sub-section (2) provides that for the states of Malacca, Penang, Sabah and Sarawak, "the law to be administered shall be the same as would be administered in England in the like case at the corresponding period, if such question or issue had arisen or had to be decided in England". Sub-section (1) provides that the cut-off date for the states other than Malacca, Penang, Sabah and Sarawak, is 7 April 1956. Thus, there might be

[26] *Mokhtar* v. *Arumugam* (1959) 25 MLJ 232; *Permodalan Plantations Sdn Bhd* v. *Rachuta Sdn Bhd* [1985] 1 MLJ 157; *Pushpah a/p MSS Rajoo* v. *Malaysian Co-operative Insurance Society and Anor* [1995] 2 MLJ 657; and *Jayakumar a/p Arul Pragasam* v. *Suriya Narayanan a/p V Ramanathan* [1996] 4 MLJ 421.

no uniformity in the English commercial law applicable throughout the different states in Malaysia.

It is certain that "the law to be administered" includes statutes. This is supported by *Seng Djit Hin* v. *Nagurdas Purshotumdas and Company*[27] and *Shaik Sahied bin Abdullah Bajerai* v. *Sockalingam Chettiar*.[28] However, there is some uncertainty with regard to the type of English statutes which could be imported into Malaysia under s.5(1) of the Civil Law Act 1956 in the absence of local statute or statutes. The predecessor of s.5(1) of the 1956 Act was s.5(1) of the Civil Law Ordinance (Straits Settlement No. 111 of 1920), and on two occasions, the Privy Council was called upon to interpret the said provision. In *Seng Djit Hin*,[29] the Privy Council held that if the issue before the court pertained to a matter within the scope of s.5(1), then the law applicable would be the law administered in England. If the law was written, the court could apply the statute because it was the law as would be administered in England to resolve the said issue. The nature of the statute need not be mercantile in nature.

However, in *Sockalingam Chettiar*,[30] the Privy Council's approach to s.5(1) was as follows. The provision allowed the application of English law only where a question or issue had to be determined with respect to mercantile law. The statute which could be imported to resolve the issue must be of general application. A statute which was of municipal in nature, would not be imported. Not even the relevant parts which were of general application, could be imported. Lord Atkin said:[31]

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[27] [1923] AC 444.
[28] [1933] AC 342.
[29] *Supra*, note 27, at 448-449.
[30] *Supra*, note 28, at 344-347. The statutes in contention were the English Moneylenders Act 1900 and Moneylenders Act 1927 which regulated the registration and licensing of moneylenders in England.
[31] *Ibid.*, at 347.

> To take one or two sections of such an Act, divorced from their context, is to apply a new law, which is not the law of England, and so abstracted might never have been introduced into England at all

The conflicting approaches to the interpretation of s.5 of the Civil Law Act 1956 cause uncertainty on the application of some English statutory provisions in Malaysia, including the provisions conferring rights on third parties in insurance law. This uncertainty will be shown in the subsequent chapters of this thesis.

1.6 Methodology and Organisation of the Thesis

The main sources of material for this thesis are the relevant books, law reports and journals, articles and parliamentary debates available in the Law Library of the University of Malaya and the library in the Malaysian Institute of Insurance. The online database facility of the Law Library, and the internet, particularly the websites of the authorities in the United Kingdom, were used for updates and additional material. To gain a better understanding of the practices of the insurance industry and the regulating bodies, the writer interviewed insurers, officers of Bank Negara Malaysia and the Motor Insurers' Bureau of West Malaysia. The writer also sought clarifications from a senior officer of the Financial Service Compensation Scheme Ltd on the entitlements of claimants under policies issued by an insolvent insurer in the United Kingdom.

For ease of reference in this thesis, the writer uses the words and expressions importing the masculine gender, namely, "he", "him" and "his", to denote both masculine and feminine genders.

This thesis consists of seven chapters. Chapter 1 is on introductory matters, whereas Chapter 7 is the concluding chapter. Chapters 2 to 6 form the core of this thesis. Chapters 2, 3 and 4 focus on the rights of three common classes of third parties in an insurance contract, namely a nominee, an assignee and a beneficiary of a statutory trust. Chapters 5 and 6 discuss the rights of third parties in five specific types of insurance contracts, namely a motor insurance policy, a group life policy, a group personal accident policy, an approved solicitors' professional liability policy and a workmen's compensation policy. The above arrangement of the chapters for this thesis is adopted for its coherency.

Chapter 2 deals with the rights of a nominee. A policy owner may direct the insurer to pay the insured sum to a specified person, instead of himself, upon the happening of an insured event. The specified person, known as the nominee, is a third party to the contract. This Chapter will study the nominee's position at common law and under the Insurance Act 1996. Although the Act confers on a nominee the right to sue the insurer for the policy moneys payable on the policy owner's death, the nominee is entitled to receive them as an executor, and not as a beneficiary. The only exception is where the nominee is the policy owner's spouse or child, or the policy owner's parent who is nominated at a time when the policy owner does not have a living spouse or child. If the policy owner intends to benefit his nominee who is not related to him in any of the ways mentioned above, the policy owner should assign the policy moneys to the nominee.

Chapter 3 examines the rights of the assignee to an assignment of a life or general policy. It deals with, first, an assignment of the subject matter of the policy; secondly, an assignment of the policy itself; and thirdly, an assignment of the policy proceeds.

This Chapter will also discuss whether the highly personal nature of the insurance contract and the requirement of insurable interest affect the assignability of a policy or its proceeds in Malaysia. The priority of competing assignees and interests will also be dealt with in Chapter 3.

If the policy owner nominates his spouse or child, or his parent (who is nominated when the policy owner does not have a living spouse or child), to receive the policy moneys payable upon the policy owner's death, s.166 of the Insurance Act 1996 prescribes that a statutory trust is created. The nominee, being the beneficiary of a statutory trust, will enjoy the benefits conferred by the provision. Chapter 4 examines the requirements, scope and limitations of the trust under s.166. This Chapter also examines the trust under s.23 of the Civil Law Act 1956. A comparative study between the two statutory trusts and the rights of their respective beneficiaries will be made. The writer will also examine the applicability of s.23 of the Civil Law Act 1956 after the Insurance Act 1996 came into effect.

The Road Transport Act 1987 requires the user of a motor vehicle on a road to be insured against certain third party risks. Chapter 5 examines the scope of the compulsory motor policy scheme. The writer will also study and review the rights conferred by the Act on first, the person who sustains injury in a motor accident; secondly, the person whose liability is insured under a motor policy even though he is not the policy owner; and thirdly, the hospital that gives emergency treatment to the injured third party. This Chapter also examines an injured third party's rights that are allied to the statutory provisions, namely his rights against the person who permits an uninsured tortfeasor to use the motor vehicle on the road and his rights against the Motor Insurers' Bureau of West Malaysia.

In a group policy, a number of persons are insured severally pursuant to a single contract made between the insurer and the group policy owner. An insured person is a third party to the insurance contract and strictly, he has no enforceable rights due to the doctrine of privity. However, the Malaysian legislature has enacted provisions pertaining to four types of group policies, namely, a group life policy, a group personal accident policy, a solicitors' professional liability policy, and a workmen's compensation policy. The rights of a person insured and a claimant under each of the aforesaid group policies in the Malaysian context will be examined in Chapter 6.

Chapter 7 is the concluding chapter. The Chapter highlights the inadequacies in the present laws pertaining to the rights of third parties in insurance law in Malaysia, and proposes statutory reforms to address the said shortcomings.

This thesis is based on the laws in Malaysia as at 27 February 2006.

1.7 Limitation of the Thesis

This thesis is a critical study on the rights of third parties in insurance law in Malaysia which are conferred by statutes and which are allied to the relevant statutory provisions. The common law exceptions to the doctrine of privity, and the scope and consequences of insurance rules which affect third party rights are discussed only where they are applicable and relevant in this thesis. They each raise complex issues and merit an in-depth separate research. For similar reasons, the writer will not attempt to discuss the procedural issues and the various avenues available to a third party who wishes to seek recourse against the insurer, namely, the courts, the arbitrators and the Customer Service Bureau in Bank Negara Malaysia.

For the purpose of analysing the documents relevant to this study, the writer obtained specimen policies issued pursuant to the Workmen's Compensation Act 1952. The Malaysian Bar Council also made available to the writer the Master Policy, the Certificate of Insurance and the proposal form for the solicitors' professional liability policy which were approved by the Council pursuant to the Legal Professional Act 1976 for the years 2003 and 2004. However, the writer was given access to only the Certificate and the proposal form for the year 2005 and the writer did not receive any response to the query whether the terms in the 2005 Master Policy were similar to that of the 2004 Policy. Thus, the discussion on the rights of third parties under the solicitors' professional liability policy was conducted on the basis that the terms in the 2004 and 2005 Master Policies were similar. This was one of the limitations faced in conducting this study.

Further, the discussion in this thesis is confined to the rights of third parties in conventional insurance. Thus, while the rights of third parties in a conventional life policy effected by a Muslim policy owner are covered in Chapter 4 of this thesis, this thesis does not address the rights of third parties in *takaful* insurance. The latter involves a study of *Syariah* law principles which are beyond the scope of this thesis.

CHAPTER TWO

RIGHTS OF A NOMINEE AS A THIRD PARTY

2.1 Introduction

The court in *Re William Phillips' Insurance*[1] held that in general, the moneys payable on a policy effected by a person on his own life belongs to him. The policy owner may deal with the policy and its proceeds in accordance with the policy. He may dispose off the policy moneys by will. He may nominate another person to receive them upon his death. The policy owner may effect the nomination either at the time or after the policy is incepted. Just like a will, the nomination takes effect only upon the policy owner's death. The owner of a policy on the life of another person has similar rights. The policy owner may nominate a third party to receive the policy moneys when the insured event happens.[2]

In most instances, the policy owner intends the nominee to receive the policy moneys as a beneficiary, and it is the perception of the general public that the nominee is legally and beneficially entitled to the said moneys. However, due to the doctrine of privity, this perception is not always correct. If the insurer fails to pay the nominee, the nominee may not have any recourse against the insurer. Even if the insurer pays or is willing to pay the nominee in accordance with the policy owner's direction, it is uncertain whether the nominee can retain the moneys for his own benefit.[3]

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[1] (1883) LR 23 Ch 235, at 247.
[2] *Re Engelbach's Estate* [1924] 2 Ch 348.
[3] It will be seen in Pt. 2.2 that there are many uncertainties at common law pertaining to the status of nomination and the rights of a nominee. *Infra*, at 22-36.

This Chapter discusses the rights of a nominee as a third party to the insurance contract. His rights at common law in England will be examined in Part 2.2. The common law is relevant because it may apply where there is a *lacuna* in Malaysian statutes dealing with insurance. In Parts 2.3 and 2.4, the writer will analyse the rights of a nominee in Malaysia before and after the Insurance Act 1996 (Act 553) came into effect. The Insurance Act 1996 regulates the position of a nominee of a life policy or a personal accident policy effected by a person on his own life providing for payment of policy moneys on his death. It will be shown that the nominee of such policy in Malaysia is more settled, but weaker, when compared to that at common law.

2.2 Position of a Nominee at Common Law in England

Where the nomination takes effect under a statute, the rights of the policy owner and his nominee are governed by that statute. The nomination, which becomes effective upon compliance of the prescribed procedures and conditions, even takes precedence over a disposition under a will.[4] This Part discusses the position of a nominee under a non-statutory nomination. The discussion will be carried out in four Parts, namely, first, the status of a non-statutory nomination; secondly, the procedure to be followed for a valid nomination; thirdly, the rights of a nominee; and fourthly, the revocation of a nomination before and after the policy owner's death.

2.2.1 Status of a non-statutory nomination

A vital question which has to be dealt with is whether a non-statutory nomination effected by a policy owner is his testamentary disposition or a contractual act. This

[4] It is immaterial whether the nominator makes the will before or after the nomination. See Chappenden, W.J., "Non-Statutory Nominations" [1972] *JBL* 20, at 21; *Eccles Provident Industrial Co-operative Society Ltd* v. *Griffiths* [1912] AC 483; and *Bennett* v. *Slater and Anor* [1899] 1 QB 45.

issue is important because if the nomination is a testamentary disposition, its procedure and the nominee's rights are governed by the Wills Act 1837 (UK). If the nomination is a contractual act, its procedure is governed by the terms of the policy, and the nominee's rights are uncertain.

The question whether a nomination is a testamentary disposition or a contractual act does not have a satisfactory answer. In the words of Megarry J. in *Re Danish Bacon Co Ltd Staff Pension Fund*,[5] "non-statutory nominations are odd creatures". One school of thought holds the view that a non-statutory nomination tantamounts to a testamentary disposition and thus, must comply with the Wills Act 1837 (UK) to be effective. A case which supports this point of view[6] is the English Court of Appeal's case of *Re Williams*.[7] In this case, the policy owner gave his housekeeper his policy together with a signed endorsement that he authorised her to receive the policy moneys for her own benefit upon his death. Lord Cozens-Hardy MR held that the endorsement was:[8]

> a mere mandate which ceased to be operative at death; and further it seems to me to be, if anything, of the nature of a testamentary document. It is a document which was intended only to take effect in the event of the donor predeceasing the donee.

Since the nomination did not fulfil the requirements of a testamentary disposition, the nomination was held to be invalid and the Court of Appeal ordered the policy moneys be remitted to the deceased policy owner's personal representatives.

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[5] [1971] 1 All ER 486, at 494.

[6] The contention that a non-statutory nomination is a testamentary disposition is also supported by Nunan, W.F., "The Application of the Wills Acts to Nominations of Beneficiaries under Superannuation or Pension Schemes and Insurance Policies" (1966) 40 *ALJ* 13; and Chappenden, *supra*, note 4.

[7] [1917] 1 Ch 1. Both court at first instance and the Court of Appeal held that there was no assignment created in favour of the housekeeper.

[8] *Ibid.*, at 7.

However, in *Re A Policy No. 6402 of the Scottish Equitable Life Assurance Society*,[9] the court held that the nominee's legal representatives were entitled to receive the policy moneys as trustees for the policy owner's legal representatives. Thus, by implication, a non-statutory nomination is not a testamentary disposition, for otherwise the policy moneys would form part of the nominee's estate.

In view of the conflicting decisions, the writer refers to the cases on nominations made pursuant to pension schemes. In *Re Danish Bacon Company Ltd Staff Pension Fund*,[10] the court held that the nomination which was made pursuant to the rules of the company's pension scheme, was not a testamentary disposition by the deceased even though it had certain testamentary characteristics. Megarry J held that "such a nomination (operated) by force of the provisions of those rules, and not as a testamentary disposition by the deceased".[11] According to the learned judge, the nominator was not disposing an asset which he was entitled to during his lifetime, but an asset which would come into his estate only after his death.[12]

The Privy Council in the case of *Baird* v. *Baird*,[13] an appeal from the Court of Appeal of Trinidad and Tobago applied the decision in *Re Danish Bacon*. In *Baird* v. *Baird*, the deceased nominated his brother to receive the benefits payable upon his death

[9] [1902] 2 Ch 282.

[10] *Supra*, note 5. In this case, the nominator nominated a beneficiary to receive the benefits payable by the pension fund set up by his employer in the event he died in service.

[11] *Ibid.*, at 494.

[12] *Ibid.*, at 493. As per Megarry J:

> "What I am concerned with is a transaction whereby the deceased dealt with something which ex hypothesi could never be his. He was not disposing of his pension, nor of his right to the contribution and interest if he left the company's service. He was dealing merely with a state of affairs that would arise if he died while in the company's pensionable service, or after he had left it without becoming entitled to a pension. If he did this, then the contributions and interest would, by force of the rules, go either to his nominee, if he had made a valid nomination, or to his personal representatives, if he had not. If he made a nomination, it was revocable at any time before his death".

[13] [1990] 2 All ER 300.

whilst in employment, from an employee's pension scheme. On his death, his brother and the deceased's widow claimed for the benefits under the scheme. The widow contended that since the nomination did not comply with the Wills and Probate Ordinance (Laws of Trinidad and Tobago 1950),[14] it was invalid. Thus, the moneys should be released to her as the administrator of the deceased's estate. The Privy Council did not agree with the administrator's contention.

According to the Privy Council, whether a non-statutory nomination was a testamentary document or a contractual act depended on the particulars of the funds.[15] The nomination is testamentary in nature if the nominator has the absolute power to deal with the funds during his lifetime. This includes the unhindered right to make and revoke a nomination. In this case, since the nominator did not have the absolute power to deal with the amount standing to his credit in the pension scheme, the nomination was a contractual act. It was valid and effective even though it did not fulfil the requirements of a valid will. Therefore, the court ordered the funds be paid to the person nominated by the deceased, and not to the administrator of his estate.

In conclusion, it is submitted that a non-statutory nomination is a testamentary disposition and must comply with the requirements of a valid will only if the following two conditions are complied with. First, following the case of *Re Danish Bacon Company Ltd Staff Pension Fund*,[16] the nominator was entitled to the property, which

[14] The Ordinance follows the provision of the English Wills Act 1837 in requiring a will to be executed in the presence of two witnesses.

[15] *Supra*, note 13, at 308. As per Lord Oliver of Aylmerton:

> "(W)here the effect of the particular scheme is, as it was in *Re MacInnes* (1935) 1 DLR 401, to confer on a member a full power of disposition during his lifetime over the amount standing to his credit under the scheme, a disposition of that interest on his death would normally constitute a testamentary disposition requiring attestation in accordance with the statutory requirements for the execution of a will".

[16] *Supra*, note 5.

forms the subject matter of the nomination, during his lifetime. Secondly, following the case of *Baird* v. *Baird*,[17] the nominator's power to deal with the subject matter of the nomination must not be restricted in any way. Thus, a nomination of the policy moneys payable upon the nominator's death is always a contractual act, for the first condition is not fulfilled. However, whether a nomination of the policy moneys payable on the death of a person other than the nominator, is a testamentary disposition or a contractual act depends on the terms of the policy. The discussions below will show that the procedure for nomination and the rights of the nominee depend much on the status of the nomination.

2.2.2 Procedure for nomination

At common law, a non-statutory nomination could either be a testamentary disposition or a contractual act. If it is the former, the policy owner must comply with the requirements of a valid will. If it is a contractual act, the policy owner may comply with either the nomination procedure prescribed in the policy or the requirements of a valid will. It is to the nominee's advantage if the nomination instrument complies with the latter, for then it can be admitted to probate as a will.[18]

Since the Wills Act 1837 (UK) does not require the testator to identify his beneficiary by his name, it follows that it is sufficient for the policy owner to merely describe his nominee where the nomination is a testamentary disposition. The nominee may be a minor or a body corporate.

[17] *Supra*, note 13.
[18] *In the Goods of Baxter* [1903] P.12

Similarly, the common law does not stipulate the qualifications of a nominee where the nomination is a contractual act. Therefore, unless the policy stipulates otherwise, the nominee may be a minor or a body corporate. He may also be identified by description.[19]

2.2.3 Rights of a nominee

The rights of a nominee of a nomination which is a testamentary disposition is clear. He is entitled to the sum stipulated in the nomination as a beneficiary. However, unless the nominee is also the policy owner's personal representative, he cannot sue the insurer. The nominee may, nonetheless, sue the policy owner's personal representatives if they fail to act against the insurer for breach of contract.[20] Part 2.2.3 examines the rights of a nominee of a nomination which is a contractual act. His status, whether as a beneficiary or agent, will be analysed. There will also be a discussion on the nominee's rights against the insurer and the Financial Services Compensation Scheme Ltd. (UK) respectively.

2.2.3.1 Status of a nominee

At common law, a major concern is whether the nominee is entitled to receive the policy moneys payable on the policy owner's death, as a beneficiary or merely as a representative of the policy owner's estate. The position is clear where the nominee is also named by the policy owner in his will as the beneficiary of the policy moneys, for then he is entitled to the moneys as a beneficiary. In this situation, it is immaterial that the 'nomination' does not comply with the procedure prescribed in the policy.

[19] *Re Browne's Policy* [1903] 1 Ch 188, where the policy owner effected a policy on his life for the benefit of his wife and children.

[20] Sunnucks, J.H.G. (*et al.*), *Williams, Mortimer and Sunnucks on Executors, Administrators and Probate*, (being the 18th ed. of Williams on Executors and the 6th ed. of Mortimer on Probate, 2000), Sweet & Maxwell, London, at para. 46-04.

However, where the nomination complies with the terms of the policy, but not the requirements of a valid will, the nominee's entitlement is uncertain. The authorities are conflicting.[21]

In *Re Burgess's Policy*,[22] a mother effected a policy "for the benefit of her children". The issue before the court was whether the policy moneys belonged to the mother's estate or her children.[23] The court held that since no interest passed to the children by reason merely of them being mentioned in the policy, the moneys should be released to the mother's legal representatives. The nominees were not entitled to the moneys.

In *Re Engelbach's Estate*,[24] a father effected an endowment policy on his daughter's life for her benefit. He nominated her to receive the policy moneys. Despite the policy owner's clear intention to benefit his daughter,[25] the court ordered the insurer to pay the moneys to the father's personal representatives. The moneys belonged to the father's estate.

In *Re Sinclair's Life Policy*,[26] the policy owner effected a policy and named his godson as the nominee. The policy was deposited with the godson's father. Farwell J, who had no doubts that the policy owner intended to benefit his godson,[27] held that the godson was not the beneficiary of the moneys. The learned judge ordered the moneys be remitted to the executors of the policy owner's estate. Farwell J also commented that if

[21] According to Legh-Jones, Nicholas (*et al.*) (Ed.) *MacGillivray on Insurance Law Relating to All Risks Other Than Marine*, (10th ed., 2003), Sweet & Maxwell, London, at para. 24-44, the nominee's entitlement depends on the intention of the parties to the policy. This is the position if the nomination is subject to the Contracts (Rights of Third Parties) Act 1999 (UK).

[22] [1916] 85 LJ Ch 273.

[23] Section 10 of the Married Women's Property Act 1870 (UK) applied to a policy effected by a married man, and not by a married woman.

[24] *Supra*, note 2.

[25] *Ibid.*, at 355-356.

[26] [1938] Ch 799.

[27] *Ibid.*, at 802.

the godson had received the policy moneys, he would hold it as a constructive trustee for his godfather's estate.[28]

These three decisions are contrasted with that of *Re Schebsman*,[29] where the husband nominated his wife to receive the compensation in the event of his death. The English Court of Appeal held that the husband's intention was that his wife should receive the moneys as a beneficiary and therefore she could retain and enjoy the moneys. As per du Parcq LJ:[30]

> It is open to (the) parties to agree that, for a consideration supplied by one of them, the other will make payments to a third person for the use and benefit of that third person and not for the use and benefit of the contracting party who provides the consideration. Whether or not such an agreement has been made in a given case is clearly a question of construction, but, assuming that the parties have manifested their intention so to agree, it cannot, I think be doubted that the common law would regard such an agreement as valid and as enforceable (in the sense of giving a cause of action for damages for its breach to the other party to the contract), and would regard the breach of it as an unlawful act....
>
> I now turn to the agreement in the present case to seek in the document itself the answer to the question whether the parties intended that, after the debtor's death, the company should be under an obligation to make payments to Mrs. Schebsman for her own benefit, and the debtor's personal representatives should be under a corresponding obligation to accept payment to Mrs. Schebsman for her own benefit as a fulfillment of the contract. It seems to me to be plain on the face of the contract that this was the intention of the parties.

These are conflicting authorities. The writer submits that the better view is that where the nomination is an act of contract, the nominee shall be entitled to receive the moneys as a beneficiary if that is the intention of the contracting parties. Their intention can be construed from the contract and the surrounding circumstances. Although before the Contracts (Rights of Third Parties) Act 1999 (UK) ("the CRTP Act 1999 (UK)"), there was the problem of overcoming the doctrine of privity, the court should had fulfilled and not hindered the policy owner's intention just as in all other general contracts.[31] The unjust results in *Re Sinclair's Life Policy* and *Re Engelbach's Estate* would not

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[28] *Ibid.*, at 805.
[29] [1944] 1 Ch 83.
[30] *Ibid.*, at 101-103.
[31] Beale, H.G. (*et al.*) (Ed.), *Chitty on Contracts*, (29th ed., 2004), Sweet & Maxwell, London, at para. 12-72.

have happened had the courts given effect to the clear intentions of the policy owners to benefit their respective nominees. In connection with this, reference should be made to the views expressed by Lord Reid and Lord Upjohn in *Beswick* v. *Beswick*[32] that *Re Schebsman* was rightly decided. If the policy moneys were released to the nominee whom the policy owner intended to benefit, then the nominee should be allowed to retain them for his benefit.

In fact, this is the position if the nomination is subjected to the CRTP Act 1999 (UK).[33] The Act, which came into effect on 11 November 1999 and applies to contracts made after 10 May 2000, confers on a third party the right to enforce a contractual term if the contract provides that he may do so[34] or the term purports to confer an enforceable benefit on him.[35] It follows that if the policy owner and insurer intend to benefit the nominee, then the nominee should receive the policy moneys as a beneficiary, and not as an agent. The rights of the nominee in the UK are thus, strengthened with the enactment of the CRTP Act 1999 (UK).

2.2.3.2 Rights against the insurer

This Part examines first, whether the nominee who is entitled to the policy moneys as a beneficiary, is entitled to sue the insurer if the insurer fails to remit them to him; and secondly, the amount which can be recovered by the nominee from the insurer where he has recourse against the insurer.

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[32] [1968] AC 58, at 71 and 96.

[33] The nominee can enforce the benefit conferred on him. See Beatson, J., *Anson's Law of Contract* (28th ed., 2002), Oxford University Press, Oxford, at 445 and the illustration in para. 7-34 of the English Law Commission Report No. 242, *Privity of Contract: Contracts for the Benefit of Third Parties*, (1996), on which the CRTP Act 1999 (UK) was based.

[34] Section 1(1)(a) of the CRTP Act 1999 (UK).

[35] Section 1(1)(b) together with s.1(2) of the CRTP Act 1999 (UK).

At common law, the doctrine of privity applies to a nomination which is a contractual act. Thus, even though the insurer is bound to honour its contract with the policy owner to release the moneys to the nominee, the nominee cannot sue the insurer.[36] If the insurer fails to honour its contract with the policy owner, only the policy owner's personal representatives can sue the insurer for breach of contract. It is immaterial that the nominee is entitled to the moneys as a beneficiary.[37]

In England, however, if the nomination is effected after 10 May 2000 to benefit the nominee, the CRTP Act 1999 (UK)[38] permits the nominee to sue the insurer for its failure to remit the moneys to him. The only exception is where on a proper construction of the wording of the nomination, it appears that the insurer and policy owner did not intend the nomination to be enforceable by the nominee.[39]

Where the nominee has recourse against the insurer, he can recover from the insurer what the policy owner is entitled to. In this connection, reference is made to s.3 of the Life Assurance Act 1774 (UK) which provides that:

> And in all cases where the insured has interest in such life or lives, event or events, no greater sum shall be recovered or received from the insurer or insurers than the amount of value of the interest of the insured in such life or lives, or other event or events.

Unfortunately, this provision does not specify whether the sum recoverable is to be determined at the time the policy is effected or when the policy becomes a claim.

[36] Anderson, Winston, "Designation of Beneficiaries Under Policies of Life Assurance" [1993] 22 *AALR* 221, at 251. See also *Cleaver and Ors* v. *Mutual Reserve Fund Life Association* [1892] 1 QB 147, at 157. The cases of *Baird* v. *Baird, supra*, note 13; and *Re Danish Bacon Co Ltd Staff Pension Fund, supra*, note 5, were interpleader proceedings.

[37] *Beswick* v. *Beswick, supra*, note 32. However, the Singapore High Court in *Vaswani Lalchand Challaram and Anor* v. *Vaswani Roshni Anilkumar and Anor* [2005] 3 SLR 625, at 531, held that the nominee who was named the beneficiary could sue the insurer if the administrator was not appointed.

[38] *Supra*, at 29.

[39] Section 1(2) of the CRTP Act 1999 (UK).

Nevertheless, the court in *Dalby* v. *The India and London Life-Assurance Company*[40] confirmed that since s.1 of the 1774 Act requires the policy owner to have insurable interest in the life insured only at the inception of the policy, it is only correct that the quantum recoverable should be determined at that point in time. Thus, if the nominee has recourse against the insurer, he should be able to recover the amount of insurable interest which the policy owner had in the life insured at the policy's inception.[41]

However, it can also be argued that since the amount of premiums payable by the policy owner was calculated and fixed by the insurer according to the value agreed upon by both parties at the policy's inception, the insurer is estopped from disputing the amount of insurable interest which the policy owner had in the life insured. The only exception is where there was misrepresentation on the policy owner's part.[42] Thus, unless the exception applies, a nominee who has recourse against the insurer should be able to recover the sum insured.

2.2.3.3 Rights against the Financial Services Compensation Scheme Ltd

If the insurer is insolvent, it may be futile for a nominee to commence an action against the insurer. In the United Kingdom, the Financial Services Compensation Scheme Ltd ("FSCS (UK)") was established pursuant to Part XV of the Financial Services and Markets Act 2000 (UK) to, *inter alia*, meet the liabilities of an insolvent insurer to a claimant of the proceeds of a policy. The workings of the FSCS (UK) are set out in detail in the Financial Services Authority's Compensation Sourcebook Instrument 2001 (UK) ("the COMP").

[40] 139 ER 465.
[41] There is a presumption at common law that a person has insurable interest in his own life and in that of his spouse. See *M'Farlane* v. *The Royal London Friendly Society* (1886) 2 TLR 755 and *Griffiths* v. *Fleming and Ors* [1909] 1 KB 805. Further, s.253 of the Civil Partnership Act 2004 (UK) presumes that a person has insurable interest in the life of his civil partner.
[42] Parke B. in *Dalby* v. *The India and London Life-Assurance Company, supra.*, note 40, at 475-476.

The issue is whether a nominee is an eligible claimant against the FSCS (UK). The writer submits that only he who has direct recourse against the insurer is an eligible claimant. With regard to a life policy, it is submitted that the nominee has no recourse against the FSCS (UK) unless first, the nomination is subjected to the Contracts (Rights of Third Parties) Act 1999 (UK); and secondly, the insured person died before the insurer becomes insolvent. This is because the nominee has no direct recourse against the insurer at common law and the nomination takes effect only upon the insured person's death.

2.2.4 Revocation of a nomination

A nominee loses all rights conferred on him if his nomination is revoked. The revocation of a nomination will be discussed under two separate headings, namely, its revocation before and after the policy owner's death.

2.2.4.1 Before the policy owner's death

A nomination which is a testamentary disposition is subject to the Wills Act 1837 (UK). Since the Act does not prohibit the testator from varying or revoking his will, the policy owner may vary or revoke his nomination. Further, the settlor's bequest is also revoked if the beneficiary predeceases the settlor. Thus, it follows that a nomination is also revoked if the nominee predeceases the policy owner.[43]

However, where the nomination is a contractual act and the nominee is to receive the moneys as a beneficiary, the policy owner cannot revoke it unilaterally unless the terms of the policy permit so. This is because any variation to the nomination may be made only with the mutual consent of the insurer and policy owner. In this connection,

[43] *Re Barnes* [1940] 1 Ch 267.

reference may be made to the decision in *Re Schebsman*[44] that a contract, which requires the promisor to pay a third party, instead of the promisee, for the third party's use and benefit, is valid and enforceable by the promisor. A breach of such promise is "unlawful" and gives rise to a cause of action for damages. Therefore, as was held by du Parcq LJ, the promisee:[45]

> can never .... lawfully claim payment of the money for himself while the contract remains unaltered. That the common law allows it to be varied nobody doubts. At any time the parties may agree that payment shall in future be made, not to the payee named in the contract, but to the party from whom the consideration moved, or, for that matter, to any other person, but in the case of such a contract there cannot be a variation at the will of one of the parties any more than a condition introduced into a contract for the benefit of both parties can be waived by only one of them.

Following the above, a nomination can be revoked by the mutual consent of the parties to the contract, namely, the policy owner and insurer. The nominee, being a stranger to the contract, cannot object to it.[46]

If the Contracts (Rights of Third Parties) Act 1999 (UK) applies to the nomination, the position of the nominee depends on the terms of the nomination. If the terms of the nomination is silent, s.2(1) of the Act permits the policy owner and the insurer to revoke or vary the nomination, or surrender or vary the policy in such a way as to extinguish the nominee's entitlement unless one of the following takes place. First, the nominee has consented to the nomination; secondly, the policy owner is aware that the nominee has relied on the nomination; or thirdly, the policy owner can reasonably be expected to have foreseen that the nominee would rely on the nomination and he has in fact relied on it. Nonetheless, the nominee can still consent to a dealing which affects his rights.

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[44] *Supra*, note 29.
[45] *Ibid.*, at 102.
[46] *Cleaver and Ors* v. *Mutual Reserve Fund Life Association, supra*, note 36, at 152 and 157.

At common law, another issue which must be considered is whether the nominee's death during the policy owner's lifetime revokes his non-testamentary nomination. According to the court in *Re A Policy No. 6402 of the Scottish Equitable Life Assurance Society*,[47] it is not revoked. Instead, the deceased nominee's personal representative steps into his shoes to receive the policy moneys from the insurer. He receives the moneys as a trustee for the deceased policy owner's personal representatives. The writer submits that this is contrary to the general principle that an agency is terminated upon the agent's death.[48] Nevertheless, if the nominee is to receive the moneys as a beneficiary,[49] the nomination is not revoked upon the nominee's death unless the terms of the nomination stipulate otherwise.

2.2.4.2 After the policy owner's death

The next pertinent issue is whether a contractual nomination is revoked upon the policy owner's death. The writer submits that it depends on whether the nominee is to receive the policy moneys as the policy owner's agent or as a beneficiary. If it is the former, the nomination is revoked. This is following the general principle at common law that an agency is terminated upon the principal's death.[50] Thus, strictly speaking, a nomination in respect of the moneys payable under an own-life policy will never have any effect if the nominee is to receive them as the policy owner's agent.

It is submitted that where the nominee is to receive the policy moneys as a beneficiary, the nomination can only be revoked with the insurer's consent. This is following the principle in *Ahmed Angullia bin Hadjee Mohamed Salleh Angullia* v. *Estate and Trust*

[47] *Supra*, note 9.
[48] Beale, *supra*, note 31, at para. 31-160. In Malaysia, see s.154 of the Contracts Act 1950.
[49] *Supra*, at 29-30.
[50] *Supra*, note 48.

Agencies (1927) Ltd.[51] In this case, the Privy Council held that although the deceased's personal representatives had the duty to honour the deceased's obligations under the contract, they could terminate the contract if first, the other party to the contract consented to it; and secondly, the termination benefited the estate.

Applying the above principle to a nomination, it is submitted that since the policy moneys will form part of the deceased's estate if not for the nomination, it is beneficial to the estate for the nomination to be revoked. Thus, it follows that the policy owner's personal representatives, with the insurer's consent, can revoke the nomination. However, the personal representatives may not be able to revoke the nomination where first, the nominee is to receive the moneys as a beneficiary; and secondly, the nomination is subjected to the CRTP Act 1999 (UK).[52]

Thus, it is clear that at common law, the rights of a nominee to receive the policy moneys are not firm. They may be withdrawn at any time by the policy owner's personal representatives with the insurer's consent.

2.3 Position of a Nominee in Malaysia Before the Insurance Act 1996

In the preceding Part, the writer dealt with the position of a nominee of a non-statutory nomination at common law. This Part examines the rights of a nominee in Malaysia before the Insurance Act 1996 came into force. The rights of a nominee after the Insurance Act 1996 came into effect will be analysed in Part 2.4.

[51] [1938] 3 All ER 106.
[52] *Supra*, at 34.

Prior to the Insurance Act 1996, the statutory provisions on insurance matters were found in the Insurance Act 1963 (Act 89) (Repealed). The repealed 1963 Act did not prescribe the procedure and requirements for a valid and effective nomination by the owner of a life policy. Thus, any nomination effected by the policy owner was non-statutory. Due to some provisions in the repealed Insurance Act 1963 and decided cases, there were uncertainties whether some of the common law principles pertaining to nomination as discussed in Part 2.2.3[53] applied. They pertained to first, the status of the nominee as a beneficiary; secondly, the nominee's rights to sue and give a good discharge to the insurer; thirdly, the sum recoverable by the nominee if he had r against the insurer; and fourthly, the nominee's rights against the insurance gu scheme fund when the insurer was wound-up.

2.3.1 Status of a nominee

There is a High Court case in Malaysia which decided that a nominee received t policy moneys as a beneficiary if the policy owner's intention to benefit his no was clear. The court in *Manonmani* v. *Great Eastern Life Assurance Co Ltd*[54] did follow the English courts' decisions in *Re Sinclair's Life Policy*[55] and *Re Engelbach Estate*.[56] In *Manonmani*, the mother filed an application in the High Court for the determination of, among others, the question whether she was the sole beneficiary of all moneys payable under a whole life policy and if so, an order that the moneys be paid to her. Eusoff Chin J looked at the circumstances of the case. The deceased effected two policies on his life after his marriage. In one policy, he named his mother as the beneficiary, and in the other policy, he named his wife and child as the

[53] *Supra*, at 27-32. The local statute which prescribes the requirements for a valid will is the Wills Act 1959 (Act 346, Rev. 1988).
[54] [1991] 1 MLJ 364.
[55] *Supra*, note 26.
[56] *Supra*, note 2.

beneficiaries. These clearly showed that the deceased effected the first policy to benefit his mother.[57] The learned judge gave effect to the deceased's clear intention and held that the mother was the sole beneficiary of the policy moneys.

The following Parts 2.3.2 and 2.3.3 will discuss the consequential issues of whether, before the coming into force of the Insurance Act 1996, the nominee who was the beneficiary of the moneys, could sue the insurer and had the sole right to give a good discharge to the insurer.

2.3.2 Right to sue the insurer

Although the doctrine of privity does not allow a nominee to enforce his nomination, the court in *Manonmani* v. *Great Eastern Life Assurance Co Ltd*[58] decided otherwise. In *Manonmani*, Eusoff Chin J distinguished the facts of the case from that of *Kepong Prospecting Ltd and Ors* v. *Schmidt*,[59] a Privy Council decision from Malaysia which upheld the doctrine of privity. According to Eusoff Chin J, all the contracting parties in *Kepong Prospecting* were alive and could enforce the contract. Therefore, the third party to the contract, though given a benefit under the contract, was not the proper plaintiff to take action in court. However, in *Manonmani*, the promisee had died and thus, the third party who "was certainly privy to the consideration"[60] was entitled to sue on the contract. It is respectfully submitted that the reasoning and its value are disputable on the following grounds.

[57] *Supra*, note 54, at 369.
[58] *Supra*, note 54.
[59] [1968] 1 MLJ 170.
[60] *Supra*, note 54, at 367.

First, being a High Court case, *Manonmani*'s value as an authority to overcome the doctrine of privity is doubtful. It is submitted that the doctrine as applied in *Kepong Prospecting* remains unshaken. It is immaterial that the promisee had died.[61] Secondly, what His Lordship meant by the phrase "was certainly privy to the consideration" was not elaborated in the judgment in *Manonmani*. It could be taken to mean that the mother provided the consideration, that is, paid the premium. It is submitted that even if she did, the Privy Council in *Kepong Prospecting* clearly held that a person who was not a party to the contract had no legal standing to sue on it even though he had provided consideration. It is immaterial that the third party gave consideration for the promise or the parties to the contract intended to benefit him.

In conclusion, it is submitted that, with all due respect to Eusoff Chin J, the court's decision in allowing the nominee to sue the insurer was incorrect. The doctrine of privity was, and still is, applicable in Malaysia.

2.3.3 Right to give a good discharge

Before the enactment of the Insurance Act 1996, one of the provisions which might had affected the rights of a nominee to give a good discharge was s.44 of the Insurance Act 1963. This provision regulated the payment of a claim on a life policy. It provided that the insurer might release the policy moneys to "a proper claimant ... without the protection of any probate or letters of administration and the insurer should be discharged from all liability in respect of the sum paid". A proper claimant was a person defined in s.44(5) to mean:

> a person who claims to be entitled to the sum in question as executor of the deceased, or who claims to be entitled to that sum (whether for his own benefit or not) and is widower, widow, parent, child, brother, sister, nephew or niece of the deceased; and in deducing any relationship

[61] *Beswick* v. *Beswick*, note 32.

> for the purposes of this subsection an illegitimate person shall be treated as the legitimate child of his actual parents.

The issue was whether s.44 applied where the policy owner had effected a nomination. There were two conflicting High Court decisions.

In *Manonmani* v. *Great Eastern Life Assurance Co Ltd*,[62] Eusoff Chin J held that s.44 did not apply where the policy owner had named a beneficiary to receive the policy moneys upon his death. His Lordship said:

> The purpose of s.44 of the Insurance Act 1963 is no doubt to facilitate and expedite payment by an insurer of any money due under a life policy to 'a proper claimant' without the need for the claimant to first obtain any letters of administration. This section would, I believe, apply where the deceased policy owner either had not appointed and named any beneficiary in the policy to receive the policy money upon his death in which case the policy money would go to his estate, or he had specifically stated in the policy that the policy money should go to his estate when he died. In that event, the insurer is nevertheless authorised by this section to pay out the policy money to a 'proper claimant' as described under s.44(5) of the Insurance Act 1963, the payment being subject to s.44(2) and the Insurance (Payment of Life Policy Moneys) Regulations 1983.

Following Eusoff Chin J's decision, the insurer could be compelled to release the policy moneys to the nominee. The insurer would be in breach of contract to the policy owner's personal representatives if it failed to do so.

However, in *Perumal a/l Manickam* v. *The Malaysian Co-operative Insurance Society Ltd*,[63] Idris J held that the insurer had the option to release the policy moneys to either the nominee or a proper claimant. The learned judge held that either of them could give

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[62] *Supra*, note 54, at 369.

[63] [1995] 2 CLJ 634. Idris J said at 640:

> "(I)f the beneficiary named in the policy is a person who comes within the category of a proper claimant the moneys should be disbursed to the said person. However, there is one fear ... where in a certain situation the named beneficiary does not qualify to be a proper claimant. It would appear ... that (the) nature (of) the operation of s.44 may cause confusion on the part of the insurers especially when there is more than one proper claimant. With respect I think the defendant should not be unduly concerned about this for the position of the insurers still remains unaffected for so long as payments are made to proper claimants or any of the proper claimants. This is because the role of a proper claimant as contemplated by s.44 is to receive the moneys on behalf of the estate of the deceased. Subsection (5) of the said section does not confer any authority on a proper claimant to utilise the moneys for his or her own use – and if he or she happens to be one of the beneficiaries of the deceased's estate not until after obtaining the distribution order under the relevant law".

a good discharge to the insurer. Thus, the nominee did not have the sole right to give a good discharge to the insurer for the policy moneys.

It is submitted that the decision of Eusoff Chin J is correct because "a nomination is a direction to a person who holds funds on behalf of another to pay those funds in the event of death to a nominated person".[64] Since the insurer was authorised under its contract with the policy owner to remit the policy moneys to the nominee upon the policy owner's death, it should comply with the policy owner's direction unless the nomination was terminated. The legal representatives of the policy owner should not complain if the insurer fulfilled its contractual obligations towards the policy owner. In addition, the principle in *Re Schebsman*[65] gave the nominee the right to give a good discharge to the insurer.

2.3.4 Amount recoverable

The amount recoverable by the nominee under a life policy from the insurer where the nominee had recourse against the insurer was another pertinent point. It is submitted that he had a right to receive the policy owner's entitlement under the policy as prescribed in s.40 of the Insurance Act 1963. Section 40(1) provided, *inter alia*, that the policy moneys paid under a life policy should not exceed the amount of the policy owner's insurable interest in the life insured at the policy's inception.

However, as in the case of a nominee's position in the UK, it could be argued that since both insurer and policy owner had agreed on the amount of insurable interest which the

[64] Margrave-Jones, Clive V., *Mellows: The Law of Succession*, (5th ed., 1993), Butterworths, London, at 10.
[65] *Supra*, note 29.

policy owner had in the life insured at the policy's inception, the insurer would be estopped from disputing the said amount unless it could prove misrepresentation on the policy owner's part.[66] The insurer would have to pay the sum insured to the nominee because the nominee's interest was the policy owner's interest.

2.3.5 Rights against the Insurance Guarantee Scheme Fund

This Part deals with the nominee's rights when the insurer was wound-up. In this connection, it is noted that the Insurance Act 1963 was amended in 1975 to provide for the establishment of a separate insurance guarantee scheme fund for general insurance and life insurance businesses respectively.[67] The funds were contributed by the insurers and managed by Bank Negara Malaysia ("BNM"). The funds were used to meet the liabilities arising out of policies issued by an insurer which was wound-up due to insolvency.[68] The claimants who were qualified to claim from the funds were the policy owners,[69] persons entitled through them, and any other proper claimants as defined in s.44(5) of the Insurance Act 1963.[70]

The issue is whether a nominee was a qualified claimant. Since a nominee was not the policy owner, he had to be either a person entitled through the policy owner or a proper claimant to be eligible for compensation from the insurance guarantee scheme fund for life insurance business. If the nominee was also a proper claimant as defined in s.44(5), it was clear that he could claim against the scheme fund. Otherwise, his rights against

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[66] *Supra*, at 32.

[67] Insurance (Amendment) Act 1975 (Act A294/1975). The amendment came into effect on 15 July 1977.

[68] See the Explanatory Statement to the Insurance Amendment Bill 1975 which was presented in the Dewan Rakyat on 31 March 1975.

[69] Para. 3 of the First Schedule to the Insurance Act 1963 defined the phrase "policy owner" as:

> "where a policy has been assigned, the assignee for the time being and, where they are entitled as against the insurer to the benefit of the policy, the personal representatives of a deceased policy owner"

[70] Section 12A(4)(c) of the Insurance Act 1963. See the discussion in Pt. 2.3.3, *supra*, at 39-40, for the list of "proper claimants".

the fund were uncertain. This was because following the strict application of the doctrine of privity, the nominee being a stranger to the contract between the insurer and the policy owner, did not have a cause of action against the insurer. However, as discussed in Parts 2.3.2[71] and 2.3.3,[72] the High Court in *Manonmani* v. *Great Eastern Life Assurance Co Ltd*[73] ordered the insurer to remit the policy moneys to the nominee. If the nominee had a right to sue the insurer, it follows that he should also enjoy a direct recourse against the insurance guarantee scheme fund when the insurer was wound-up on the ground of insolvency. As discussed above, the writer is of the opinion that the decision in *Manonmani* was *per incuriam*.

The issue whether a nominee was a qualified claimant is now academic, for none of the insolvent insurers prior to 1997 were involved in life insurance business. The current position of the nominee when the insurer becomes insolvent will be discussed in Part 2.4.2.3.[74]

2.4 Position of a Nominee in Malaysia under the Insurance Act 1996

The Insurance Act 1963 was repealed when the Insurance Act 1996 came into effect on 1 January 1997.[75] Under the 1996 Act, the position of a nominee of an own-life policy or a personal accident policy is more certain. Part XIII of the Act includes provisions which prescribe the procedures for the nomination of moneys of a life policy and a personal accident policy effected by a person on his own life providing for payment of policy moneys on his death.[76] It also prescribes the rights of the nominee. In view of

[71] *Supra*, at 38-39.
[72] *Supra*, at 39-41.
[73] *Supra*, note 54.
[74] *Infra*, at 58-67.
[75] PU(B) 580/96.
[76] Section 162 of the Insurance Act 1996.

s.172,[77] Part XIII governs all nominations of such policy moneys made before, on and after, the Insurance Act 1996 came into effect.

Section 163 which prescribes the procedure for nomination, reads as follows:

> (1) A policy owner who has attained the age of eighteen years may nominate a natural person to receive policy moneys payable upon his death under the policy by notifying the licensed insurer in writing the name, date of birth, identity card number or birth certificate number and address of the nominee-
>
> (a) when the policy is issued, or
>
> (b) after the policy has been issued, together with the policy for the licensed insurer's endorsement of the nomination on the policy.
>
> (2) A nomination made under subsection (1) shall be witnessed by a person of sound mind who has attained the age of eighteen years and who is not a nominee named under that subsection.
>
> (3) The licensed insurer-
>
> (a) shall prominently display in the nomination form that the policy owner has to assign the policy benefits to his nominee if his intention is for his nominee, other than his spouse, child or parent, to receive the policy benefits beneficially and not as an executor;
>
> (b) shall record the nomination and the particulars of the nominee in its register of policies; and
>
> (c) shall return the policy to the policy owner after endorsing the nomination on the policy or by issuing an endorsement to the original policy by registered mail to the policy owner and the nomination shall take effect from the date the nomination is registered by the licensed insurer.
>
> (4) A failure to comply with subsection (3) shall not affect the validity of the nomination if it is otherwise proved that the nomination was made by the policy owner and given to the licensed insurer.
>
> (5) A nomination made under subsection (1) may be in favour of one person or several persons and where there is more than one person nominated, the policy owner may direct that specified shares be paid to the persons nominated and in the absence of direction by the policy owner, the licensed insurer shall pay the persons in equal shares.

Since this is a statutory nomination, the relevant statutory provisions have to be considered to determine the rights of the nominee. This Part analyses first, the coverage of the statutory nomination; secondly, the statutory rights of a nominee of the moneys payable upon the death of the policy owner; and thirdly, the revocation of a nomination.

[77] Section 172 of the Insurance Act 1996 stipulates that Part XIII shall have effect from 1 January 1997 notwithstanding anything contained in the policy, or anything inconsistent with or contrary to any written law relating to probate, administration, distribution, or disposition of the estate of a deceased person, or in any rule of law, practice or custom in relation to these matters.

2.4.1 Coverage of the statutory nomination

The statutory nomination in s.163 of the Insurance Act 1996 covers only a nomination effected by a policy owner who has attained the age of 18 years. Four issues arise from this. The issues are first, whether s.163 covers the nomination of all types of policies; secondly, whether s.153 which appears to confer full contractual capacity on a policy owner above the age of 16 years, permits him to effect a nomination despite s.163; thirdly, the qualifications of a nominee as prescribed in s.163; and fourthly, the nomination procedure as prescribed in s.163. These issues are examined below.

2.4.1.1 Life and personal accident policies

Section 163 is within Part XIII of the Insurance Act 1996. Section 162 provides that the word "policy" in Part XIII is a reference to a life policy and a personal accident policy effected by a person on his own life providing for payment of moneys on his death (herein this Part collectively called "the own-life policy"). Thus, the statutory nomination covers only a nomination effected by the owner of an own-life policy. It does not cover the nomination of moneys payable under a policy effected on the life of a person other than the policy owner. Thus, the position of such nominee is similar to that at common law. His rights remain uncertain even after the Insurance Act 1996 came into effect.

2.4.1.2 Policy owner

Section 163(1) provides that only a policy owner who has attained the age of 18 years has the power to nominate. The issue is whether this provision prevails over s.153(2), which provides that a policy owner who has attained the age of 16 years old is "as competent in all respects to have and exercise the powers and privileges of a policy owner in relation to a life policy of which he is the owner as he would be if he had

attained the age of majority".[78] One of the powers and privileges of a policy owner is to nominate a person to receive the policy moneys payable upon his death.

Section 153(2) is a general provision empowering a minor between the ages of 16 and 18 years to effect a policy on his life without the parent's or guardian's consent, whereas s.163(1) is a specific provision on the rights of a policy owner, who has attained the age of majority, to nominate. Following the principle in *Pretty* v. *Solly*,[79] s.163(1), being the specific provision, prevails over s.153 in respect of the minor's power to nominate.[80]

Thus, it is submitted that the owner of an own-life policy who is below the age of 18 years has no capacity to effect a nomination. The nomination made by him has no effect. The insurer has to comply with the procedure prescribed in s.169[81] as if the policy owner died without having made a nomination. The insurer is to release the policy moneys to the policy owner's executor or administrator. Section 169 also gives the insurer the discretion to release the moneys "to the policy owner's spouse, child or parent in that order of priority and where there are more than one spouse, child or

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[78] Section 153(2) of the Insurance Act 1996. According to the Age of Majority Act 1971 (Act 21), the age of majority of a person in Malaysia is 18 years. Section 153(2) is a statutory exception to this general rule.

[79] 53 ER 1032, at 1034. Romilly MR held:

> "The rule is, that wherever there is a particular enactment and a general enactment in the same statute, and the latter, taken in its most comprehensive sense, would overrule the former, the particular enactment must be operative, and the general enactment must be taken to affect only the other parts of the statute to which it may properly apply".

[80] In this context, see Dass, S. Santhana, *Law of Life Insurance in Malaysia*, (2000), Alpha Sigma, Petaling Jaya, at 53. The author holds the opinion that since a policy owner who has attained the age of 16 years may exercise all the powers and privileges of a policy owner as if he has attained the age of majority, he has the capacity to make a nomination.

[81] The insurer will pay the policy moneys in accordance with s.169 where:

(i) the policy owner dies without making any nomination; or
(ii) the nomination is revoked by the death of the nominee before the policy becomes a claim (see s.164(1)(a)) or before the moneys are remitted to the nominee (see s.165(4)); or
(iii) a nominee fails to submit his claim within 12 months after the insurer first becomes aware of the policy owner's death (see s.165(2)).

parent, in equal shares to each person of that class". If there is no surviving spouse, child or parent, the insurer may release the policy moneys up to RM100,000 to the beneficiary of the policy owner's estate or a person likely to be its executor or administrator. The balance will be released to the person who produces the letters of administration or grant of probate to the policy owner's estate. However, if no executor or administrator claims for the balance within twelve months after the first release, the insurer shall pay the balance to the initial recipient.

It is pertinent to point out that the Insurance Act 1996 does provide in s.153(1) for a child between the ages of 10 to 16 to effect and *assign* a policy on his own life provided the transactions are consented to by either his parent or his guardian. A policy owner, who is 16 years old and above, has the full capacity to do so, and he does not need to obtain the written consent of his parent or his guardian. On one hand, the Act treats a child between the ages of 10 to 16 years as a person with limited contractual capacity and a child who is 16 years old and above as a person with full contractual capacity to insure and assign. On the other hand, the Act does not give him the capacity to nominate. This is notwithstanding that, unlike under an assignment, the policy owner does not give away any of his rights or privileges by effecting a nomination under s.163.[82]

In conclusion, a person who is nominated by a policy owner who is a minor to receive the policy moneys upon the policy owner's death has no right whatsoever, for the nomination is not valid. It is also immaterial that the policy owner, upon attaining the age of majority, does not revoke or vary the nomination before the policy moneys become payable. It appears that the 'nominee' will enjoy the rights under the Insurance

[82] The nominee will receive the policy moneys as an executor, not as a beneficiary. *Infra*, at 53-54.

Act 1996 only if the policy owner, after attaining the age of majority, confirms the nomination by re-nominating him. The following Part will discuss the qualifications of a nominee.

2.4.1.3 Nominee

Section 163 of the Insurance Act 1996 requires the policy owner to provide the insurer with the proposed nominee's name, date of birth, latest address,[83] and birth certificate number or identity card number. It thus follows that the nominee cannot be an unborn child or a body corporate. He must be a natural person who is in existence and known to the policy owner at the time of the nomination. A policy owner cannot nominate a person by description[84] or a class of persons.[85] If the policy owner does so, the 'nominee' has no right under the Insurance Act 1996. The nomination is of no effect unless it meets the requirements of the Malaysian Wills Act 1959 (Act 346, Rev. 1988). Then, it would be valid as a will.[86]

The writer submits that the requirement that the nominee should be clearly identified corresponds with the intention of Part XIII of the Act as stated in the Explanatory Notes[87] to the Insurance Bill, that is, "to expedite payment of policy moneys upon

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[83] The nominee's address is required in case the nominee fails to claim the moneys. Then, the insurer is required to notify the nominee at his last known address, of his entitlement to claim the said moneys within 12 months from the date the insurer became aware of the policy owner's death. *Infra*, at 57.

[84] For example, "my fiancé".

[85] For example, "my siblings".

[86] *In the Goods of Baxter*, *supra*, note 18; and *Patch* v. *Shore* 62 ER 743.

[87] Contrary to *Foo Loke Ying and Anor* v. *Television Broadcast Ltd and Ors* [1985] 2 MLJ 35, at 39; and *Re First Malaysia Finance Bhd* [1990] 1 MLJ 504, at 505, the explanatory statement in a Bill could be relied upon to interpret a provision. The said cases were decided prior to the enactment of s.17A in the Interpretation Acts 1948 and 1967 (Act 388, Consolidated and Rev. 1989) on 24 July 1997. Section 17A reads:

> "In the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object".

It is submitted that the said s.17A in fact promotes the use of extrinsic material, such as the Explanatory Notes to a Bill, to discover the purpose of the legislation.

death of the person insured". The insurer can pay the policy moneys without delay only if the identity and relevant particulars of the nominee are known to it.

2.4.1.4 Prescribed procedure

Apart from prescribing the qualifications of the nominator and nominee, s.163 of the Insurance Act 1996 also prescribes the procedure for nomination. If the nominator does not comply with the procedure, the nomination is invalid and the 'nominee' will not enjoy the benefits conferred by Part XIII of the Act on a nominee.[88]

According to s.163(1) and (2), a nomination is effected when the policy owner has submitted a duly completed nomination form to the insurer either at the time the policy is issued or after it has been issued. The nomination must be witnessed by a person who is of sound mind and has attained the age of 18 years. The nominee cannot be the witness to his nomination.

The insurer, too, must comply with the procedure laid down in s.163(3) upon receipt of the duly completed nomination form from the policy owner. First, the insurer is to record the nomination and particulars of the nominee in its register of policies. Secondly, the insurer is to either endorse the nomination on the policy or issue an endorsement to the original policy,[89] and return it to the policy owner by registered mail.

[88] If the prescribed procedure is not followed, the insurer is required to comply with the procedure laid down in s.169 when the insured event happens. If the insurer releases the moneys without complying with the provisions of the Insurance Act 1996, it is not entitled to a statutory discharge.

[89] See Rafiah, Salim, "Part XIII of the Insurance Act 1996: Payment of Policy Money under a Life Insurance Policy or Personal Accident Insurance Policy" [1997] 24 *JMCL* 55, at 62. The author suggests that the nomination should be endorsed on the policy if the policy was forwarded to the insurer. However, if the policy was not forwarded to the insurer together with the nomination form, the insurer should issue an endorsement to the policy.

The writer submits that the prescribed nomination procedure is not free from controversy. The first controversy is related to r.44(a)(vi) of the Insurance Regulations 1996 (PU(A) 653/1996) when read together with s.163(1) of the 1996 Act. The regulation requires the insurer to enter the nominee's name, address and relationship with the policy owner into its register of policies. However, s.163(1) does not require the policy owner to notify the insurer of his relationship with the nominee. It is submitted that the insurer would require the said information to determine whether the nomination is an ordinary nomination or a trust under s.166 of the Insurance Act 1996. A trust under s.166 is created when the policy owner nominates his spouse or child, or his parents or one of his parents at a time when he does not have a living spouse or child. In the pages that follow, the writer will use the phrase "a s.166 beneficiary" to denote the beneficiary of a trust under s.166. It will be seen in Chapter 4 of this thesis that the rights of a s.166 beneficiary are different from those of a nominee. The insurer should therefore ensure that its nomination form requires the policy owner to declare his relationship with his respective nominees.

The second controversy pertains to s.163(4) which provides that the insurer's failure to register the nomination will not invalidate it. This is despite s.163(3)(c) which provides that a nomination takes effect only when the insurer records it in the insurer's register of policies. This inconsistency could be due to s.164(1)(c) which provides that "a nomination, including a nomination to which s.166 applies, shall be revoked by any subsequent nomination". Thus, where the insurer fails to record the nominee's particulars in its register, the nomination is effective on the death of the policy owner if he has not made a subsequent nomination. The nominee who wants to enjoy the rights conferred on him by the Insurance Act 1996 must then prove that the policy owner has submitted a duly completed nomination to the insurer.

However, there appears to be an oversight on the part of the legislature. Section 166(4) provides that the policy owner cannot revoke a trust under s.166 without the trustee's prior written consent.[90] As a result, where the first nomination creates a trust under s.166, the policy owner cannot revoke it by making another nomination unless the trustee has consented to it. This conflicts with the general provision in s.163(3)(c) that a second nomination which is recorded by the insurer in its register is valid.

It is submitted that in view of the purpose of s.166 as well as the restriction placed by s.166(4), the first nomination which is in favour of a s.166 beneficiary has priority. This is supported by *Shunmuga Vadevu S Athimulam and Ors* v. *The Malaysian Co-Operative Insurance Society Ltd and Anor*,[91] a case which was decided after the Insurance Act 1996 came into effect. In this case, the deceased nominated his wife to receive the policy moneys payable upon his death. Subsequently, he made another nomination. Abdul Hamid Mohamad J held that the second nomination was void. The policy owner had created a trust under s.166 when he nominated his wife to receive the policy moneys. He did not obtain the trustee's prior written consent as required by s.166(4) when he effected the second nomination.

The third controversy pertaining to the prescribed nomination procedure arises from the fact that neither the insurer nor the policy owner is required to notify the nominee of his nomination. It is submitted that the nominee should be notified[92] for the following reasons. A nominee who is notified of his nomination is given the option

[90] Section 166(4) of the Insurance Act 1996 reads, "A policy owner shall not deal with a policy to which subsection (1) applies by revoking a nomination under the policy, by varying or surrendering the policy, or by assigning or pledging the policy as security, without the written consent of the trustee."
[91] [1999] 1 CLJ 231. For an in-depth discussion on this case, see Part 4.4.1, *infra*, at 176-177.
[92] In 2003, the InsuranceInfo, which is a collaborative programme of Bank Negara Malaysia and the insurance industry, issued a guide booklet on life insurance. The guide advises a policy owner to notify his nominee about the insurance policy, and presumably, his nomination.

whether to accept or reject his nomination. If he rejects the nomination during the lifetime of the policy owner, the policy owner has the opportunity to nominate another person to receive the policy moneys upon his death.[93]

Further, a nominee who is unaware of his nomination, will not submit his claim to the insurer upon the policy owner's death. The insurer, unaware of the policy owner's death, will not be subjected to s.165(2).[94] The insurer will not notify the nominee of his entitlement until the deceased policy owner's next-of-kin claims the moneys from the insurer. Although the next-of-kin may be entitled to the proceeds as a beneficiary, the insurer cannot release the moneys to him. The insurer must notify the nominee of his right to claim the moneys. The insurer may release the policy moneys to the next-of-kin[95] only if the nominee fails to claim for them within 12 months from the time the insurer first knew of the policy owner's death.[96] All these may result in delay and may not correspond with the legislature's intention when it enacted Part XIII of the Insurance Act 1996.[97]

In conclusion, the writer submits that the legislature should review s.163(3) and (4) to remove the uncertainties mentioned above and to strengthen the position of the nominee.

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[93] *Infra*, at 54-55.
[94] Under s.165(2), the insurer is required to notify the nominee of his entitlement if the nominee fails to submit his claim within 60 days from the date the insurer first knew of the policy owner's death. This will be discussed in detail in Pt. 2.4.2.2, *infra*, at 57.
[95] Section 169 of the Insurance Act 1996. *Supra*, at 46-47.
[96] *Infra*, at 57.
[97] *Supra*, at 48-49.

2.4.2 Rights of a nominee

Upon the enactment of the Insurance Act 1996, a nomination of an own-life policy takes effect under the Act. It thus follows that the rights of the nominee are governed by the Act.

2.4.2.1 Status of a nominee

Section 167(1) clearly provides that the nominee who claims for the policy moneys upon the policy owner's death, shall receive them as an executor of the policy owner's estate. For ease of reference, s.167(1) is reproduced below.

> A nominee, other than a nominee under subsection 166(1), shall receive the policy moneys payable on the death of the policy owner as an executor and not solely as a beneficiary and any payment to the nominee shall form part of the estate of the deceased policy owner and be subject to his debts and the licensed insurer shall be discharged from liability in respect of the policy moneys paid.

At no time is the policy or its moneys beneficially vested in the nominee.[98] As the nominee is the executor of the moneys, which form part of the deceased policy owner's estate, he has to settle the deceased policy owner's debts with the policy moneys before distributing the balance in accordance with the laws of succession applicable to the deceased.

Section 172(1) expressly provides that nothing in the policy shall derogate from Part XIII of the Insurance Act 1996. Thus, the provision in s.167(1) when read together with s.172, does not permit the policy owner to circumvent s.167 by expressly providing that the nominee is to receive the policy moneys as a beneficiary. It is immaterial whether the policy or the nomination was effected before the Act came into

[98] Unless he is entitled to it under the laws of succession applicable to the deceased policy owner.

force. The principle in *Re Schebsman*[99] and *Manonmani* v. *Great Eastern Life Assurance Co Ltd*[100] as discussed in Parts 2.2.3.1[101] and 2.3.1[102] respectively, does not apply even where the nomination was effected before the Insurance Act 1996 came into effect.

It is submitted that a policy owner who effected the nomination prior to the Insurance Act 1996 might have intended his nominee to receive the policy moneys for his own benefit. Further, a policy owner who effects a nomination after the 1996 Act came into effect may be ignorant of the effect of s.172 on the nominee's role. This is despite s.163(3)(a) which requires an insurer to display in the nomination form that the policy owner has to assign the policy moneys if he intends his nominee, other than his spouse or child, or his parent who is nominated when he has no living spouse or child, to receive them as a beneficiary. It is possible for a policy owner to effect the nomination with the intention and hope of benefiting the nominee. Unfortunately, with the abrogation of the principle in *Re Schebsman* and *Manonmani* by s.172, the policy owner's intention will not be given effect.

In addition, a nominee may not be aware of his role as an executor. Thus, upon nomination, he should be notified of his nomination and status as an executor. He should be given an opportunity to reject the nomination. A nominee who does not benefit from the nomination, may reject it since he will be burdened with the duties and obligations of an executor upon receipt of the moneys. If a nominee rejects the

[99] *Supra*, note 29.
[100] *Supra*, note 54.
[101] *Supra*, at 29.
[102] *Supra*, at 37-38.

nomination after the policy owner's death,[103] there will only be delay in the receipt of the policy moneys by the rightful claimant. Even if a nominee does not reject his nomination upon first being notified, the insurer should remind the nominee of his status and duties as an executor when he receives the policy moneys. Otherwise, he may unwittingly appropriate the moneys.

2.4.2.2 Rights against the insurer

A nominee shall receive from the insurer the sum insured after deducting the moneys which are due under the policy[104] or under any assignment or pledge.[105] Section 152(1) of the Insurance Act 1996, which provides that the amount payable under a policy shall not exceed the amount of the insurable interest that the policy inceptor has in the life insured at the time when the policy becomes a claim, does not apply. This is because Part XIII of the Insurance Act 1996 applies only to a policy where the policy owner is the life insured and a person is deemed to have unlimited insurable interest in his own life.[106]

However, if the policy owner has nominated several persons and directed that specified shares of the policy moneys be paid to each of the nominees, a nominee will not receive the whole sum insured, but only his specified portion. In the absence of such direction, the moneys are to be paid to the nominees in equal shares.[107]

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[103] He may still do so, for an executor is given the option whether to accept or renounce the office. See *Halsbury's Laws of Malaysia*, Vol. 4, (2002 Reissue), MLJ, Kuala Lumpur, at paras. 70-248 and 70-262 to 264.

[104] Section 154 of the Insurance Act 1996. The only exception is where the deduction is made with the prior consent of the person entitled to the said moneys.

[105] Section 168(1) requires the insurer to remit the moneys assigned or pledged to the assignee or pledgee, and not to the nominee. Where the assignment or pledge is over a part, and not the whole policy moneys, the insurer is to pay the balance of the moneys to the nominee after paying the assignee or pledgee. It is immaterial whether the assignment or pledge is created before or after the nomination. *Infra*, at 135.

[106] Section 152(1) of the Insurance Act 1996.

[107] Section 163(5) of the Insurance Act 1996.

Since the insurer is required by the Act to pay the nominee, it follows that the nominee has the rights to sue and give a good discharge to the insurer. His right to sue arises 60 days after he has submitted to the insurer his claim together with the proof of the policy owner's death.[108] This is following s.161(1) which requires the insurer to pay the claim within 60 days, failing which the nominee is entitled to receive from the insurer a minimum compound interest of 4% per annum or such other rate as may be prescribed on the amount unpaid until the date of payment. The writer submits that the time frame of 60 days for the insurer to process the claim is too long.

In addition, the interest of 4% imposed on the amount unpaid is low. It is even lower than the rate prescribed by O.42 r.12 of the Rules of the High Court 1980 (PU(A) 50/1980) and O.29 r.12 of the Subordinate Court Rules 1980 (PU(A) 328/1980) for judgment sums, which is 8% per annum. The writer recommends that the Insurance Act 1996 should specify a rate which is fair to the claimant and which will also act as a factor to discourage the insurer from delaying payment of the moneys to the claimant. The prescribed rate could be based on the average overdraft rate charged by financial institutions. Alternatively, it could fix a higher default rate which is deterrent in nature. Examples are found in clause 23(2) of Schedule G and clause 26(2) of Schedule H to the Housing Developers (Control and Licensing) (Amendment) Regulations 2002 (PU(A) 473/2002). A housing developer is liable to pay its purchaser liquidated damages of 10% per annum of the property's purchase price from the expiry date of the delivery of vacant possession until the date of its actual delivery.

The next pertinent issue is whether the insurer has any obligation towards the nominee if the nominee fails to submit his claim for the policy moneys. The nominee may not

[108] Sections 161(1) and 165(1) of the Insurance Act 1996.

now of his nomination because it was made without his knowledge or consent. urther, he may not know of the policy owner's death.[109] Section 165(2) provides that f the insurer does not receive a nominee's claim within 60 days of it being notified of he policy owner's death, it is required to write to the nominee of his entitlement at his ast known address. If the nominee fails to claim the policy moneys within 12 months rom the time the insurer first knew of the policy owner's death, s.165(3) requires the nsurer to pay out the moneys in accordance with s.169.[110]

here is a weakness in s.165(3). It does not stipulate a time period for the insurer to otify the nominee of his entitlement. Thus, a situation may arise where the insurer otifies the nominee just before the expiry of the 12 months' period giving the nominee ittle time to submit his claim. In such circumstances, even though the nominee is not at ault for not submitting his claim within the stipulated time period, the insurer is equired by s.165(3) to treat his portion as unnominated, and pays out the portion in ccordance with s.169. Another situation where the insurer is required by s.165(4) to eat the deceased nominee's portion as unnominated is when a nominee dies after the eath of the policy owner but before the policy moneys are paid to the nominee. It is bmitted that where there are several nominees, the unwilling or deceased nominee's are should not be treated as unnominated. Instead, his share should be released to other nominee for his distribution in accordance with the laws of succession plicable to the deceased policy owner. As highlighted, a nominee is merely an ecutor of the policy moneys.

Another situation is where the nominee is aware of his nomination and the policy owner's death, but ses to submit his claim because he will not receive the moneys as a beneficiary.
Supra, at 46-47.

.4.2.3 Rights against the Insurance Guarantee Scheme Fund ("IGSF")

he Insurance Act 1996 prescribes the rights of a nominee of a nomination which is ffected pursuant to the Act. It also prescribes the rights of a policy owner and a person ntitled through him when the insurer becomes insolvent. Part XIV of the Act provides or the establishment of separate insurance guarantee scheme funds (the "IGSF") for eneral insurance and life insurance businesses respectively. The funds for the scheme, hich are contributed by the insurers and managed by Bank Negara Malaysia "BNM"), are to be utilised to meet the liabilities of an insolvent insurer to its policy wners and persons entitled through them. For ease of reference, they will be referred o as "the qualified claimants" in the discussion below.

his Part scrutinises the workings of the IGSF in relation to the rights of a nominee. he issues that will be raised are first, the pre-conditions to claim against the IGSF; econdly, the absence of a time period for the payment of compensation to a qualified laimant; thirdly, whether the qualified claimant is entitled to receive interim or dvance payment from the IGSF; and fourthly, the termination of the policy upon the surer's winding-up.

) Pre-conditions to claim against the IGSF

ot everyone who has a claim against an insolvent insurer is eligible to claim mpensation from the IGSF. The following conditions must be fulfilled.

Qualified claimant

e first condition is that the claimant is the owner of a policy issued by an insolvent urer or a person entitled through the policy owner, for s.178(1)(c) of the Insurance t 1996 provides that BNM "may utilise the moneys in an insurance guarantee

heme fund to meet the liabilities of an insolvent insurer to a policy owner or person ntitled through him". Thus, it is pertinent to study the scope of the phrases "the policy wner" and "the person entitled through him (the policy owner)".

he phrase "the policy owner" is defined in s.2 of the Insurance Act 1996 as follows:

> "policy owner" means the person who has legal title to a policy and includes –
> (a) where a policy has been assigned, the assignee;
> (b) the personal representative of a deceased policy owner, where such personal representative is entitled as against the insurer to the benefits of a policy;
> (c) in relation to a policy providing for the payment of annuity, an annuitant; and
> (d) where under a policy, moneys are due or payable, whether periodically or otherwise, the person to whom the moneys are due or payable.

nfortunately, the definition is far from clear, for it contains contradicting words, amely, "means" and "includes". The definition for a term which is defined to "mean", explanatory and restrictive. If the definition for a term has the word "includes", the efinition is extensive. Thus, where the definition contains the words "means" and ncludes", there is uncertainty as to its interpretation.[111] However, there are views that e phrase "means and includes" limits the meaning of the word.[112]

the absence of local judicial interpretation, there is obviously uncertainty as to the rrect interpretation to the phrase "the policy owner" in s.2 of the Insurance Act 1996. e writer is of the view that the natural meaning of the phrase is that it refers to a son who is legally entitled to the policy moneys. He must have legal recourse inst the insurer if the insurer breaches its obligations. Paragraphs (a) to (d) of the inition are merely illustrations of a policy owner. There could be other categories of

dgar, S.G.G., *Craies on Statute Law*, (7th ed., 1971), Sweet & Maxwell, London, at 213; Gifford, and John Salter, *How to Understand an Act of Parliament*, (1996), Cavendish Publishing, London, 1-53; Pearce, D.C., and R.S. Geddes, *Statutory Interpretation in Australia*, (4th ed., 1996), rworths, Sydney, at paras. 6.36-6.40.
ifford and Salter, *ibid.*, at 52; and Pearce and Geddes, *ibid.*, at para. 6.40.

rsons who are entitled to receive the policy moneys from the insurer. If this is the rrect interpretation, the person to whom the policy moneys are due and payable der the policy as stated in paragraph (d) must be a person who is legally entitled to e policy moneys.

ith regard to the phrase "person entitled through him (the policy owner)", it, too has t been the subject of judicial interpretation. It is also not free from difficulties. The iter submits that there are two possible interpretations to this phrase. The first ssible interpretation is that the IGSF is to meet an insolvent insurer's contractual bilities to a person other than the policy owner. However, the writer submits that this erpretation is not acceptable. The doctrine of privity does not permit a third party to e the insurer. It is doubted that a person who does not have any right against the urer is conferred a right to claim compensation from the IGSF when the insurer is und-up.

e writer submits that the phrase "person entitled through him (the policy owner)" also be interpreted to mean the third party to whom an insolvent insurer is either utorily or contractually liable. If an insolvent insurer is liable to pay a third party er any policy or by virtue of any statute, the moneys in the IGSF may be withdrawn eet the said liability. It is submitted that this interpretation is preferred and should dopted, for it is in accordance with the spirit of the IGSF's establishment.

pertinent issue is whether a nominee whose nomination complies with s.163 is ed to claim compensation from the IGSF. As discussed in Part 2.4.2.2,[113] the nee has a right to claim against the insurer for the policy moneys payable upon the

a, at 56.

licy owner's death. It is thus submitted that a nominee is a qualified claimant. He ay seek compensation from the IGSF if the insurer is wound-up after the policy vner's death. However, he may not claim from the IGSF any moneys payable to the licy owner because a nominee is entitled to receive the policy moneys payable only on the policy owner's death. Thus, a nominee of a life policy is not entitled to claim om the IGSF for life insurance business, the actuarial valuation reserve payable to the licy owner where the policy ceases to be effective when the insurer is wound-up. A minee of a personal accident policy is also not entitled to claim from the IGSF for neral insurance business the prorated premium for the unexpired part of the policy.

the ensuing discussion, the writer will use the phrase "the qualified claimant" stead of the term "the nominee". This is because the discussion in Part 2.4.2.3 is also evant and will be referred to in the other chapters of this thesis.

Insurer is wound-up

e second pre-condition for a claim against the IGSF is that the insurer must have n wound-up on the ground of insolvency.[114] Section 182 provides that the moneys n the IGSF may be utilised to pay the qualified claimant only when the insurer's ding-up order is effective.[115] This is despite s.178(1)(c) which provides that the neys in the IGSF may be utilised "to meet the liabilities of *an insolvent insurer* to a

r-date, the funds from IGSF have been withdrawn to meet the liabilities of three insolvent insurers n were wound-up pursuant to petitions filed by BNM. They are First General Insurance (M) Sdn SEG Insurance Sdn Bhd and Mercantile Insurance Sdn Bhd. All three were general insurers.

e Insurance Act 1963 did not have this requirement. It must also be noted that not all companies are wound-up by the court are insolvent. An insurer which is solvent and has a viable business can e wound-up. The IGSF will not meet such insurer's liabilities since the insurer's assets are ient to settle the claims lodged against it. Moreover, s.111(1) of the Insurance Act 1996 requires solvent insurer's business to have been transferred to another insurer. The claimant should claim t the transferee.

policy owner or a person entitled through him".[116] Section 178(3) prescribes three alternative insolvency circumstances which will in most, if not all, cases happen before the insurer is wound-up. The three circumstances are first, the insurer is insolvent at the close of its previous financial year, for which the balance sheet and other relevant accounting records have been lodged with BNM;[117] secondly, winding-up proceedings have been commenced against the insurer;[118] and thirdly, the court has made a receiving order against the insurer. It is submitted that in view of s.182, the prescribed statutory tests for insolvency are redundant. A qualified claimant cannot claim compensation from the IGSF unless the insurer is wound-up.

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[116] The writer's own emphasis.

[117] There is uncertainty on the meaning of the phrase 'insolvent'. According to Dzaiddin Abdullah FCJ in *China Airlines Ltd* v. *Maltran Air Corp Sdn Bhd and Anor Appeal* [1996] 3 CLJ 163, at 180:

> the word 'insolvent' … cannot have any technical meaning ascribed to it because it has no such meaning in our Bankruptcy Act 1967, where only the word 'bankruptcy' is used (see s.3(1) of the Act as to the 'Acts of bankruptcy'). Thus, insolvent by popular usage simply means unable to pay debts or if it is to be more formal, it means 'unable to pay one's debts or discharge one's liabilities' (The Shorter Oxford English Dictionary).

There are two simple tests to determine the financial health of a person (see *Datuk Mohd Sari Datuk Nuar* v. *Idris Hydraulic (Malaysia) Bhd* [1996] 3 CLJ 877 and *Re Great Eastern Hotel (Pte) Ltd* [1989] 1 MLJ 161, 169). They are 'the quick assets test' (a company is insolvent if its current liabilities exceed its current assets) and 'the overall assets and liabilities test' (a company is insolvent if the liabilities of the company, present and future, exceed all its assets). It is unclear which test the legislature intended to apply for the purpose of s.178(3)(a). The writer is of the view that 'the overall assets and liabilities test' should apply for the following reasons.

First, 'the quick assets test' is a test to determine whether a business could meet its current liabilities immediately (see *Re Great Eastern Hotel (Pte) Ltd*, *supra*.). In other words, it is a liquidity test and not a test in law for insolvency. As succinctly put by Needham J in *Expo International Pty Ltd* v. *Chant and Ors (Receivers and Managers Appointed) (In Liq.) and Anor* [1979] 2 NSWLR 820, at 836, "a lack of liquidity is not equivalent to insolvency".

Secondly, the insurer's financial health is to be determined from the balance sheet and other relevant accounting records lodged with BNM. If the intended test is the quick assets test, the financial health should be determined solely from the insurer's balance sheets, without going through the other accounting records (see *Datuk Mohd Sari Datuk Nuar* v. *Idris Hydraulic (Malaysia) Bhd, supra*, at 889).

Thirdly, s.180 of the Insurance Act 1996 (see also s.12A(4C) of the Insurance Act 1963) provides that BNM shall determine the percentage of a claim or class of claims that is payable by the IGSF after taking into consideration the insurer's assets that are available for distribution to its claimants. This also indicates that the applicable test is the overall assets and liabilities test.

[118] There are two types of winding-up, namely voluntary winding-up and compulsory winding-up by the court. An insurer cannot be wound-up voluntarily unless its whole business has been transferred to another insurer (see s.111(1) of the Insurance Act 1996). Then, all claims pursuant to policies issued by the former will be directed to the latter, and not to the IGSF. Thus, the second test pertains to the commencement of the compulsory winding-up proceedings. Section 219 of the Companies Act 1965 (Act 125, Rev. 1973) stipulates that such winding-up proceedings is deemed to have commenced upon the presentation of the petition for winding-up or on the day a resolution is passed to wind-up the company, whichever is the earlier.

(iii) Notification to the liquidator

The third pre-condition is that the qualified claimant must have notified the liquidator of his claim within six months from the effective date of the insurer's winding-up order or such other period as BNM may allow.[119] The writer is of the view that the time frame of six months is too short. A qualified claimant may not be aware of the insurer's status and submit his claim in time. In addition, where the qualified claimant is a nominee, he may not be aware of his nomination.[120]

Though BNM has the discretion to extend the claim's period on the merits of each case,[121] it is recommended that the legislature reviews the current prescribed claim's period. BNM should adopt the formula prescribed by the UK's Financial Services Authority's Compensation Sourcebook Instrument 2001 ("COMP") 8.2.3R.[122] If it is adopted, then the nominee will have six years from the time the policy moneys are due and payable by the insurer to claim from the IGSF.

(iv) BNM has determined the minimum and maximum amount of compensation

The fourth pre-condition is that BNM has fixed the minimum and maximum amounts on a claim or class of claims which is payable from the IGSF. This is following s.180 of the Insurance Act 1996. Section 180(1)(b) stipulates that the minimum amount is RM10 or such greater amount as may be prescribed by BNM. Thus, if a qualified claimant's claim is lesser than the minimum amount prescribed by BNM, he will not

[119] Section 179(2)(b) of the Insurance Act 1996. Its genesis is s.12A(4B)(b) of the Insurance Act 1963.
[120] *Supra*, 52.
[121] It is to be noted that the IGSF is still settling claims against the liquidated insurers which came within the ambit of the previous IGSF. In 2004, the IGSF settled 605 claims totaling RM4.8million against the Mercantile Insurance Sdn Bhd which was wound-up by the court on 6 September 1994. See 42nd Insurance Annual Report (2004), at 7.
[122] COMP 8.2.3R provides that the FSCS (UK) "must" reject an application for compensation if the claimant's claim against the insurer is time barred either when the insurer becomes insolvent or when the claimant first indicates in writing that he may have a claim against the insurer.

receive any compensation from the IGSF. Possibly, the imposition of a minimum amount is to reduce the volume of insignificant and small claims and the costs incurred in processing and administering them.

Following s.178(2) and s.180(2), the qualified claimant will not receive the full amount due to him. He can receive a maximum amount not exceeding 90% of the lawful amount.[123] BNM is to determine the maximum amount after taking into consideration any moneys receivable by the qualified claimant from all other sources, including the insurer's liquidator[124] and the insolvent insurer's assets which are available for distribution.[125]

The writer is of the view that the maximum amount recoverable by a qualified claimant should not be statutorily prescribed. It is more than sufficient that s.180 provides that BNM has regard to the insurer's assets which are available for distribution before fixing the maximum amount. The writer notes from the 42nd Insurance Annual Report (2004) that currently BNM imposes levies only on general insurers. The levy is 0.25% of the insurer's gross direct premiums for the preceeding financial year.[126] Before 2002, the levy was pegged at 1%. No levy is imposed on the premiums collected by the life insurers.

[123] Section 12A(4D) of the Insurance Act 1963 also conferred on BNM the discretion to impose a maximum amount on a claim which was payable under the scheme. This was not found in the original IGSF (1977). It was included only on the 9 September 1994 pursuant to the Insurance (Amendment) Act 1994 (Act A898/1994).

[124] Section 178(2) of the Insurance Act 1996 and the proviso in s.12A(4) of the Insurance Act 1963. These limitations were not found in the original IGSF (1977). They were imposed only on the 9 September 1994 pursuant to the Insurance (Amendment) Act 1994.

[125] Section 180 of the Insurance Act 1996 and s.12A(4C) of the Insurance Act 1963.

[126] Prior to 2002, the quantum of levies payable by the general insurers was 1% of their respective gross direct premiums. It was reduced to 0.25% in 2002 and remained at 0.25% in the years 2003 and 2004. See the 40th Insurance Annual Report (2002), at 5; and 41st Insurance Annual Report (2003), at 6; and 42nd Insurance Annual Report (2004), at 7.

It is proposed that contributions from life insurers should also be collected.[127] BNM should not wait until there are signs of ill-health in the balance sheets of any of the life insurers before imposing levies on the life insurance industry. If necessary, BNM should also increase the levy imposed on the general insurers to ensure there is sufficient moneys in the IGSF for general insurance business to meet the claims of qualified claimants.

(b) Time period for payment

One of the pre-conditions for a claim against the IGSF is that the qualified claimant must have submitted his claim to the insurer's liquidator within six months from the effective date of the insurer's winding-up order or such other period as allowed by BNM. Unfortunately, there is no time period for the IGSF to remit the compensation to the claimant. In its absence, there is a risk that the IGSF may delay paying the qualified claimant. The risk is real as highlighted by the Honourable Member of Parliament for Kota Melaka during the second reading of the Insurance Bill on 10 July 1996.[128]

To protect a qualified claimant when the insurer is wound-up, the writer recommends that the practice prescribed by COMP 9.2.1R be adopted. COMP 9.2.1R prescribes that the Financial Services Compensation Scheme Ltd. ("the FSCS (UK)") must remit the payment within three months after it has calculated the amount of compensation due to

[127] According to the 42nd Insurance Annual Report (2004), at 7, the amount in the IGSF for life insurance business was RM500,000, being fines collected for offences related to life insurance business which were credited into the IGSF.

[128] Parliamentary Debates, Dewan Rakyat, Official Report, Ninth Parliament, Second Session, 10 July 1996, Columns 75-79.

the claimant.[129] The Financial Services Authority may extend the payment period to six months. The FSCS (UK) itself may also postpone the payment if it considers that the claim or a part thereof is covered by another insurance with a solvent insurer or where another person may make payments to the claimant.[130] Thus, if the FSCS (UK)'s practice is adopted, a qualified claimant will receive his entitlement within a time frame which is reasonable under the circumstances.

(c) Interim payments

As discussed in Part 2.4.2.3(a),[131] a qualified claimant is not entitled to receive any payments until the insurer's winding-up order has become effective and after BNM has fixed the maximum percentage or amount of a claim or class of claims payable from the IGSF.

It is recommended that the procedure of FSCS (UK) as found in COMP 11.2.4R be adopted. BNM should be given the discretion to make interim payment to a qualified claimant where compensation is payable in principle but its final amount has not been fixed.[132] To enable BNM to prove in the insurer's liquidation, the qualified claimant could be required to assign to the IGSF the right to claim the actual amount paid to him from the scheme fund.

[129] In calculating the amount of compensation due to a qualified claimant, COMP 12.2.7 requires the FSCS (UK) to take into account all payments received by the claimant in connection with his claim from all sources. They include the insolvent insurer, another insurer who covers the same loss, the claimant's broker or any other third party. See Merkin, Robert, *Colinvaux and Merkin's Insurance Contract Law* (Loose-leaf) (Release 2, April 2002), Sweet & Maxwell, London, at paras. D-1136 to D-1137.

[130] COMP 9.2.2R(3). It is submitted that this does not apply to life insurance policies.

[131] *Supra*, at 61-64.

[132] Section 214(1)(i) of the Financial Services and Markets Act 2000 (UK).

(d) Termination of policy

The IGSF scheme accords protection to qualified claimants who have claims against the insurer, but not those who have no pending claims against the insurer prior to the insurer's winding-up. The scheme does not provide for BNM to try to secure the continuity of an insurance policy with another insurer. In fact, s.121 of the Insurance Act 1996 provides that a general policy shall cease to remain in force with effect from the date of the insurer's winding-up order. Thus, the nominee of a personal accident policy issued by an insurer which is wound-up on the ground of insolvency will not continue to enjoy the protection conferred by the policy if the policy becomes a claim after the winding-up order.

As for a life policy issued by an insurer which is wound-up on the ground o insolvency, the policy, too, shall cease to be effective pursuant to s.121 unless the insurer's liquidator acts under s.125. Section 125 gives the liquidator of a life insurer the discretion to transfer the insurer's assets and liabilities, including life policies, to another insurer. If they are transferred, the new insurer will take over the policies. Thus, the nominee of a life policy which has been transferred to another ins enjoy the protection conferred by the new policy.

The writer recommends that if the policy is for a short term of not more than one year, the policy should not cease when the insurer is wound-up, but only on its expiry. For a long term policy, BNM should be conferred the power to require a solvent insurer to take over the policy. These measures will safeguard the position of not only the policy owner but all third parties who may be prejudiced when the insurer is wound-up on the ground of insolvency.

2.4.3 Revocation of nomination

In the preceding Part, the writer has analysed the rights of a nominee. However, a nominee will lose them if the nomination is revoked. In this connection, it is noted that s.164 of the Insurance Act 1996 prescribes the procedure for the revocation of a nomination. It provides that a nomination may be revoked at any time by the policy owner by either giving a written notice to the insurer or submitting a new nomination.[133] It also provides that a nomination is revoked if the nominee predeceases the policy owner. The deceased nominee's share will then be apportioned among the surviving nominees.[134] If there is no surviving nominee, the policy moneys will be paid out in accordance with s.169 as if the policy owner did not make any nomination. Section 165(4) also provides that a nomination is revoked if the nominee dies after the policy owner, but before the insurer remits the policy moneys to him. The writer submits that the automatic revocation of the nomination upon the nominee's death is in line with s.167(1) which provides that a nominee shall receive the moneys as an executor.[135] It is also in line with the general principle that an agency is revoked upon the agent's death.[136] If the agency arising from the nomination is not revoked, the insurer has to release the moneys to the nominee's legal representatives who, in turn, have to distribute the moneys according to the laws of succession applicable to the deceased policy owner. This will result in unnecessary delay.

Apart from prescribing the procedure for revocation, s.164 also expressly provides that a nomination cannot be revoked by a will, or by any other act, event or means. Thus, a nomination remains effective despite the policy owner's marriage subsequent to the

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[133] Section 164(1)(b) and (c) of the Insurance Act 1996.
[134] Section 164(3) of the Insurance Act 1996.
[135] *Halsbury's Laws of Malaysia*, *supra*, note 103, at para. 70-289.
[136] Section 154 of the Contracts Act 1950.

nomination. Nevertheless, it must be noted that if the policy owner bequeaths the policy moneys to another person in a valid will, the nominee will have to remit the moneys to him upon receipt from the insurer. This is because the nominee receives the moneys as an executor.

2.5 Conclusion

It is the perception of the general public that a nominee is legally and beneficially entitled to the policy moneys. However, as was shown in this Chapter, this perception is not always correct at common law. If the nomination is non-statutory, it can be either a testamentary disposition or a contractual act. Much depends on the nature and wording of the policy. If the nomination is a testamentary disposition, the nominee is entitled to receive the policy moneys as a beneficiary. If it is a contractual act, the rights of the nominee are uncertain. First, even though the insurer is obliged under the contract to release the policy moneys to the nominee, the nominee has no recourse against the insurer. Secondly, even if the insurer releases the moneys to the nominee, it is uncertain whether the nominee is entitled to retain them for his benefit.

In Malaysia, the position of a nominee of a life policy or a personal accident policy effected by a person on his own life providing for payment of policy moneys on his death ("an own-life policy") is more certain, but weaker. Although the nominee has the rights to sue and give a good discharge to the insurer for the policy moneys, he has no other rights. He receives the moneys as an executor and has to apply them according to the laws of succession applicable to the deceased policy owner. This also applies to nominations which were effected before the Insurance Act 1996 came into force. As a result, the expectations and legal position of the nominees who were nominated before

the Insurance Act 1996 might be defeated. The Act has undermined the nominee's position.

As the nominee receives the moneys as an executor, he is given the choice whether to claim for them when the policy owner dies. If he claims for them, he is imposed with the duties and obligations of an executor. Thus, there is a likelihood of a nominee who is not an heir under the laws of succession applicable to the deceased policy owner, declining to claim the moneys. This undermines the purpose of a nomination.

There are also provisions in Part XIII of the Insurance Act 1996 which are not beneficial to the policy owner or his nominee. They were enacted for the convenience of the insurer. First, there is no time frame prescribed for the insurer to notify the nominee of his entitlement after it becomes aware of the policy owner's death. On the other hand, the nominee is required to submit his claim to the insurer within 12 months after the insurer first becomes aware of the policy owner's death. It is unfortunate that the time frame is linked to an event which the nominee can have no knowledge of.

Secondly, upon receipt of the nominee's claim together with the proof of the policy owner's death, the insurer is given 60 days to make payment to the nominee, failing which the insurer is liable to pay interest at the minimum rate of 4% on the unpaid amount to the nominee. The writer submits that the time frame given to the insurer is long under the circumstances. Further, the default rate is low. The Act should impose a shorter time frame and a higher default rate which will be deterrent in nature.

In addition, s.163 prescribes that only a policy owner who has attained the age of 18 years may effect a nomination. As a result, the nominee of a nomination effected by the

policy owner when the latter was still a minor, does not enjoy the rights conferred by the Insurance Act 1996.

Furthermore, there are weaknesses in the Insurance Guarantee Scheme Fund which was established to protect policy owners and members of the public when an insurer is wound-up on the ground of insolvency. The weaknesses affect the IGSF's effectiveness. The writer proposes that the persons who could claim against the IGSF should be clearly defined as persons who are legally entitled to claim the policy moneys from the insolvent insurer. To further protect the qualified claimants, the IGSF scheme should be revamped. A model could be found in the UK's Financial Services Compensation Scheme Ltd.

The Insurance Act 1996 does not confer any rights on the nominee of a life policy effected on the life of a person other than the policy owner and thus, his position remains uncertain. Although such nominee's position should be legislated, the writer does not advocate the extension of the relevant provisions in Part XIII of the Act to him until the provisions are reformed. Pending the reforms, the owner of a life policy or a personal accident policy who wishes to benefit his nominee, should assign the policy or its proceeds to the nominee. Alternatively, he should declare a trust over the proceeds in the nominee's favour in a separate document, or bequeath them to him in a valid will. The rights of an assignee of a policy or its proceeds will be examined in the next Chapter of this thesis.

CHAPTER THREE
RIGHTS OF AN ASSIGNEE AS A THIRD PARTY

3.1 Introduction

As concluded in Chapter 2 of this thesis, the policy owner should assign the policy moneys payable upon his death to the nominee if the policy owner intends the nominee to receive them as a beneficiary.

This Chapter analyses the rights of the assignee in an assignment in connection with an insurance policy. In Part 3.2, the writer will discuss the general law on assignment and the rights of an assignee. This will be followed by an examination on the rights of an assignee of the subject matter of an insurance policy, of the policy itself, and of the policy proceeds[1] in Parts 3.3, 3.4 and 3.5 respectively. Part 3.6 analyses the rights of an assignee against the Insurance Guarantee Scheme Fund when the insurer is wound-up. It will be shown that the laws in Malaysia pertaining to the rights of an assignee are unsatisfactory. In certain areas, the assignee's rights are uncertain. Statutory reforms are thus, necessary in Malaysia.

3.2 General Law on Assignment

Under an assignment, the promisee transfers his rights under his contract with the promisor to a third party. The promisee is known as the assignor, whereas the promisor

[1] The Court of Appeal in *Re Turcan* (1889) LR 40 ChD 5 recognised the difference between an assignment of the policy itself and an assignment of its proceeds. In that case, the life policy contained a provision against an assignment of the policy. The policy owner pursuant to his marriage settlement assigned his interest in the policy to the trustees. Cotton LJ held that the assignment was effective. The prohibition was not construed as a prohibition against an assignment of the policy proceeds.

is known as the debtor. The assignee is the third party to whom the contractual rights are transferred. Once the assignment is effected, the debtor has to perform his obligations under the contract in favour of the assignee. It is immaterial that the debtor does not intend to benefit the assignee. If it is a legal assignment, the assignee can even sue the debtor directly when the debtor breaches his obligations. Nevertheless, this does not create a privity of contract between the assignee and debtor because under the assignment, the assignor assigns only his rights, and not his liabilities. The assignee is not bound by the contractual duties of, or liable for its non-performance by the assignor.[2]

Part 3.2.1 narrates the evolution and recognition of an assignment in England. This will be followed by a study on the types of general assignments in Malaysia and the issue on the priority between competing assignments in Parts 3.2.2 and 3.2.3 respectively. The latter is important where the policy owner has created several assignments and the competing assignees do not agree on their rankings. Part 3.2.4 studies the law pertaining to the stamp duty payable on an assignment.

3.2.1 Evolution and recognition of an assignment in England

In England, an assignment of a chose in action was not recognised by the courts of common law. The only exceptions were where the assignments were made by or in favour of the Crown, consented to by the debtor, or recognised by statute. The apparent reasons for such restricted recognition were that the common law judges feared that it

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[2] *Tolhurst* v. *The Associated Portland Cement Manufacturers (1900) Ltd* [1902] 2 KB 660, at 668. See also the discussion in Grubb, Andrew (Ed.), *The Law of Contract*, (1999), Butterworths, London, at 1067-1068.
However, this must be distinguished from an assignment of conditional benefits where the assigned benefits are qualified. The assignee will enjoy the benefits only if certain conditions stipulated in the contract are fulfilled. See Beale, H.G. (*et al.*) (Ed.), *Chitty on Contracts*, (29th ed., 2004), Sweet & Maxwell, London, at para. 19-078.

would undermine the doctrine of privity of contract, and encourage maintenance and unnecessary litigation.[3]

As the assignment was generally not recognised by the courts of common law, an assignee who wished to sue the debtor, could do so only in the assignor's name. The assignor's consent was required. Fortunately, the court of equity did recognise an assignment of a chose in action notwithstanding the doctrine of privity.[4] Thus, when the assignor refused to consent to the suit, the assignee could apply to a court of equity to compel the use of the assignor's name.

By the middle of the nineteenth century, the legislature in England relaxed the rule against assignment. The enactment of the Policies of Assurance Act 1867 (UK) ("the PAA 1867 (UK)") on 20 August 1867 granted statutory recognition to an assignment of a life policy. This Act, which still applies in England, empowers the assignee to sue on the policy in his own name.

The general statutory recognition for assignment came with the enactment of the Supreme Court of Judicature Act 1873 (UK) ("the Judicature Act 1873 (UK)"). This Act, which came into force on 2 November 1874, fused the courts of common law and equity to form the High Court of Justice and empowered all courts in England to administer both law and equity.[5] In particular, s.25(6) empowered the courts to enforce assignments which were created following a prescribed procedure. This provision was subsequently repealed and substituted by s.136(1) of the Law of Property Act 1925

[3] Beatson, J., *Anson's Law of Contract*, (28th ed., 2002), Oxford University Press, Oxford, at 470-471; *Lampet's Case* 77 ER 994, at 997; and *Fitzroy* v. *Cave* [1905] 2 KB 364, at 372.
[4] *Halsbury's Laws of England*, Vol. 6, (4th ed., 2003 Reissue), LexisNexis Butterworths Tolley, at para. 26.
[5] Section 24 of the Judicature Act 1873 (UK).

(UK). Section 136(1) still applies in England. Its provision has been enacted with some modifications in s.4(3) of the (Malaysian) Civil Law Act 1956 (Act 67, Rev. 1972).

3.2.2 Types of general assignments in Malaysia

There are two types of general assignments in Malaysia. The first is an assignment which fulfils the requirements of s.4(3) of the Civil Law Act 1956. The second type of general assignment is an assignment which does not fulfil the said requirements but takes effect in equity.

3.2.2.1 Assignment created pursuant to section 4(3) of the Civil Law Act 1956

An assignment created pursuant to s.4(3) of the Civil Law Act 1956 is herein referred to as "a s.4(3) assignment". Section 4(3) reads:

> Any absolute assignment, by writing, under the hand of the assignor, not purporting to be by way of charge only, of any debt or other legal chose in action, of which express notice in writing has been given to the debtor, trustee or other person from whom the assignor would have been entitled to receive or claim the debt or chose in action, shall be, and be deemed to have been, effectual in law, subject to all equities which would have been entitled to priority over the right of the assignee under the law as it existed in the State before the date of the coming into force of this Act, to pass and transfer the legal right to the debt or chose in action, from the date of the notice, and all legal and other remedies for the same, and the power to give a good discharge for the same, without the concurrence of the assignor.

The scope of s.4(3) and the rights conferred by the provision on an assignee are examined below.

(a) Scope of section 4(3) of the Civil Law Act 1956

The assignee will enjoy the benefits conferred by s.4(3) of the Civil Law Act 1956 only if the elements in the provision are fulfilled. First, the subject matter of a s.4(3) assignment must be either a debt or other legal chose in action. Thus, it is important to examine the scope of the expressions "debt" and "other legal chose in action".

According to Lord Alverstone CJ in *Jones* v. *Humphreys*,[6] a "debt" within s.25(6) of the Judicature Act 1873 (UK), which was the genesis of s.4(3) of the Civil Law Act 1956, was a definite sum owed by the debtor to the assignor. The debtor must know how much he has to pay the assignee. The term "debt" also includes a definite sum out of a debt which is payable in the future.[7]

The phrase "chose in action"[8] was defined by Channell J in *Torkington* v. *Magee*,[9] as "all personal rights of property which can only be claimed or enforced by action, and not by taking physical possession". In other words, the rights of a party to a contract are choses in action, for they could only be enforced by taking an action in court. It is immaterial that the rights will mature only in the future, as long as they are based on an existing contract.[10] The issue is whether the phrase "other legal chose in action" includes the choses in action recognised by the courts of equity in England. The same phrase was used in s.25(6) of the Judicature Act 1873 (UK) and s.136(1) of the Law of Property Act 1925 (UK) and thus, reference will be made to the decisions in England. The English courts have held that the phrase includes the choses in action recognised by both courts of common law and equity before the enactment of the Judicature Act 1873 (UK).[11] The benefits of a contract, such as the contractual rights to a sum of money which is definitely payable by the debtor to the assignor in the future,[12] and a sum payable under a policy of insurance[13] are some examples of choses in action. It is

[6] [1902] 1 KB 10, at 13.
[7] For the purpose of a s.4(3) assignment, the whole debt must be assigned. This will be discussed shortly.
[8] In s.136(1) of the Law of Property Act 1925 (UK), the phrase "thing in action" is used. It has the same meaning as "chose in action". The two phrases are used interchangeably.
[9] [1902] 2 KB 427, at 430.
[10] *Earle (G. and T.) (1925) Limited* v. *Hemsworth Rural District Council* [1929] 140 LT 69, at 71.
[11] *King* v. *Victoria Insurance Co Ltd* [1896] AC 250, at 254-256; and *Torkington* v. *Magee*, *supra*, note 9, at 430-431.
[12] *The Mount I* [2001] 2 WLR 1344.
[13] *Re Moore* (1878) LR 8 ChD 519. See also Pearson J in *F & K Jabbour* v. *Custodian of Israeli Absentee Property* [1954] 1 WLR 139, at 145-146; and Peh Swee Chin FCJ in *Public Finance Bhd* v. *Scotch Leasing Sdn Bhd* [1996] 2 MLJ 369, at 379.

immaterial that the exact amount is not ascertainable at the outset.[14] Thus, in the context of insurance law, it is clear that a policy owner can create a s.4(3) assignment by assigning his insurance policy or its proceeds to a third party.

Secondly, for the assignment to be effective under s.4(3) of the Civil Law Act 1956, the assignor must have transferred the whole debt or all his rights in the legal chose in action to the assignee.[15] The assignment must be absolute. Thus, the debtor will not be left in doubt as to the identity of the person who can give a good discharge to him. He will not be placed "in the unfair position of being liable to two creditors, and of exposure to more than one action".[16] Section 4(3) also does not recognise an assignment purporting to be by way of a charge[17] only or an assignment which is conditional.[18]

Thirdly, a s.4(3) assignment must be signed by the assignor, and written notice of it must have been given to the debtor. In fact, the assignment is completed only upon the debtor's receipt of the written notice.[19] Thenceforth, the assignee is vested with the rights prescribed by s.4(3). The rights are discussed in paragraph (b) below.

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[14] *Halsbury's Laws of England*, *supra*, note 4, at para. 8 n(8).

[15] *Hughes* v. *Pump House Hotel Co Ltd* [1902] 2 KB 190, at 194. If it were otherwise, the assignor could break up the debt and assign different portions to various assignees. This would result in multiplicity of legal actions against the debtor in respect of what was once a single debt by the debtor to the assignor. As mentioned above, this was frowned upon by the common law judges prior to the Judicature Act 1873 (UK). Thus, when the Act was enacted to, among others, give recognition to an assignment of debt or chose in action, care was taken to protect the debtor against multiplicity of suits. See also *Durham Brothers* v. *Robertson* [1898] 1 QB 765, at 774.

[16] Hall J.C., "Gift of Part of a Debt" [1959] *Cambridge LJ* 99, at 118.

[17] The term "charge" is not equivalent to security or mortgage. An example of an assignment by way of charge is where the assignor gives the assignee a right of payment out of a particular fund without transferring the fund to him.

[18] An assignment is conditional where the assignment takes effect or lapses upon the happening of an event.

[19] *Holt* v. *Heatherfield Trust Ltd and Anor* [1942] 2 KB 1. Prior to the notice, the assignment is valid in equity and binding against the assignor. The assignee enjoys the rights of an equitable assignee. The rights of an equitable assignee will be discussed in Pt. 3.2.2.2, *infra*, at 79-82.

(b) Rights of the assignee

The rights of the assignee of a s.4(3) assignment are stipulated in s.4(3) of the Civil Law Act 1956. The assignee has the legal rights to the debt or chose in action, together with all its legal remedies.[20] He may sue in his own name, without joining the assignor as a party to the suit.[21] However, his rights against the debtor are subject to first, the equities and defences which arose out of the subject matter of the assignment prior to the notice of the assignment to the debtor;[22] and secondly the assignee's own conduct subsequent to the assignment.

Further, only the assignee can give a good discharge to the debtor of the debt or chose in action assigned to him. Thus, the assignee has recourse against the debtor if the debtor repays the debt to or performs the chose in action in favour of the assignor without the assignee's consent. The debtor has to pay or perform once more in favour of the assignee.[23]

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[20] *UMW Industries Sdn Bhd* v. *Ah Fook* [1996] 1 MLJ 365, at 371. See also *Read* v. *Brown* (1888) LR 22 QBD 128, at 132 where Lord Esher MR, when construing the meaning of s.25(6) of the Judicature Act (UK), said:

> "The words mean what they say; they transfer the legal right to the debt as well as the legal remedies for its recovery. The debt is transferred to the assignee and becomes as though it had been his from the beginning; it is no longer to be the debt of the assignor at all, who cannot sue for it, the right to sue being taken from him; the assignee becomes the assignee of a legal debt and is not merely an assignee in equity, and the debt being his, he can sue for it, and sue in his own name".

[21] The assignor may sue on the debt or chose in action only if it is reverted to him by way of a s.4(3) assignment. See *Thiam Joo (M) Sdn Bhd* v. *Sykt Isda Sdn Bhd and Anor* [1992] 3 CLJ 1763.

[22] *Roxburghe* v. *Cox* (1881) LR 17 ChD 520, at 526. Since the notice is a precondition for a s.4(3) assignment, it follows that the equities and defences available to the debtor must be in existence before the creation of the legal assignment.
The debtor could, if he so wishes, release such equities and defences available to him in an action by the assignee. See *PB International Factors Sdn Bhd* v. *Maya Manufacturing & Trading Co (Pte) Ltd*, which is cited in *Mallal's Digest of Malaysian and Singapore Case Law*, Vol. 1 (4th ed., 2002 Reissue), MLJ, Singapore, at para. 3234, on s.4(6) of the Singapore Civil Law Act (Cap 43). The provision is *in pari materia* with s.4(3) of the Malaysian Civil Law Act 1956.

[23] See *Jones* v. *Farrell* 44 ER 703.

3.2.2.2 Equitable assignment

Where an assignment does not fulfil s.4(3) of the Civil Law Act 1956 or any other statutory provision, the assignment takes effect in equity. Section 4(3) which regulates the creation of a legal assignment, does not "forbid or destroy equitable assignments or impair their efficacy in the slightest degree".[24] Therefore, an equitable assignment can be created over a part of a debt or chose in action,[25] or over an interest which is not in existence at the date of the assignment.[26] Such assignment can also be conditional or by way of a charge. Further, it need not be in writing or notified to the debtor.

An equitable assignment is effective against both assignor and assignee from the date it is made.[27] The assignor must have done everything that is necessary according to the nature of the property to be done in order to transfer his benefits under the contract to the assignee.[28] This does not include notification of the assignment to the debtor unless the nature of the property or the debtor requires it. Once an equitable assignment is effective, the rights conferred on the assignee under the assignment cannot be withdrawn by the assignor.

Although an assignment in equity takes effect against the assignor and assignee from the date it is made, and not upon its notification to the debtor, the assignee should give

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[24] As per Lord Macnaghten in *William Brandt's Sons & Co* v. *Dunlop Rubber Company Limited* [1905] AC 454, at 461, when he commented on s.25(6) of the Judicature Act 1873 (UK).
See also the Federal Court's decisions in *UMW Industries Sdn Bhd* v. *Ah Fook*, *supra*, note 20; *Khaw Poh Chhuan* v. *Ng Gaik Peng and Ors* [1996] 1 MLJ 761; and *Public Finance Bhd* v. *Scotch Leasing Sdn Bhd*, *supra*, note 13, at 381.

[25] *Hughes* v. *Pump House Hotel Co Ltd*, *supra*, note 15; and *Walter & Sullivan Ltd* v. *J Murphy & Sons Ltd* [1955] 2 QB 584.

[26] An assignment over a future chose in action becomes effective only when the property comes into existence. It must be made for consideration. See *Williams* v. *Commissioner of Inland Revenue* [1965] NZLR 395, at 399.

[27] *William Brandt's Sons & Co* v. *Dunlop Rubber Company Limited*, *supra*, note 24.

[28] Beale, *supra*, note 2, at para. 19-034.

notice to the debtor to protect his interests.[29] This is for the following reasons. First, an equitable assignment is effective against the debtor only when the debtor is notified.[30] As in the case of a legal assignment,[31] it appears to be immaterial whether the notice is given to the debtor by the assignor or assignee. Thereupon, the debtor is to perform his obligations in favour of or pay his debt to the assignee, instead of the assignor. It is immaterial that the assignment is voluntary because the debtor, being a stranger to the assignment contract, cannot rely on the defences afforded by it.[32] Further, prior to the receipt of notice of the assignment, the debtor may repay the debt to and obtain a good discharge from the assignor.[33] When this happens, the assignee cannot sue the debtor, but must look to the assignor, for the moneys.[34]

[29] *Ward and Pemberton* v. *Duncombe and Ors* [1893] AC 369, at 392.

[30] *Dearle* v. *Hall* 38 ER 475, at 479, and 483-484.

[31] See McGhee, John, *Snell's Equity*, (31st ed., 2005), Sweet & Maxwell, London, para. 3-08.

[32] See the case of *Walker* v. *The Bradford Old Bank Ltd* (1884) LR 12 QBD 511, where the deceased assigned to the plaintiff all the moneys in his account with the defendant. The notice of the assignment was given only after the assignor's death. When the defendant failed to remit the moneys, the plaintiff proceeded with legal action to recover the amount standing in the assignor's account at his death. It is to be noted that the credit balance was higher at his death. Among the bank's defences was that the court of equity would not have enforced the assignment because it was voluntary. Smith J (at pages 515-516) held otherwise because

> "no person claiming under the assignor, and, indeed, no person having any interest whatever in the assignment, has ever taken any step to impugn it, and up to the present time it stands valid and unimpeached. I am of opinion that, this being so, it is not competent for a mere stranger to the assignment to successfully raise any point as to whether a Court of Equity would or would not enforce it, and I am of opinion, even if the point now taken by the defendants as to what the Court of Equity under the circumstances of this case would or would not do, be correct, that it is not open to the defendants, being mere debtors to the estate of the deceased assignor or to his assignee, now to attempt to impeach the settlement".

[33] *Stocks* v. *Dobson* 43 ER 411; and *Re Lord Southampton's Estate* (1880) LR 16 ChD 178. See also *Public Finance Bhd* v. *Scotch Leasing Sdn Bhd*, *supra*, note 13, at 381.

[34] See *Re Patrick* [1891] 1 Ch 82, where the debtor who was not notified of the assignment, paid the moneys to the assignor. The Court of Appeal held that since the assignment was completed, save for the notice, the assignor was liable to the assignee for the moneys received from the debtor.
In *Fostescue* v. *Barnett* (1824-34) All ER Rep. 361, John Leach MR held that the assignor, who made a voluntary assignment of a policy on his life but subsequently surrendered it for value, had to return the value received to the assignee. This is notwithstanding the fact that the policy continued to remain in the assignor's custody after the assignment and no notice of the assignment was given to the insurer.

Secondly, notice to the debtor establishes the assignee's priority against any competing interests.[35] The notice puts a brake on further equities attaching to the debt having priority over the assignment.[36] This is because the debtor's recognition of the assignee's rights means that the debtor will not be in the position to recognise the rights of others, even though they are created earlier. In other words, an assignee in equity takes the assignment subject to the same equities and rights as the assignor at the date the debtor receives notice of the assignment. He enjoys similar rights as an assignee in a legal assignment, except in the following areas.

An assignee in equity does not enjoy the right to sue the debtor, in his own name[37] because the chose in action is transferred only in equity to him.[38] He has a cause of action against the debtor only in equity. Thus, where the debtor breaches his obligations and the assignor refuses to sue, the assignee can sue in the assignor's name provided the assignor allows his name to be used. If the assignor refuses to sue and to allow his name to be used in the legal action against the debtor, the assignee can sue in his own name, but he has to make the assignor a co-defendant.[39] All interested parties to the debt or chose in action, namely, the debtor, assignor and all the assignees[40] must be named in the action.[41]

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[35] *Marchant* v. *Morton, Down & Co* [1901] 2 KB 829. See also Pt. 3.2.3 on the priority of competing assignments, *infra*, at 83-87.

[36] *Walker* v. *The Bradford Old Bank Ltd*, *supra*, note 32.

[37] The only exception is where the equitable assignment is over a whole equitable chose in action, such as a share or interest in partnership, an interest in trust funds and a legacy. *Halsbury's Laws of England*, *supra*, note 4, at paras. 7 and 69.

[38] The assignor still remains the legal owner of the chose and has the right to sue the debtor.

[39] *Halsbury's Laws of England*, *supra*, note 4, at para. 69.

[40] There could be several assignments where the assignor assigned different parts of the debt or chose in action to different assignees.

[41] *Three Rivers District Council* v. *Governor and Company of The Bank of England* [1996] QB 292, at 298.
However, there are situations where the courts have exercised their discretion to waive the requirement. See *William Brandt's Sons & Co* v. *Dunlop Rubber Company Limited*, *supra*, note 24, at 462. In this case, the House of Lords waived the requirement since the assignor had no more interest in the matter.

Further, an assignee in equity cannot give a valid discharge to the debtor of the debt or chose in action, unless he is expressly empowered to do so by the assignor.[42] However, the debtor who has received notice of the assignment cannot pay the debt to or perform the chose in action in favour of the assignor unless he has obtained the assignee's consent. This is because the debtor becomes the trustee for the assignee after receipt of the notice of assignment.[43] It is immaterial that the equitable assignment is over the whole or a part of the debt or chose in action.[44]

3.2.3 Priority between competing assignees

This Part examines the position of the assignees where the assignor has created several assignments on the same debt or chose in action. The first may be a legal assignment, followed by an equitable one;[45] or vice versa; or both may be equitable assignments.[46] The issue of priority becomes important where the competing assignees do not agree with their rankings, and the proceeds of the debt or chose in action are insufficient to satisfy all of them. The assignee who has priority will be paid first and the other

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[42] *Durham Brothers* v. *Robertson*, *supra*, note 15, at 770.

[43] *Halsbury's Laws of England*, *supra*, note 4, at para. 71.

[44] In *Walter & Sullivan Ltd* v. *J Murphy & Sons Ltd*, *supra*, note 25, the assignor claimed from the debtor a sum of £1,808 for work done. Prior thereto, the assignor had irrevocably authorised the debtor to pay the assignee a sum of £1,558 and stipulated that the receipt by the assignee of any payment received by them from the debtor would be a good discharge for the sums paid. The Court of Appeal held that the arrangement amounted to an equitable assignment and therefore, the assignor could not recover any of the sums due and owing by the debtor, even the excess over £1,558. To do so, the assignor had to either join the assignee as a party to the suit, or withdraw its authority to pay the assignee.

vides for unilateral revocation, the
he assignment is for value, it
ing a contract between the
ting in a breach of contract. The
voluntary and has yet to be perfected.

[45] The first assignment is subject to redemption by the assignor. After the creation
gnment, the assignor agrees to assign the same property upon the reassignment by the

assignee will be paid only if there is excess. If the latter is not paid in full, he may sue the assignor for the unsatisfied sum, but only as an ordinary creditor.

Generally, there are two rules governing the priority of competing interests. The first rule is that they rank according to the order of their creation. It is expressed in the Latin maxim "*qui prior est tempore potior est jure*"[47] and "*nemo dat quod non habet*".[48] The second rule is that their priority depends on the order in which notices of their interests are received by the debtor.[49] It is submitted that where the first assignment is legal, it is immaterial which rule applies to govern the priority between the competing assignments. If the first assignment is legal, it is not only the first assignment in time, it is also the first assignment notified to the debtor, for a legal assignment is created only when notice of the assignment is received by the debtor.[50] However, it is a vital issue whether the first rule or the second rule applies where the first competing assignment is an equitable one. This is because an equitable assignment is effective as between the assignor and assignee when it is made.[51] Notice to the debtor is not necessary unless the nature of the chose or the debtor requires it.

According to Peh Swee Chin FCJ in *Public Finance Bhd* v. *Scotch Leasing Sdn Bhd*,[52] the priority of competing interests, including assignments, is governed by the *nemo dat* rule because nobody can claim any personal property against its real owner. The learned judge held the opinion that unless there is statutory intervention, notice to the debtor will not affect the priority of competing assignments. The notice merely instructs the debtor to pay the assigned debt to the assignee. Where the second

[47] It means that "he who is prior in time is stronger in right".
[48] It means that "no one can give a better title than he has".
[49] McGhee, *supra*, note 31, at para. 4-02.
[50] See Pt. 3.2.2.1(a), *supra*, at 77.
[51] *William Brandt's Sons & Co* v. *Dunlop Rubber Company Limited*, *supra*, note 24, at 462.
[52] *Supra*, note 13.

assignee, but not the first assignee, has given notice of the assignment to the debtor, the debtor can lawfully pay the debt to the second assignee. Nevertheless, the first assignee, being the real owner, can recover the moneys from the second assignee based on the *nemo dat* rule.

Peh FCJ's opinion was merely an *obiter dictum*, and the writer is of the opinion that it was *per incuriam*. The learned judge did not refer to s.3 of the Civil Law Act 1956 which provides, *inter alia*, that in the absence of any local statutory provisions on a particular matter, the courts in West Malaysia, Sabah and Sarawak shall apply the common law of England and the rules of equity as administered in England on 7 April 1956, 1 December 1951 and 12 December 1949 respectively so far as the local circumstances permit. At present, there is no local statutory provision of general application which governs the priority between two competing assignments. And in England, on the dates mentioned in s.3 of the Civil Law Act 1956, their priority was governed by the rule in *Dearle* v. *Hall*.[53]

According to the rule in *Dearle* v. *Hall*, the priority between competing assignments is governed by the order the debtor receives the notices of them. It is not material who gives the notices.[54] However, the rule does not apply when the assignee who is the

[53] *Supra*, note 30. The decision in this case was described by Lord Macnaghten in *Ward and Pemberton* v. *Duncombe and Ors*, *supra*, note 29, at 393 as "perilously near legislation"

[54] In *Dearle* v. *Hall*, the court stressed the importance of an assignee giving notice of his assignment to the debtor to complete his title against the debtor. It is important for a person claiming priority to have done everything that is necessary to complete his title. Further, until the debtor receives notice of the assignment, it does not become a trustee for the assignee in respect of the assigned property. However, in later cases, the courts held that it is immaterial whether the notice of the assignment is given by the assignee or by a third party and what is the purpose of the notice. See *Lloyd* v. *Banks* (1868) LR 3 Ch App 488 where the court held that the prior assignee had priority even though the debtor came to know of it from the newspaper. The subsequent assignee gave a formal notice to the debtor.

second in time is a volunteer,[55] or has actual or constructive notice[56] of the prior assignment before he acquires or advances moneys for his assignment.[57] The apparent reason behind the rule in *Dearle* v. *Hall* is that an assignee who fails to give notice to the debtor enables the assignor to create a second assignment in favour of the subsequent assignee. Thus, his priority should be postponed.

The next important question is whether the rule in *Dearle* v. *Hall*, which was formulated at a time when assignments were generally not recognised by the courts of common law, applies in a contest between a prior equitable assignment and a subsequent legal assignment. In the UK, there are conflicting opinions.

In *E. Pfeiffer Weinkellerei-Weineinkauf G.m.b.H. & Co* v. *Arbuthnot Factors Ltd*,[58] Phillips J held the opinion that s.136(1) of the Law of Property Act 1925 (UK) and its predecessor, s.25(6) of the Judicature Act 1873 (UK), merely enable the legal assignee to acquire a title that has all the procedural advantages of a legal title. The rule in *Dearle* v. *Hall* continues to apply to regulate the priority of competing assignments,

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[55] In *Dearle* v. *Hall*, all the competing assignees had provided valuable consideration for their respective assignments. In *Justice* v. *Wynne* (1860) 12 Ir.C 289, the Irish Court of Appeal held that where the assignments are voluntary, the rule in *Dearle* v. *Hall* does not apply. Instead, the priority of the voluntary assignees is regulated by the order of their creation. A subsequent assignee, who is a volunteer, does not get a better title by giving notice to the debtor. He takes his gift subject to existing equities, which include any prior assignment. However, where the first assignment is voluntary, followed by an assignment for value, the rule in *Dearle* v. *Hall* applies. The assignee who first gives notice of the assignment to the debtor gains priority. See also Goode, R.M., "The Right to Trace And Its Impact in Commercial Transactions – II [1976] 92 *LQR* 528, at 555.

[56] In *Re Weniger's Policy* [1910] 2 Ch 291, the insurance policy was deposited with the first assignee. He did not notify the insurer of the assignment. The court held that the subsequent assignee did not gain priority by giving notice because he had constructive notice of the prior interest. John de Lacy in his article, "The Priority Rule of Dearle v. Hall Restated" [1999] *Conv.* 311, at 316-318, does not agree. Among his reasons is that an insurance policy is not a document of title. However, see *Rummens* v. *Hare and Rummens* (1876) LR 1 ExD 169.

[57] This qualification was first introduced in *Timson* v. *Ramsbottom* 48 ER 541. By the year 1879, it was accepted as settled law. See *Re Hamilton's Windsor Ironworks* (1879) LR 12 ChD 707, at 711. However, it is immaterial that the subsequent assignee knew about the prior assignment at the time he gave notice to the debtor. This is because he should be allowed to protect his security by giving the notice of the assignment to the debtor. See *Mutual Life Assurance Society* v. *Langley* (1886) LR 32 ChD 460, at 468.

[58] [1988] 1 WLR 150, at 162-163.

irrespective of whether they are legal or equitable. Their priority will be determined as though they are equitable assignments.[59] The assignment which is first notified to the debtor prevails.

However, Fidelis Oditah[60] pointed out that the view expressed by Phillips J on the issue of priority was merely an *obiter dictum*. Earlier in his judgement, the learned judge declared that the first assignment was void against the assignor's other creditors for want of registration under s.95 of the Companies Act 1948 (UK). It follows then that the second assignment in time was the only valid assignment. There was no need to consider the issue of priority. Only the assignee of a valid assignment was entitled to the proceeds.

Oditah also pointed out that there were *obiter dicta* to the contrary by Viscount Finlay in the House of Lords' case of *Performing Right Society Ltd* v. *London Theatre of Varieties Ltd*[61] and Robert Goff J in *Ellerman Lines Ltd* v. *Lancaster Maritime Co Ltd and Others ("The Lancaster")*.[62] They were not cited or referred to by Phillips J in *Pfeiffer*. In these cases, the learned judges held the opinion that a prior equitable assignee was liable to be defeated by a subsequent legal assignee for value without notice. The *obiter dicta* applied the *nemo dat* rule and its exceptions.

Between the *nemo dat* rule and the rule in *Dearle* v. *Hall* in a contest between successive assignments, the writer prefers the application of the latter for the reasons propounded by Phillips J. in *E. Pfeiffer*. This is notwithstanding the weaknesses of the

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[59] See Legh-Jones, Nicholas, (*et al.*) (Ed.), *MacGillivray on Insurance Law Relating To All Risks Other Than Marine*, (10th ed., 2003), Sweet & Maxwell, London, at para. 24-87.
[60] Oditah, Fidelis, "Priorities: Equitable versus Legal Assignments of Book Debts" [1989] 9 *OJLS* 513.
[61] [1924] AC 1, at 19.
[62] *Supra*, note 46, at 503. In this case, the lien holder, who was the first in time, gave notice of its equitable lien to the debtor after the legal assignee gave notice of its interest to the debtor.

rule in *Dearle* v. *Hall* as highlighted by Oditah.[63] Further, the application of the *nemo dat* rule that a prior equitable assignee is liable to be defeated by a subsequent legal assignee for value without notice, may cause injustice to an assignee of a part of a debt or chose in action. Since an assignment of a part of a debt is an equitable assignment,[64] and will always remain so, its assignee will never have priority over a subsequent legal assignee for value who is unaware of the prior assignment. It is immaterial that the prior equitable assignee has given notice of his assignment to the debtor, for the notice to the debtor cannot be imputed to the subsequent assignee, unless the subsequent assignee has made enquiry of the debtor.[65] In fact, according to de Lacy,[66]

> the rule in *Dearle* v. *Hall* is now a universally accepted means of determining priority disputes concerning successive assignments of a chose in action in both fields of real and personal property.

However, pending a clear judicial decision[67] or intervention by the legislature in Malaysia, it is still uncertain whether the priority between competing assignments is governed by the *nemo dat* rule or the rule in *Dearle* v. *Hall.*

3.2.4 Stamp duty payable on an assignment

An assignment attracts stamp duty. Where the assignment is a security, the stamp duty payable is *ad valorem*.[68] According to item 27 of the First Schedule to the Stamp Act 1949 (Act 378, Consolidated and Rev. 1981), the stamp duty payable is RM5 for every

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[63] *Supra*, note 60, at 525-527.

[64] The only exception is where the assignment is effected pursuant to the PAA 1867 (UK), for the PAA 1867 (UK) does not require the assignment to cover the whole life policy. See the discussion in Pt. 3.4.2.1(b), *infra*, at 102.

[65] Following the case of *Foster* v. *Cockerell* 6 ER 1508, it is immaterial that the subsequent assignee does not make the necessary enquiry with the debtor.

[66] de Lacy, *supra*, note 56.

[67] Peh Swee Chin FCJ's opinion in *Public Finance Bhd* v. *Scotch Leasing Sdn Bhd*, *supra*, note 13, was merely *obiter*.

[68] The cases of *Holland* v. *Smith* 170 ER 895; and *Re Waterhouse's Policy* [1937] Ch 415 indicate that an assignee who is given the assignment as security cannot keep more than what he is entitled to. He has to refund the surplus to the assignor. The amount such assignee-creditor is entitled to depends on the amount of stamp duty paid on the instrument.

RM1,000 or part thereof of the amount secured. It is payable by the assignor.[69] However, where the assignment is effected as a sale or a gift, the stamp duty payable is according to the scale applicable to a conveyance.[70] It is as follows:

(a) On the first RM100,000, the stamp duty is RM1 for every RM100 or part thereof;

(b) On the amount in excess of RM100,000 but not exceeding RM500,000, the stamp duty is RM2 for every RM100 or part thereof; and

(c) On the amount in excess of RM500,000, the stamp duty is RM3 for every RM100 or part thereof.

It is submitted that the stamp duty payable on an assignment is high. The assignor or assignee, as the case may be, may not pay the stamp duty imposed. If it is an unstamped document, it is not admissible in evidence and thus, the assignee will not be able to enforce the assignment.[71]

3.3 Assignment of the Subject Matter of an Insurance Policy

As this thesis is on the rights of third parties in insurance law in Malaysia, it is important to examine the rights of an assignee in an assignment in connection with an insurance policy. There are three broad categories of assignments, namely, an assignment of the subject matter of an insurance policy, an assignment of the policy itself and an assignment of the policy proceeds. This Part examines the first category.

[69] Item 3 of the Third Schedule to the Stamp Act 1949.
[70] Item 32 of the First Schedule to the Stamp Act 1949 together with s.16(1) of the said Act.
[71] Section 52 of the Stamp Act 1949.

When the owner of the subject matter of the insurance policy, such as a property, sells or disposes the property, he may transfer the property by effecting an assignment of the property in favour of the purchaser. The issue is whether the assignee has any rights under an insurance policy effected by the assignor on the said property.

At common law, the assignee of the subject matter of the insurance policy can claim under the policy only if first, the policy is assigned to him;[72] and secondly, the assignment is effected simultaneously with the assignment of its subject matter. This is because after the assignment of the subject matter, the assignor has no insurable interest in it. The policy lapses[73] and whatever assignment effected by the assignor thereafter is of no effect. Prior to the assignment of the subject matter to the assignee, the assignee has no insurable interest in the subject matter. Any assignment of the policy to him then will not give him any rights against the insurer.[74]

Thus, the assignee of the subject matter of the insurance policy has no rights under the insurance policy on the subject matter unless the policy is also assigned to him. Therefore, it is important to analyse an assignment of a policy and the rights of its assignee. These will be analysed in the following Part.

[72] The assignment of the policy cannot be assumed. In Pt. 3.4, the writer will discuss the issues and problems pertaining to the assignment of an insurance policy.

[73] *Roslan bin Abdullah* v. *New Zealand Insurance Co Ltd* [1981] 2 MLJ 324. The Federal Court in *Nanyang Insurance Co Ltd* v. *Salbiah and Anor* [1967] 1 MLJ 94 held that the insurance policy would not lapse if the policy owner continued to retain an interest in the insured property. See also Merkin, Robert, *Colinvaux and Merkin's Insurance Contract Law*, (Loose-leaf) (Release 5&6, March-June 2003), Sweet & Maxwell, London, at paras. D-0004.

[74] Merkin, *ibid.*, at para. D-0013.

3.4 Assignment of an Insurance Policy

In an assignment of an insurance policy, the policy is transferred from the assignor to the assignee. The assignee, with effect from the assignment of the policy, replaces the assignor as the owner of the policy.[75] However, due to two factors, not all policies are assignable. The first factor is the general requirement that the policy owner must have insurable interest in the subject matter of the policy. As the requirement of insurable interest is different for the various types of policies, the writer will deal with this factor when the writer examines the assignments of the respective types of policies.

The second factor is the nature of an insurance contract. It is a highly personal contract because the policy owner's identity and personal attributes are of utmost importance to the insurer. These affect the assignability of the policy, for it is trite that a promisee cannot assign his benefits under a contract if the promisor's performance depends on the promisee's personal qualities or capacities. The promisor has a right to the benefit that he has contemplated from the character, credit and substance of the party with whom he contracted.[76] As per Collins MR in *Tolhurst* v. *The Associated Portland Cement Manufacturers (1900) Ltd*,[77] assignments of choses in action have been:

> confined to those cases where it can make no difference to the person on whom the obligation lies to which of two persons he is to discharge it, and ... the benefit of all that remains to be done under it.

[75] Apart from being entitled to the benefits under the policy, the assignee is also liable to fulfil the conditions of the policy, such as the payment of the premium and comply with the claims procedure set out in the policy (See *Re An Arbitration Between Carr and The Sun Fire Insurance Co* (1897) 13 TLR 186; and Ivamy, E.R. Hardy, *General Principles of Insurance Law*, (6th ed., 1993), Butterworths, London, at 353-354). The assigned benefits are conditional.

[76] Lord Denman CJ in *Humble* v. *Hunter* 116 ER 885, at 887.

[77] *Supra*, note 2, at 668-669.

Thus, the question is whether an insurance policy, which is a chose in action,[78] is assignable in view of it being a highly personal contract. Invariably, an insurance policy stipulates that the insurer's consent is required for any assignment. If the insurer consents, it can impose new conditions and terms. Therefore, effectively, upon the assignment of a policy, a new contract is formed between the insurer and assignee. The old contract between the insurer and assignor is substituted. This is actually a novation,[79] which is recognised by s.63 of the Contracts Act 1950 (Act 136, Rev. 1974).[80]

The (Malaysian) Insurance Act 1996 (Act 553) does not deal with the assignment of a policy. However, in England, there are statutory provisions which give express recognition to the assignment of a marine[81] or a life[82] insurance policy without the insurer's prior consent. This Part analyses the English provisions and their applicability in Malaysia. The arrangement of this Part is as follows. The rights of an assignee of a marine policy will be dealt with in Part 3.4.1. Part 3.4.2 examines the rights of an assignee of a life policy in England, and in Malaysia before and after the enactment of the Insurance Act 1996 respectively.

3.4.1 Assignment of a marine policy

A marine policy is a contract where the insurer undertakes to indemnify the policy owner against losses incident to a marine adventure in the manner and up to the extent

[78] *Re Moore*, *supra*, note 13; and *Public Finance Bhd* v. *Scotch Leasing Sdn Bhd*, *supra*, note 13, at 379.
[79] Beale, *supra*, note 2, at para. 19-085.
[80] Nik Ramlah, Mahmood, *Insurance Law in Malaysia* (1992), Butterworths, Kuala Lumpur, at 209. Section 63 of the Contracts Act 1950 reads, "If the parties to a contract agree to substitute a new contract for it, or to rescind or alter it, the original contract need not be performed."
[81] This was in response to the demands of international sale of goods contracts. See Bennet, Howard N., *The Law of Marine Insurance*, (1996), Oxford University Press, Oxford, at 335.
[82] This could be in response to the role of a life policy as a valuable property. A life policy has a surrender value and thus, it can be sold or used as a security.

agreed upon.[83] The specific provisions pertaining to marine insurance are found in the Marine Insurance Act 1906 (UK) ("the MIA 1906 (UK)"). This Act, though enacted in England, applies in Malaysia by virtue of s.5(1) of the Civil Law Act 1956.[84]

This Part studies, first, the types of assignments of a marine policy; secondly, the requirement of insurable interest by the assignee; and thirdly, the rights enjoyed by the assignee.

3.4.1.1 Types of assignments

As discussed in Part 3.2.2,[85] there are two types of general assignments, namely, legal and equitable assignments. This applies, too, to an assignment of a marine policy.

(a) Legal assignment of a marine policy

According to the Court of Appeal's decision in *The Mount I*,[86] a marine policy can be assigned under s.50 of the MIA 1906 (UK) or s.136(1) of the Law of Property Act 1925 (UK). The decision is of persuasive authority in Malaysia. Thus, the writer will study and compare the procedures for assignments under s.50 of the MIA 1906 (UK) and s.4(3) of the Civil Law Act 1956, which is *in pari materia* with s.136(1) of the Law of Property Act 1925 (UK), respectively.

Section 50(1) of the MIA 1906 (UK) provides that a marine policy is freely assignable unless there is a term in the policy to the contrary. The assignment procedure is prescribed in s.50(3). Section 50 reads:

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[83] Sections 1 and 22 of the MIA 1906 (UK).
[84] *United Oriental Assurance Sdn Bhd Kuantan* v. *WM Mazzarol ("The Melanie")* [1984] 1 MLJ 260, at 264.
[85] *Supra*, at 75.
[86] *Supra*, note 12, at 1365.

> (1) A marine policy is assignable unless it contains terms expressly prohibiting assignment. It may be assigned either before or after loss.
>
> (2) Where a marine policy has been assigned so as to pass the beneficial interest in such policy, the assignee of the policy is entitled to sue thereon in his own name; and the defendant is entitled to make any defence arising out of the contract which he would have been entitled to make if the action had been brought in the name of the person by or on behalf of whom the policy was effected.
>
> (3) A marine policy may be assigned by indorsement thereon or in other customary manner.

For ease of reference, an assignment of a marine policy under s.50 of the MIA 1906 (UK) is herein referred to as "an MIA assignment". It is observed that an MIA assignment is similar to a s.4(3) assignment in only one procedural aspect, namely, it must be an absolute assignment. In *The Mount I*, the Court of Appeal held that in an MIA assignment, the assignor must have transferred all his interests, including his insurable interest, in the subject matter to the assignee. In the instant case, the assignment was not absolute since the insurance continued to protect the assignor against losses and liabilities which he might incur as a mortgagor or operator of the vessel. "Section 50 could not apply – the policy cannot be split into a series of sub-policies".[87]

In other aspects, the procedure for an MIA assignment is very different from the procedure for a s.4(3) assignment.[88] First, an MIA assignment need not be in writing, for s.50(3) provides that it can be effected in any customary manner. The court in *J. Aron and Co (Inc)* v. *Miall*[89] held that in the case of an assignment of a marine policy by the seller of the goods to the buyer, it can be done by merely delivering the policy

[87] *Ibid.*, at 1370.
[88] For the procedure for a s.4(3) assignment, see Pt. 3.2.2.1(a), *supra*, at 77.
[89] (1928) 30 Lloyd's Rep 287.

endorsed in blank. However, this method is not acceptable for an assignment of other types of marine policies.[90]

Secondly, the insurer is bound by an MIA assignment even though it has not been served notice of the assignment.[91] This may subject the insurer to double liability. An insurer who is unaware of the assignment when it pays the policy owner or a subsequent assignee, will be required to pay once more to the rightful claimant. The position of the rightful claimant will be affected if the insurer does not have sufficient funds to pay him. However, most of the Institute Clauses, which are incorporated into the relevant Lloyd's Marine Policy and Institute of London Underwriters Companies Marine Policy Form,[92] overcome this risk by imposing a restriction on assignment. They provide that an assignment over the marine policy or its proceeds is binding and effective against the insurer only after it has been served notice of the assignment.[93] They further provide that the assignee who produces the original policy which has been endorsed and signed by the assignor will be entitled to receive the policy moneys from the insurer.

In conclusion, the procedure for an MIA assignment is more flexible compared to a s.4(3) assignment.

[90] Merkin, *supra*, note 73, at para. D-0017.
[91] Merkin, *supra*, note 73, at para. D-0017.
[92] Merkin, *supra*, note 73, at para. D-0012.
[93] However, some of the Institute Clauses, such as the Institute Cargo Clauses (A), (B) and (C), Institute War and Strikes Clauses (Hull-Time), Institute War Clauses (Cargo), Institute Strikes Clauses (Cargo) and Institute Mortgages Interest Clauses Hull, do not have a similar provision.

(b) Equitable assignment of a marine policy

The Court of Appeal in *The Mount I*[94] also recognised that the owner of a marine policy may assign the policy without complying with the procedure prescribed by any statute. The assignment is effective in equity and binds both policy owner and assignee. Nevertheless, it binds the insurer only when notice of the assignment is given to it.[95]

3.4.1.2 Requirement of insurable interest in a marine policy

One pertinent question is at which point in time is the assignee of a marine policy required to have insurable interest in the subject matter. It is noted that generally, the assignee must have insurable interest at two points in time. First, the assignee must have insurable interest in the subject matter of the policy at the time of the assignment. This is in view of s.51 of the MIA 1906 (UK) which provides that an assignment of a marine policy can be created either contemporaneously with the assignment of the subject matter or pursuant to an agreement before the policy owner parts or loses his insurable interest in the subject matter of the policy.[96] The insurable interest must shift to the assignee before or at the same time as the assignment of the policy.

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[94] *Supra*, note 12.

[95] *Ibid.*, at 1373-1374. In this respect, it is noted that the insurer is better protected under an equitable assignment, as compared to under an MIA assignment. Under an MIA assignment, notice is not required to be given to the insurer.

[96] Section 51 of the MIA 1906 (UK) reads:

> "Where the assured has parted with or lost his interest in the subject matter insured, and has not, before or at the time of so doing, expressly or impliedly agreed to assign the policy, any subsequent assignment of the policy is inoperative provided that nothing in this section affects the assignment of a policy after loss".

According to Mustill, Michael J. and Jonathan C.B. Gilman, *Arnould's Law of Marine Insurance and Average*, (16th ed., 1981), Steven & Sons, London, at 170, the policy is kept alive for the prospective assignee's benefits until he is capable of taking an assignment. See also Lush J in *North of England Oil-Cake Co* v. *Archangel Insurance Co* (1875) LR 10 QBD 249, at 254:

> "If, then, the policy were not agreed to be assigned before the seller's interest ceased by the delivery on board the lighters, an assignment after that interest ceased should not create an interest in the plaintiffs".

See also Bennet, *supra*, note 81, at 332-333; O'May, Donald, *Marine Insurance Law: Law and Practice*, (1993), Sweet & Maxwell, London, at 52; and Thomas, D. Rhidian (Ed.), *The Modern Law of Marine Insurance*, (1996), LLP, London, at 135.

Secondly, the assignee is required to have insurable interest in the subject matter of the policy when the insured event happens. This is because s.6(1) of the MIA 1906 (UK) provides that the policy owner is required to have insurable interest at that point in time. Since the assignee steps into the shoes of the policy owner upon the assignment, it follows that the assignee is required to have insurable interest in the subject matter when the insured event happens.[97] He can recover only his losses.

However, the position is different where the policy owner assigns his marine policy after loss, which is permitted under s.51 of the MIA 1906 (UK).[98] In this situation, the assignee is not required to have insurable interest in the subject matter at the time of the assignment[99] or when the insured event happens.[100] The amount recoverable by the assignee is the assignor's losses.[101]

3.4.1.3 Rights of the assignee of a marine policy

The preceding Part showed that the assignee can recover his losses when the insured event happens provided the assignment is effected before loss. However, if the assignment is effected after loss, he can recover the assignor's losses. With regard to the general rights of an assignee of a marine policy, it is noted that if he is a legal assignee, generally, his rights are similar to those enjoyed by an assignee of a general legal assignment.[102] It is immaterial whether the marine policy is assigned under s.50 of the MIA 1906 (UK) or s.4(3) of the Civil Law Act 1956. Similarly, the rights of an

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[97] Ivamy, E.R. Hardy, *Marine Insurance*, (4th ed., 1985), Butterworths, London, at 28.

[98] Mance LJ, who delivered the Court of Appeal's judgment in *The Mount I*, *supra*, note 12, at 1367, held that after a loss, the policy owner could assign his interest in the claim against the insurer pursuant to either s.50 of the MIA 1906 (UK) or s.136(1) of the Law of Property Act 1925 (UK). It is then the only property covered by the policy.

[99] Rose, F.D., *Marine Insurance: Law and Practice*, (2004), LLP, London, at para. 7-25.

[100] Hodges, Susan, *Law of Marine Insurance*, (1996), Cavendish Publishing, London, at 22.

[101] Ivamy, E.R. Hardy, *Chalmer's Marine Insurance Act 1906*, (10th ed., 1993), Butterworths, London, at 75.

[102] See Pt. 3.2.2.1(b), *supra*, at 78.

equitable assignee of a marine policy are the same as the rights of an assignee of a general equitable assignment.[103]

However, due to the peculiarity of the procedure for the creation of an MIA assignment, a vital issue is whether the *nemo dat quod non habet* rule or the rule in *Dearle* v. *Hall* applies to regulate the priority between the competing assignees of a marine policy. The writer is not aware of any case law on this issue.

If the rule in *Dearle* v. *Hall* applies, then in a contest between an MIA assignment, a s.4(3) assignment and an equitable assignment over a marine policy, the first assignment notified to the insurer has priority over the policy proceeds. The MIA assignment, though first in time and absolute, does not have priority unless notice thereof has been given to the insurer before the subsequent assignment. The writer submits that this is unjust to the MIA assignee who has not given notice. Although he has done everything that is required by the specific provision regulating the assignment of a marine policy, namely s.50 of the MIA 1906 (UK), he still does not enjoy priority under the rule in *Dearle* v. *Hall* over a subsequent assignee for value who has no notice of the prior MIA assignment and who has given notice to the insurer. The writer doubts that that was the legislature's intention when it enacted s.50 of the MIA 1906 (UK). The legislature would have intended the assignee to have priority if it is the first in time. It is immaterial that notice of the MIA assignment is not given or is given after the subsequent assignment has been notified to the insurer. Thus, the writer submits that the *nemo dat* rule should apply where the first assignment in time is a MIA assignment.

[103] See Pt. 3.2.2.2, *supra*, at 79-82.

Nonetheless, it is proposed that the legislature should enact the assignment clause found in most of the Institute Clauses. The recommended clause not only minimises the problem with regard to the priority of competing assignees, but also protects both insurer and assignee. First, the insurer is bound by an assignment only if it has been given notice of it. Secondly, the assignee who produces the original policy which has been duly endorsed and signed by the assignor will be entitled to receive the policy proceeds from the insurer. Thus, the assignee who has the original policy will have priority with regard to the proceeds. It follows that if the assignor fails to deliver the original policy to an assignee, the assignee is put on notice that there could be a prior assignment.[104] A second assignee in time who notifies the insurer of his assignment before the first assignee does so, will not enjoy priority if the first assignee in time has the original marine policy.[105] The problem of which competing assignee has priority over the policy moneys is thus minimised. Consequently, an assignee is more certain of his rights against the insurer under the assignment.

3.4.2 Assignment of a life policy

The position of an assignee of a life policy is important because a life policy can be sold, used as a security, or given as a gift. These dealings can be effected by an assignment.[106] However, as discussed above,[107] the assignability of a policy is generally affected by first, the highly personal nature of an insurance contract; and secondly, the requirement of insurable interest.

[104] See *Re Weniger's Policy*, *supra*, note 56; and *Spencer* v. *Clarke* (1878) LR 9 ChD 137.
[105] See *Timson* v. *Ramsbottom*, *supra*, note 57.
[106] Birds, John and Norma J. Hird, *Birds' Modern Insurance Law*, (6th ed., 2004), Sweet & Maxwell, London, at 340.
[107] *Supra*, at 90.

With regard to the first factor, it is noted that the nature of a life policy is different from the other types of insurance policies. To the insurer, the identity and personal attributes of the life insured are more important than those of the policy owner. Further, in England, the legislature has enacted the Policies of Assurance Act 1867 to confer recognition on the assignment of a life policy. However, the 1867 Act does not absolve or modify the requirement of insurable interest when an assignment is effected. Thus, the assignability of a life policy may still be affected by the said requirement, for the assignee becomes the new policy owner when the assignment is effected. As the new policy owner, strictly speaking, he should have insurable interest in the life insured.

This Part analyses whether a life policy is freely assignable in view of the requirement of insurable interest. The writer will also examine the rights of the assignee of a life policy where they differ from those of an assignee of a general assignment. These discussions are carried out in three Parts, namely, the position in England, and the positions in Malaysia before and after the Insurance Act 1996 came into effect. The matters pertaining to the assignment of a life policy proceeds will be dealt with in Part 3.5.2.[108]

3.4.2.1 Position in England

This Part examines first, the assignability of a life policy in England in the light of the requirement of insurable interest as prescribed by the Life Assurance Act 1774 (UK) ("the LAA 1774 (UK)"); secondly, the types of assignments applicable to a life policy; and thirdly, the rights of an assignee of a life policy.

[108] *Infra*, at 125-137.

(a) Requirement of insurable interest in a life policy

Insurable interest has been identified by the courts as a legal interest[109] which is capable of being valued in monetary terms.[110] The requirement of insurable interest in a life policy was introduced by the LAA 1774 (UK). The Act is still in force in the UK. Section 1[111] identifies the persons who are required to have insurable interest in the life insured at the time the policy is incepted. They are the person who incepts the policy ("the policy inceptor") and the "*persons for whose use, benefit, or on whose account*" ("the intended beneficiary") the policy is incepted. If this requirement is not fulfilled, the policy is illegal and thus, void.[112] The only exceptions are where the life insured is the policy owner himself,[113] his spouse,[114] or his civil partner.[115] In addition, s.2 of the

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[109] *Halford* v. *Kymer and Ors* 109 ER 619, at 620. This was upheld by the Court of Appeal in *Griffiths* v. *Fleming and Ors* [1909] 1 KB 805. Moral obligation by the policy owner has been held to be insufficient to support the requirement for insurable interests. See *Harse* v. *Pearl Life Assurance Co* [1904] 1 KB 558, where the plaintiff effected a policy on his mother's life to pay for her funeral expenses. The Court of Appeal decided the case on the assumption that the plaintiff did not have insurable interest because he was not under any liability to pay the funeral expenses of his mother.

[110] *Hebdon* v. *West* 122 ER 218, at 222. See also *Simcock* v. *Scottish Imperial Insurance Co* [1902] 10 SLT 286, at 288 where Lord Pearson held that "the value of the interest as at the date of the policy must be calculated with some reference to the legal relation subsisting between the parties.... It is impossible to appreciate in money the 'amount or value' of an interest whose endurance rests on sentiment or good feeling or mutual advantage".

[111] Section 1 of the LAA 1774 (UK) reads:

> "From and after the passing of this Act no insurance shall be made by any person or persons, bodies politick or corporate, on the life or lives of any person or persons, or on any other event or events whatsoever, wherein the person or persons for whose use, benefit, or on whose account such policy or policies shall be made, shall have no interest, or by way of gaming or wagering; and that every assurance made contrary to the true intent and meaning hereof shall be null and void to all intents and purposes whatsoever."

[112] According to Merkin, Robert (Ed.), *Colinvaux's Law of Insurance*, (7th ed., 1997), Sweet & Maxwell, London, at para. 3.26, it is the duty of the court to refuse jurisdiction in the event that a claim under a policy which is illegal comes before it, even though the insurer does not seek to plead illegality.
However, where the policy owner and the intended beneficiary did not have insurable interest, the insurer is not prohibited from paying the policy moneys if it so wishes. See *Worthington* v. *Curtis* (1875) LR 1 ChD 419, and *Attorney General* v. *Murray and Anor* [1904] 1 KB 165.

[113] *Griffiths* v. *Fleming and Ors*, *supra*, note 109, at 820-821; and *M'Farlane* v. *The Royal London Friendly Society* (1886) 2 TLR 755.

[114] *Griffiths* v. *Fleming and Ors*, *ibid.*

[115] Section 253 of the Civil Partnership Act 2004 (UK).

LAA 1774 (UK)[116] requires all persons interested in, and not only the ultimate beneficiary of,[117] the policy to be named in the policy. The failure to do so renders the policy illegal and void.[118]

An important issue is whether the aforesaid requirements in s.1 and s.2 of the LAA 1774 (UK) must be complied with if the life policy is effected with the intention of assigning it to a third party. The courts have held that it depends on whether the policy is effected for the purpose of assigning it to a particular person. If it is, *M'Farlane* v. *The Royal London Friendly Societies*[119] held that the intended assignee must have insurable interest in the life insured at the policy's inception. He must also be named in the policy. These requirements apply to both legal and equitable assignments because an assignee, irrespective of whether he is an assignee at law or in equity, is the beneficiary of the policy upon completion of the said assignment.[120] Thus, the policy is void if the assignee does not have insurable interest in the life insured at the policy's inception or is not named in the policy.

However, where a person effects a life policy with the general intention of assigning it, but with no particular person in mind, the policy is valid even though the assignee has no insurable interest in the life insured. It is immaterial whether the assignment is legal

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[116] Section 2 of the LAA 1774 (UK) reads:

> "(I)t shall not be lawful to make any policy or policies on the life or lives of any person or persons, or other event or events, without inserting in such policy or policies the person or persons name or names interested therein, or for whose use, benefit, or on whose account such policy is so made or underwrote".

[117] *Evans* v. *Bignold* (1869) LR 4 QBD 622.

[118] *Ibid.*

[119] *Supra*, note 113. See Merkin, Robert, *Colinvaux and Merkin's Insurance Contract Law* (Loose-leaf) (Release 8&9, March 2004), Sweet & Maxwell, London, at para. A-0437.

[120] If the assignor receives the debt or the performance of the chose in action, he does so as a trustee for the assignee and is liable to repay the assignee. See *Re Patrick*, *supra*, note 34; and *Fostescue* v. *Barnett*, *supra*, note 34.

or equitable.[121] The policy is also valid even though the assignee is not named in the policy. The exemptions from s.1 and s.2 of the Act are logical because the policy is not initiated for the said assignee's benefit. Further, his identity is not determined by the policy inceptor at the policy's inception.

(b) Legal and equitable assignments of life policies

In 1867, the legislature in England enacted the Policies of Assurance Act 1867. The Act grants statutory recognition to an assignment of a life policy or part thereof which complies with the prescribed procedure. The prescribed procedure requires the assignment to be made either by an endorsement on the policy or by a separate instrument in the form or to the effect set forth in the Schedule to the Act.[122] It also requires written notice of the assignment to be given to the insurer at its principal office or principal place of business stated in the policy.[123] The PAA 1867 (UK), which also regulates the priority between competing assignees, is still applicable in England.

Apart from the procedure laid down in the PAA 1867 (UK), the owner of a life policy may also create an assignment by complying with s.136(1) of the Law of Property Act 1925 (UK). This is following the decision of the Court of Appeal in *Re Moore*[124] that an insurance policy is a chose in action, which is a subject matter of an assignment under s.136(1). However, if the owner of a life policy wishes to effect a legal assignment on only a part of his life policy, he can do so by complying with the PAA 1867 (UK). Section 136(1) of the Law of Property Act 1925 (UK) requires the assignment to be absolute. The owner of a life policy may also effect an assignment on

[121] *Ashley* v. *Ashley* 57 ER 955.
[122] Section 5 of the PAA (UK).
[123] Sections 3 and 4 of the PAA (UK).
[124] *Supra*, note 13.

the policy or part thereof without complying with either of the statutory provisions. It takes effect in equity.

(c) Rights of the assignee of a life policy

The assignee of an assignment created pursuant to the procedure laid down in the PAA 1867 (UK) enjoys the rights conferred by the Act. He has the rights to sue the insurer in his own name and to give a good discharge to the insurer. The issue is whether the assignee of an assignment of a life policy under s.136 of the Law of Property Act 1925 (UK) enjoys the benefits conferred by the provision. It has been opined that the legal position is uncertain.[125] It was argued that since s.136(2) provides that the section does not affect the application of the PAA 1867 (UK), s.136 is intended to cover choses in action other than those covered by the 1867 Act. In view of the uncertainty, it was commented by Surridge and Murphy that the assignee of an assignment of a life policy under s.136 of the Law of Property Act 1925 (UK) can give the insurer a good discharge only if the assignor is joined as a party.[126] In other words, he does not enjoy the benefits conferred by s.136. Instead, he is treated as an assignee in equity. The majority of the textbook authors however do not agree with this view.[127]

It is submitted that the view of the majority of the textbook authors that where s.136 of the Law of Property Act 1925 (UK) applies, the assignee enjoys the rights conferred by the section, is to be preferred. The writer's opinion is based on the Court of Appeal's

[125] Surridge, Robert J. and Brian Murphy, *Houseman and Davies Law of Life Assurance*, (12th ed., 2001), Butterworths Tolley, London, at para. 7-7.
[126] *Ibid.*
[127] Clarke, Malcolm A., *Law of Insurance Contracts*, (Loose-leaf) (Service Issue 4, 31 Oct 2001), LLP, London, at para. 6-1; Ivamy, E.R. Hardy, *Personal Accident, Life and Other Insurance*, (2nd ed., 1980), Butterworths, London, at 104; and Merkin, Robert, *Colinvaux and Merkin's Insurance Contract Law*, (Loose-leaf) (Release 1, March 2002), Sweet & Maxwell, London, at para. D-0014.

decision in *Re Moore*[128] that an insurance policy is a chose in action. Since it is a subject matter of an assignment under s.136, the assignee should enjoy the statutory rights once the prescribed procedure is fulfilled.

With regard to the position of an assignee in equity of a life policy, his rights should be similar to the rights of an assignee of a general equitable assignment.[129]

There are another two issues pertaining to the rights of an assignee of a life policy. The first issue arises from s.3 of the LAA 1774 (UK) which provides that the amount receivable under a life policy shall not exceed the policy inceptor's insurable interest. Thus, it is important to examine the quantum receivable by the assignee when the insured event happens. Section 3 reads:

> And in all cases where the insured has interest in such life or lives, event or events, no greater sum shall be recovered or received from the insurer or insurers than the amount of value of the interest of the insured in such life or lives, or other event or events.

Although s.3 does not specify when the quantum is to be determined, the court in *Dalby* v. *The India and London Life-Assurance Company*[130] confirmed that since s.1 of the Act requires the policy inceptor to have insurable interest in the life insured only at the policy's inception, it is only correct that the quantum receivable should be determined at that point in time. It should be the value agreed upon by both parties at the policy's inception, for the amount of premiums payable by the policy owner is calculated and fixed by the insurer with reference to the said value. Unless there was misrepresentation on the policy owner's part, the insurer should be estopped from disputing the amount of insurable interest which the policy owner had in the life

[128] *Supra*, note 13.
[129] See Pt. 3.2.2.2, *supra*, at 79-82.
[130] 139 ER 465.

insured.[131] Thus, where the policy inceptor effects the policy with the general intention of assigning it, but with no particular person in mind, the assignee should be entitled to the sum insured. If the sum assigned is lower than the sum insured,[132] then the assignee can receive only the sum assigned.

The above discussion should also apply where the policy is incepted with the intention of assigning it to a particular assignee. This is because s.2 of the LAA 1774 (UK) requires the policy owner to notify the insurer of the intended assignee's identity prior to the policy's inception. As the insurer has calculated the premium based on the agreed value, it cannot dispute the value of the intended assignee's insurable interest unless there was misrepresentation by the policy owner or assignee.

The second issue is which assignee has priority where the policy owner has effected several assignments over the life policy in favour of different assignees. The PAA 1867 (UK) has laid down a clear priority rule. Section 3 prescribes that their priority is regulated by the dates on which notices of the assignments are received by the insurer. This is subject to the qualification introduced by the court in *Newman* v. *Newman*[133] that an assignee who has notice of a previous assignment when he advances moneys or acquires the assignment, cannot gain priority by being the first to give notice. In this respect, the qualification to the rule in *Dearle* v. *Hall* as laid down in *Timson* v. *Ramsbottom*[134] is followed. However, unlike the rule in *Dearle* v. *Hall*,[135] a prior assignee does not gain priority if the insurer knows about his assignment from another source of information, such as a newspaper. To be effective, written notice of the

[131] *Ibid.*, at 475-476.
[132] Such assignment can be created pursuant to the PAA 1867 (UK) or in equity. Section 136(1) of the Law of Property Act 1925 (UK) requires the assignment to be absolute.
[133] (1885) LR 28 ChD 674, at 680-681.
[134] *Supra*, note 57.
[135] *Lloyd* v. *Banks*, *supra*, note 54.

assignment must be given to the insurer at its principal place of business notified to the policy owner.[136]

However, s.3 applies only to competing assignments which comply with the PAA 1867 (UK). Where the competing assignments on a life policy are created pursuant to the procedure in s.136(1) of the Law of Property Act 1925 (UK) or are equitable, it is uncertain whether their priority is governed by the rule in *Dearle* v. *Hall* as discussed in Part 3.2.3.[137] The writer is of the view that it should.

3.4.2.2 Position in Malaysia before the Insurance Act 1996

This Part examines the procedure for a valid and effective assignment of a life policy and the rights of its assignee in Malaysia before the enactment of the Insurance Act 1996. Then, the provisions pertaining to life insurance were found in the repealed Insurance Act 1963 (Act 89, Rev. 1972).[138] Though the 1963 Act regulated the requirement of insurable interest in a life policy, it did not prescribe any procedure for the creation of an assignment or the rights of an assignee.

(a) Requirement of insurable interest in a life policy

Section 40 of the repealed Insurance Act 1963 which regulated the requirement of insurable interest in a life policy, read as follows:

> (1) A life policy insuring the life of anyone other than the person effecting the insurance or a person connected with him as mentioned in subsection (2) shall be void unless the person effecting the insurance has an insurable interest in that life at the time the insurance is effected; and the policy moneys paid under such a policy shall not exceed the amount of that insurable interest at that time.

[136] Sections 3 and 4 of the PAA 1867 (UK).
[137] *Supra*, at 84-87.
[138] The Insurance Act 1963 came into force in West Malaysia and East Malaysia on the 21 January 1963 and 1 January 1965 respectively. Prior thereto, the LAA 1774 (UK) was applicable by virtue of s.5(1) of the Civil Law Act 1956.

> (2) The lives excepted from subsection (1), besides that of the person effecting the insurance, are those of that person's wife or husband, of that person's child or ward being under the age of majority at the time the insurance is effected, and of anyone on whom that person is at that time wholly or partly dependent.

It is clear that s.40 enacted the common law presumptions that a person has insurable interest in his life and his spouse's life. It also extended the scope of presumed insurable interest to the lives of the policy owner's child and ward under the age of 18 years, and the person on whom he is partly or wholly dependent.

Section 40 required the policy owner to have insurable interest in the life insured "at the time the insurance (was) effected". In this respect, the statutory provision was similar to the position in the UK as prescribed in s.1 of the Life Assurance Act 1774 (UK).[139] However, s.40 was silent on whether the person for whose benefit the insurance was effected was also required to have insurable interest in the life insured. It is submitted that the spirit of s.40 required it. Thus, if the policy owner effected the policy with the intention of assigning it to a particular person, the intended assignee should have insurable interest in the life insured.

The following paragraphs (b) and (c) examine the types of assignments which could be created over a life policy, and the rights of the assignee before the Insurance Act 1996 came into effect.

(b) Legal and equitable assignments of life policies

As discussed in Part 3.2.2,[140] there are two types of general assignments, namely an assignment pursuant to s.4(3) of the Civil Law Act 1956 and an equitable assignment.

[139] However, there was no requirement for the policy owner to name all the persons who were interested in the policy. In this respect, s.40 of the Insurance Act 1963 differed from the LAA 1774 (UK).
[140] *Supra*, at 75.

The issue is whether an assignment which complied with the Policies of Assurance Act 1867 (UK) was recognised in Malaysia before the Insurance Act 1996 came into force. It would be possible if the PAA 1867 (UK) applied in Malaysia. Although there was no local case which had applied the PAA 1867 (UK), practitioners and academicians alike had assumed its application then.[141]

The writer submits that the applicability of the PAA 1867 (UK) in Malaysia was dependent on whether the Act could be imported pursuant to s.5 of the Civil Law Act 1956. As discussed in Part 1.5.2,[142] there are two rules on the importation of an English statute. The rule in *Seng Djit Hin* v. *Nagurdas Purshotumdas and Company*[143] allows the court to apply a statutory provision if it is the law as would be administered in England to resolve an issue within the scope of s.5(1). Life insurance is within its scope. But, the rule in *Shaik Sahied bin Abdullah Bajerai* v. *Sockalingam Chettiar*[144] prescribes that an English statute may be imported only if it is of general application to resolve an issue with respect to mercantile law.

The writer is of the opinion that the PAA 1867 (UK) could be imported under the rules in *Seng Djit Hin* and *Sockalingam*. First, the Insurance Act 1963 did not provide for the assignment of a life policy. In addition, although there was a local general statutory provision on the creation of an assignment, namely s.4(3) of the Civil Law Act 1956, there was none governing the priority between competing assignees.

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[141] Nik Ramlah, *supra*, note 80, at 207-208. However, Nik Ramlah is of the opinion that such a presumption is questionable.
[142] *Supra*, at 15-16.
[143] [1923] AC 444.
[144] [1933] AC 342.

Secondly, although there are a few minor provisions in the PAA 1867 (UK) which apply in the UK only, they do not affect the general application of the Act in Malaysia. Moreover, they can be easily overcome. Section 3 provides, *inter alia*, that written notice of the assignment is to be given to the insurer at its principal place of business. If the insurer has two or more principal places of business, then the notice is to be sent to "one of such principal places of business, either in England or Scotland or Ireland". This issue can be resolved by complying with s.4 of the PAA 1867 (UK) which requires the insurer to specify its principal place of business at which notice of an assignment may be given. Thus, the insurer in Malaysia can just specify its place of business in Malaysia as the place at which the notice of assignment is to be given. Another provision in the PAA 1867 (UK) which may give rise to problems is s.6. It provides that the insurer is to deliver the written acknowledgement upon receipt of "a fee not exceeding 25p". The writer submits this problem can be resolved by stipulating in the policy that the fee payable is the local currency equivalent to 25p or less.

In view of the aforesaid, the writer is of the opinion that the PAA 1867 (UK) applied in Malaysia before the Insurance Act 1996. The next issue is whether the application of the UK Act affected the application of s.4(3) of the Civil Law Act 1956 to an assignment of a life policy. The writer submits that it did not. This is because there is no provision in the Civil Law Act 1956 which is *in pari materia* with s.136(2) of the Law of Property Act 1925 (UK).[145]

In conclusion, the writer is of the opinion that in Malaysia before the Insurance Act 1996, the owner of a life policy could effect a legal assignment over a life policy pursuant to the PAA 1867 (UK) or s.4(3) of the Civil Law Act 1956, in equity.

[145] See the discussion in Pt. 3.4.2.1(c), *supra*, at 103.

(c) Rights of the assignee of a life policy

An assignee of a life policy in Malaysia before 1997 enjoyed rights similar to an assignee of a life policy in England,[146] except with regard to the quantum receivable by the assignee from the insurer when the policy became a claim. This was due to s.40(1) of the Insurance Act 1963, which prescribed that the quantum receivable should not exceed the amount of the policy inceptor's insurable interest in the life insured when the policy was effected. The exceptions were where the policy was issued before 21 January 1963,[147] or where the life insured was the policy inceptor himself, or his spouse, his child or ward below the age of 18 years when the policy was effected, or any person on whom he was wholly or partly dependent.[148]

Although s.40 did not expressly require the intended assignee of a life policy to have insurable interest in the life insured, the writer holds the opinion that the spirit of s.40 required it.[149] However, since the insurer was not notified of the assignee's identity when the sum insured was determined, the insurer could dispute the sum insured was the assignee's insurable interest in the life insured when the policy was incepted. The assignee had to prove the value of his insurable interest in the life insured. This is now academic, for the requirement of insurable interest is now governed by s.152 of the Insurance Act 1996.

With regard to the issue on the priority between the assignee and a competing interest holder, it is submitted that the position of the assignee in Malaysia before the Insurance Act 1996 was similar to his position at common law in England. It was uncertain

[146] The rights were discussed in Pt. 3.4.2.1(c), *supra*, at 103-106.
[147] Section 40(5) of the Insurance Act 1963.
[148] Section 40(2) of the Insurance Act 1963.
[149] See Pt. 3.4.2.1(a), *supra*, at 101-102.

whether the rule in *Dearle* v. *Hall* or the *nemo dat quod non habet* rule applied where the competing assignments did not comply with the PAA 1867 (UK).

3.4.2.3 Position in Malaysia under the Insurance Act 1996

The Insurance Act 1996 came into effect on 1 January 1997. The Act does not prescribe the method of assigning a life policy or govern the priority of competing assignees of a life policy. Thus, the writer submits that the owner of a life policy can continue to create an assignment over the policy under the PAA 1867 (UK), s.4(3) of the Civil Law Act 1956 or in equity. However, the Insurance Act 1996 prescribes a different test for insurable interest. This and its consequences will be studied below. The writer will also examine the position of the assignee where the policy owner has created a trust under s.166 of the Insurance Act 1996.

(a) Requirement of insurable interest in a life policy

Section 152 of the Insurance Act 1996 requires the policy inceptor to have insurable interest in the life of the person insured when the insurance is effected and when the insured event occurs. The exceptions are where the policy was issued before 21 January 1963, or where the life insured is the policy inceptor himself or the policy inceptor's spouse, child,[150] ward under the age of 18 years at the time the insurance is effected, employee[151] or a person on whom the policy inceptor is wholly or partly

[150] Note that the age of the child is immaterial. Under s.40 of the Insurance Act 1963, the child must be below the age of 18 years at the time the insurance was effected.

[151] At common law, the employer's insurable interest in the life of his employee is limited to the value of the salary equivalent to the minimum period of the termination notice of the contract of service by the employee. See *Simcock* v. *Scottish Imperial Insurance Co*, *supra*, note 110.
It is submitted that the enactment of this presumption is commendable as it gives legal effect to the common practice of employers in insuring the lives of their valuable employees beyond the values representing their contractual rights against their respective employees. As per Lord Pearson in *Simcock*, at 288, "It is impossible to appreciate in money the 'amount of value' of an interest whose endurance rests on sentiment or good feeling or mutual advantage".

dependent[152] when the insurance is effected.

Section 152 is silent on whether the person for whose benefit the insurance is effected is also required to have insurable interest in the life insured. It is submitted that since the provision is to prevent a wager contract which is void under s.31(1) of the Contracts Act 1950, it should follow that if the policy is incepted for the purpose of assigning it to a particular person, the latter should have insurable interest in the life insured. The spirit of s.152 requires it. It is proposed that s.152 be amended to give effect to this.

The writer further submits that the requirement of insurable interest curtails the growth of the life insurance industry. Since the policy inceptor must have insurable interest at the inception of the policy, an insurance policy taken out at a time when the owner does not have insurable interest in the life insured is void. It is immaterial that he expects to have the interest at a later date. It is submitted that since the main purpose of the requirement for insurable interest is to avoid wagers, it is sufficient if the policy owner has or expects to have insurable interest when the policy is incepted. To hinder

[152] This presumption is adopted from s.40 of the Insurance Act 1963. This provision has yet to be judicially interpreted, and thus, its meaning and scope have yet to be determined. As per Nik Ramlah, *supra*, note 80, at 32-33, the phrase "partly dependent" is vague, as it can range from minimally dependent to totally dependent. Nik Ramlah holds the opinion that in the light of the common law cases, the phrase refers to pecuniary dependence.
Section 152(1) of the Insurance Act 1996 provides that the amount recoverable shall not exceed the amount of the policy inceptor's insurable interest when the policy becomes a claim. It refers to pecuniary value. But it is submitted that where the law presumes insurable interest, as in the relationship between spouses, of a parent with his child, a guardian with his ward or an employer with his employee, the requirement for pecuniary dependence no longer holds true. The person may insure any amount, which is agreed upon by the insurer, on the life of his spouse, child, ward or employee, for such policies are valued policies. The writer submits that such insurable interest, which is not linked to pecuniary interest, should be extended to a person on whom the policy inceptor is at the time the insurance is effected, wholly or partly, dependent.
Hence, it is submitted that the phrase should include a person who is either pecuniarily or emotionally dependent on the life insured. A person should be presumed to have insurable interest in the lives of his parent, his sibling, his relative, and his lover. An employee should also be presumed to have insurable interest in the life of his employer. This liberal interpretation would result in a person having an insurable interest in the life of almost everyone connected or related to him. It is yet to be seen whether the court would accept such liberal interpretation or restrict it to pure pecuniary interest.

wagers, the legislature can enact a provision to the effect that if the insured event happens before the policy owner has insurable interest, the insurer is not liable and any premium paid will be forfeited.[153] In this connection, reference may be made to s.4(2) and s.6(1) of the Marine Insurance Act 1906 (UK) which do not require the policy owner to have insurable interest in the subject matter of the policy when the policy is incepted. The policy is not void if the policy owner expects to acquire an insurable interest in the subject matter.

However, the writer foresees one possible problem where the policy inceptor does not have, but merely expects to have, insurable interest in the life insured when the policy is incepted. As the quantum of his insurable interest will be known only after the policy's inception, the insurer will not be able to calculate the premium payable by the policy owner. To overcome this problem, the writer proposes that the legislature enacts that if a policy is not void, the insurer pays the insured sum which has been agreed upon at the policy's inception. This reform will also ensure that the insurer pays to the assignee of a life policy or its proceeds what the insurer had originally bargained with the policy inceptor.

(b) Rights of the assignee of a life policy

As in the position before the Insurance Act 1996, the owner of a life policy may effect an assignment over it by complying with the procedure in the PAA 1867 (UK) or s.4(3) of the Civil Law Act 1956, or in equity. Similarly, the assignee enjoys the benefits conferred by the respective statutory provisions or in equity.

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[153] Although equity requires the insurer to refund the premium if the risk does not attach, the parties can agree or the legislature can legislate otherwise. See *Stevenson* v. *Snow* 97 ER 808, at 810, where Lord Mansfiled said, "Equity implies a condition that the insurer shall not receive the price of running a risk, if he runs none. This is a contract without any consideration". See also Nik Ramlah, *supra*, note 80, at 97 and Merkin, *supra*, note 73, at para. B-0384.

With regard to the amount receivable by the assignee from the insurer, it is submitted that his position has changed in view of s.152 of the Insurance Act 1996. Sub-section (1) prescribes that the amount recoverable from the insurer under a life policy is the policy inceptor's insurable interest in the life insured when the insured event happens. If the writer's opinion that the person for whose benefit the insurance is effected should have insurable interest in the life insured, is correct, it should then follow that the maximum amount receivable by the assignee should be his own insurable interest, and not the policy inceptor's insurable interest, in the life insured when the insured event happens. The assignee can recover the insured sum without proving his insurable interest only if the policy was issued before 21 January 1963 or he is presumed by s.152 to have insurable interest in the life insured.

The next issue pertaining to the position of an assignee is whether he has priority over the policy where the policy owner has created another interest in favour of another person. It is submitted that where the competing interest is also an assignment over the policy, the position prior to 1997 still applies. This is because the Insurance Act 1996 does not regulate the priority of competing assignees of a life policy. Thus, where the PAA 1867 (UK) applies, the assignees' priority is regulated by s.3 of the 1867 Act. Otherwise, it is still uncertain whether the *nemo dat quod non habet* rule or the rule in *Dearle* v. *Hall* applies to govern their priority. The uncertainty prevails also where there is a contest between the assignee of a life policy and the assignee of its proceeds. The writer submits that the legislature should enact a priority rule in line with the rule in *Dearle* v. *Hall* for the reasons stated in Part 3.2.3.[154]

[154] *Supra*, at 85-87.

There is also no provision governing the priority between the assignee of a life policy and the beneficiary of a trust under s.166 of the Insurance Act 1996[155] even though s.166(4) permits the owner of a life policy[156] with the trustee's consent, to create an assignment over the policy after he has created the trust. The issue is whether the assignee has priority over the beneficiary of a trust under s.166.

It is clear that a subsequent assignment of the life policy which is created without the trustee's consent will not have priority. Once a trust is created, the policy owner is divested of the legal title and beneficial interests in the subject matter of the trust. Only the trustee can deal with it. If the trustee has not given his consent to the assignment, the assignment is not effective.

However, it is not clear whether a subsequent assignment of the life policy which is created with the trustee's consent has priority over the beneficiary of the trust under s.166. It would appear that the assignee has priority, for otherwise the trustee's consent is irrelevant. However, as will be discussed in Part 4.4.2.6,[157] the trustee cannot consent to the assignment if first, the assignment does not benefit the beneficiary; or secondly, the beneficiary has not consented to the assignee having priority over the policy moneys. In such a case, if the trustee consents, he breaches his fiduciary duty. The beneficiary has a right to trace the policy moneys to the assignee if the assignee is not a *bona fide* purchaser for value or has notice of the trust.

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[155] The concept of a trust under s.166 will be examined in Chapter 4. It will be studied in Pt. 4.4.2, *infra*, at 179 that the trust is created when the policy owner nominates his spouse, child, or his parent when he has no living spouse or child, to receive the policy moneys payable on his death. And as was discussed in Pt. 2.4.1.4, *supra*, at 49, s.163(1) and (2) require the policy owner to submit a duly completed nomination form to the insurer. Thus, it follows that a trust under s.166 is created only upon its notification to the insurer.

[156] It must be noted that Part XIII of the Insurance Act 1996, which includes s.166, applies to both life and personal accident policies.

[157] *Infra*, at 190-191.

(c) Stamp duty payable

Part 3.2.4[158] discussed the stamp duty payable on an assignment, which admittedly is high. Although the transfer by endorsement of an insurance policy is exempted from stamp duty, the transfer of a life insurance policy by assignment is specifically excluded from this exemption.[159] To save on stamp duty, the policy owner may decide to effect a nomination only in favour of his intended beneficiary. The intended beneficiary will not enjoy the moneys because he receives them as an executor.[160] Thus, it is recommended that the legislature either abolishes or reduces the stamp duty payable to encourage a policy owner to assign his life policy as a gift.

3.5 Assignment of the Policy Proceeds

As discussed in Part 3.4,[161] the insurance policy is transferred from the assignor to the assignee in an assignment of the policy. The assignee becomes the owner of the policy. However, in an assignment of the policy proceeds, the assignor transfers to the assignee only his rights to the proceeds payable under the insurance policy. The assignor remains the policy owner. Thus, unlike in an assignment of the policy, there is no need to obtain the insurer's consent to the assignment of the policy proceeds unless the policy so requires.[162] It is also not necessary for the assignee to possess insurable interest in the subject matter of the policy.

Part 3.5 analyses the creation of an assignment of the policy proceeds and the rights of its assignee. It will be carried out in two separate parts, first, an assignment of the

[158] *Supra*, at 87-88.
[159] See item 32 exemption (b)(iii) of the First Schedule to the Stamp Act 1949.
[160] *Supra*, at 53.
[161] *Supra*, at 90.
[162] Merkin, *supra*, note 73, at para. D-0035.

proceeds of a general policy; and secondly, an assignment of the proceeds of a life policy.

3.5.1 Assignment of the proceeds of a general policy

The analysis on the rights of the assignee of an assignment over the proceeds of a general policy is divided into first, where the assignment is voluntary; and secondly, where the assignment is by operation of law.

3.5.1.1 Voluntary assignment of the proceeds of a general policy

In a voluntary assignment of the policy proceeds, the assignment is effected by the policy owner in favour of a third party. Unless the contract stipulates otherwise, this can be done without the insurer's consent.

(a) Legal and equitable assignments of the proceeds of a general policy

The proceeds of a general policy is a chose in action within the meaning of s.4(3) of the Civil Law Act 1956.[163] The provision is *in pari materia* with s.136(1) of the Law of Property Act 1925 (UK). According to the Court of Appeal (UK) in *The Mount I*,[164] the policy owner can create an assignment under s.136(1) of the UK Act on his rights to claim under the policy subject to the following. First, if the policy has not expired, the assignment can be created only if there is a total loss that exhausts the policy. This is due to the requirement that a s.136(1) assignment must be absolute. It must cover the policy's full proceeds. Secondly, if the policy has expired, the legal assignment may be created if there is a loss to the subject matter. It is then immaterial whether the loss is partial or total. Thirdly, a s.136(1) assignment can be effected only after the insured

[163] *Re Moore*, *supra*, note 13.
[164] *The Mount I*, *supra*, note 12, at 1366-1371.

event has taken place. It cannot be created on a claim "which depend(s) on future casualties which may never occur".[165] Therefore, a future insurance claim which depends on a future event that may never happen, is only assignable in equity. These principles also apply to an assignment on the proceeds of a marine policy, which may be created pursuant to s.4(3) of the Civil Law Act 1956 or in equity.[166]

(b) Rights of the assignee of the proceeds of a general policy

The rights of an assignee of the proceeds of a general policy are similar to those enjoyed by an assignee of a general assignment. Where he is a legal assignee, he has the rights to sue and give a good discharge to the insurer. The amount receivable by an assignee is the amount which can be recovered by the assignor from the insurer as contracted in the policy. This is because the assignee's action against the insurer is subject to the same defences and equities available to the insurer as if the action has been commenced by the assignor. It is immaterial whether the defences and equities arise before or after the assignment.[167] Thus, the assignee loses his rights to the proceeds if the assignor breaches his warranty or duty of good faith, makes fraudulent claims or has been indemnified in full by a third party.[168]

[165] *Ibid.*, at 1371.

[166] *Ibid.*, at 1367. The Marine Insurance Act 1906 (UK) does not regulate an assignment of the proceeds of a marine policy. See Mustill and Gilman, *supra*, note 96, at 170.

[167] *The Litsion Pride* [1985] 1 Lloyd's Rep 437; and Clarke, Malcolm A., *Law of Insurance Contracts* , (Loose-leaf) (Service Issue 1, 30 April 2000), LLP, London, at para. 6-6.

[168] Clarke, *ibid.*
However, the insurer does not owe any duty or obligation to the assignee. See *The Good Luck* [1989] 2 Lloyd's Rep 238, at 264-265, where the policy owner assigned the benefits of the insurance to the bank. The insurer was notified of the assignment. The insurer did not inform the bank that the policy was voidable. The Court of Appeal held that the insurer owes no duty of utmost good faith to the bank, which was the assignee of the policy proceeds. The position is different where the bank is an assignee of the policy, for then it steps into the shoes of the assignor and becomes the new policy owner.

(c) Priority between competing assignees of the proceeds of a general policy

With regard to the priority between competing assignees of policy proceeds, it is unfortunate that other than s.168 of the Insurance Act 1996, there is no statutory provision or court decision on this issue. Section 168 applies to a life policy and a personal accident policy effected by a person upon his own life providing for payment of policy moneys on his death. Its effects will be dealt with in Part 3.5.2.2.[169] With regard to the priority of competing assignees of the proceeds of a general policy, other than a personal accident policy, it is uncertain whether the *nemo dat quod non habet* or the rule in *Dearle* v. *Hall* applies. However, the writer submits that the rule in *Dearle* v. *Hall* should apply for the reasons stated in Part 3.2.3.[170]

3.5.1.2 Assignment of the proceeds of a general policy by operation of law

Unlike a voluntary assignment, the consent or intention of both policy owner and insurer are irrelevant in an assignment by operation of law. In such an assignment, the assignment takes effect upon the occurrence of the event stated in the relevant statutory provision. This Part examines the position of the assignee of an assignment by operation of law. Two situations will be the subject of examination. They are first, when the insured becomes insolvent; and secondly, when the insured property is damaged or destroyed.

(a) When the insured becomes insolvent

At common law, any moneys paid by an insurer to an insured after the commencement of bankruptcy proceedings against the insured would form part of his assets. The assets would be available for distribution to his creditors. This applied, too, to where the

[169] *Infra*, at 129-137.
[170] *Supra*, at 85-87.

moneys were paid to the insured under a liability policy to settle his liabilities towards a claimant. As this was unjust to the claimant, the English legislature enacted the Third Parties (Rights against Insurers) Act 1930 ("TP(RI) Act 1930 (UK)").

The TP(RI) Act 1930 (UK) provides that where the insured has incurred liability towards a third party but has not received the insurance moneys from the insurer before he commits an act of insolvency described in s.1(1),[171] his rights against the insurer are transferred to the third party. It is an assignment by operation of law. The insurance moneys do not form part of his assets for distribution to his creditors. Instead, the third party receives the moneys directly from the insurer. However, the third party does not have better rights against the insurer than the insured himself. As per Harman LJ in *Post Office* v. *Norwich Union Fire Insurance Society Ltd*,[172] the third party cannot "pick out the plums and leave the duff behind".

The TP(RI) Act 1930 (UK) which is still in force in England, applies in Malaysia by virtue of s.5 of the Civil Law Act 1956.[173] However, according to the 39th Annual Report of the Law Commission (Annual Report 2004/2005),[174] the UK Government has accepted the English Law Commission's recommendation to reform the Act.[175] Some of the recommendations require legislations. Upon the enactment of the new

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[171] Section 1(1) of the TP(RI) Act 1930 (UK) lists the acts of insolvency as where:
(a) the insured is an individual:
  (i) the insured becomes bankrupt, or
  (ii) the insured makes a composition with his creditors,
(b) the insured is a company:
  (i) a winding-up or administration order is made against the company,
  (ii) a resolution to voluntary wind-up the company (other than for the purpose of reconstruction or amalgamation with another company),
  (iii) its debenture holder has possessed its property subject to a floating charge, or
  (iv) the approval of a voluntary arrangement under Part 1 of the Insolvency Act 1986.

[172] [1967] 1 All ER 577, at 581.

[173] *King Lee Tee* v. *Norwich Union Fire Insurance Society Ltd* (1933) 2 MLJ 187, at 189.

[174] At pg. 17.

[175] See English Law Commission Consultation Paper No. 152, *Third Parties (Rights against Insurers) Act 1930*, (1998) and Report No. 272, *Third Parties – Rights against Insurers*, (2001).

statute, the new Act may apply to the states of Malacca, Penang, Sabah and Sarawak. However, for the other states in Malaysia, the TP(RI) Act 1930 (UK) will continue to apply.[176] As a result, there may then be no uniformity in the law throughout Malaysia. Apart from the TP(RI) Act 1930 (UK), there are provisions in the Road Transport Act 1987 (Act 333) and the Workmen's Compensation Act 1952 (Act 273, Rev. 1982) which confer rights on selected third parties when the insured becomes insolvent. Although these provisions create statutory assignments, the writer will discuss the relevant provisions in the three Acts in Parts 5.3.1.2,[177] 6.4.4.2[178] and 6.5.4.1.[179] This arrangement is chosen for its coherency.

(b) When the insured property is damaged or destroyed

Another area of discussion is on the rights of the purchaser of a property towards the proceeds of the insurance effected on the property where the property is damaged or destroyed before the completion of the contract. In this connection, it is noted that an insurance policy against damage to the moveable or immovable property remains in force even after the policy owner has entered into a contract to sell the said property. The policy owner still has insurable interest in the property as its legal owner,[180] for he faces the risk of the purchaser failing to complete the contract of sale. He loses his insurable interest only upon the completion of the contract. Thus, if an insured event happens before the completion of the contract, the policy owner has a right to claim

[176] See Pt. 1.5.2, *supra*, at 14-16
[177] *Infra*, at 254-257.
[178] *Infra*, at 346-350.
[179] *Infra*, at 362-365.
[180] *Halsbury's Laws of England*, Vol. 25, (4th ed., 2003 Reissue), LexisNexis Butterworths Tolley, London, at para. 621.

against the insurer. But since the risk to the property may have passed to the purchaser,[181] there are a few issues which are of importance to the purchaser.

The vital issues are first, whether the purchaser must still pay the purchase price to the vendor if the property is destroyed; and secondly, whether the purchaser has a right to the insurance proceeds paid to the vendor pursuant to the insurance policy effected on the damaged property. The Court of Appeal in *Rayner* v. *Preston*[182] held that at common law, in the absence of an agreement between the vendor and purchaser, the purchaser has to complete the purchase. He is also not entitled to any of the benefits under the insurance policy. Thus, the purchaser is not protected if the property is damaged or destroyed before the completion of the contract.

In Malaysia, there is no statutory provision which reforms the common law position and creates an assignment of the insurance proceeds in favour of the purchaser of the property if the property is damaged or destroyed before the completion of the contract of sale. However, in England, there are two statutory provisions which regulate the application of insurance proceeds where the insured property is damaged or destroyed. They are s.83 of the Fires Prevention (Metropolis) Act 1774 (UK) and s.47 of the Law of Property Act 1925 (UK). The two English provisions and the issue whether they apply in Malaysia are examined below.

[181] The Sale of Goods Act 1957 (Act 382, Rev. 1989) applies to the sale of movable property, other than actionable claim and moneys. Section 26 prescribes that unless otherwise agreed, the goods remain at the seller's risk until the property in the goods is transferred to the purchaser. The presumptions of when property passes are laid down in s.18 to s.24 of the Sale of Goods Act 1957. In this connection, it is to be noted that the transfer of property does not necessarily coincide with the transfer of title.
With regard to the rule on the sale of an immovable property, the risk of the property is on the purchaser even though the title is not transferred to him. See Sinnadurai, Visu, *The Sale and Purchase of Real Property in Malaysia*, (1984), Butterworths, Singapore, at 240-242.

[182] (1881) LR 18 ChD 1.

(i) Section 83 of the Fires Prevention (Metropolis) Act 1774 (UK)

Section 83 of the Fires Prevention (Metropolis) Act 1774 (UK) requires the insurer to accede to the request of any person interested in the insured building which was damaged by fire, to cause the insurance proceeds to be used to reinstate the said building.[183] There is no case in Malaysia that applied s.83,[184] although in *Sheikh Amin bin Salleh* v. *Chop Hup Seng*,[185] the High Court referred to paragraph 1516 in the 13th edition of *Clerk & Lindsell on Torts* which discussed s.86 of the Fires Prevention (Metropolis) Act 1774 (UK). All provisions in the 1774 Act, except for s.83 and s.86, were repealed by the Metropolis Fire Brigade Act 1865 (UK). If s.86 applies, s.83 which is on mercantile law, should also apply. If s.83 applies, the insured's rights to require the insurer to cause the insurance proceeds to be used to reinstate the damaged building are assigned to the purchaser of the building. The purchaser is a person interested in the damaged building.

(ii) Section 47 of the Law of Property Act 1925 (UK)

Section 47 of the Law of Property Act 1925 (UK) reads as follows:

> (1) Where after the date of any contract for sale or exchange of property, money becomes payable under any policy of insurance maintained by the vendor in respect of any damage to or destruction of property included in the contract, the money shall, on completion of the contract, be held or receivable by the vendor on behalf of the purchaser and paid by the vendor to the purchaser on completion of the sale or exchange, or so soon thereafter as the same shall be received by the vendor.
>
> (2) This section applies only to contracts made after the commencement of this Act, and has effect subject to –
> (a) any stipulation to the contrary contained in the contract,
> (b) any requisite consents of the insurers,
> (c) the payment by the purchaser of the proportionate part of the premium from the date of the contract.

[183] Though the Act appears to be municipal in nature, the courts have held that the Act applies throughout England. See *Sinnott* v. *Bowden* [1912] 2 Ch 414.
[184] Nik Ramlah Mahmood, *supra*, note 80, at 180-181, is of the opinion that s.83 of the Fires Prevention (Metropolis) Act 1774 (UK) applies in Malaysia.
[185] [1974] 2 MLJ 125, at 131.

It is uncertain whether s.47 of the Law of Property Act 1925 (UK) applies in Malaysia by virtue of s.5 of the Civil Law Act 1956.[186] Following the rule in *Sockalingam Chettiar*, s.47 does not apply. This is because the Law of Property Act 1925 (UK) cannot be imported wholesale into Malaysia. A number of its provisions pertain to land matters and s.6 of the Civil Law Act 1956 specifically excludes the application of English law in matters relating to land. Nevertheless, due to the importance of s.47 of the Law of Property Act 1925 (UK) in conferring rights on the purchaser of a property which is damaged or destroyed before the completion of the contract of sale, the writer will briefly discuss the said provision.

The objective of s.47 is to require the vendor to account to the purchaser the moneys paid to him under an insurance policy.[187] The said section creates a statutory assignment. It overrides the decision of *Rayner* v. *Preston*. Unfortunately, the provision is riddled with weaknesses which were discussed in the English Law Commission Working Paper No. 109 on "Transfer of Land: Passing of Risk From Vendor to Purchaser".

As there is uncertainty whether s.83 of the Fires Prevention (Metropolis) Act 1774 (UK) and s.47 of the Law of Property Act 1925 (UK) apply in Malaysia, the writer recommends that the Malaysian legislature reviews the relevant local statutes. The National Land Code 1965 (Act 56) and the Sale of Goods Act 1957 (Act 382, Rev. 1989) may be amended by adding new provisions therein that the risk of loss and damage to the property should remain with the vendor until the completion of the contract of sale. Alternatively, the Insurance Act 1996 should be amended to include a

[186] Sinnadurai, *supra*, note 181, at 242.
[187] English Law Commission Working Paper No. 109, *Transfer of Land: Passing of Risk From Vendor to Purchaser*, (1988).

provision that the vendor's rights against the insurer under any insurance policy effected on a property, are transferred to the purchaser upon the purchaser paying the full purchase price to the vendor. In this connection, the writer recommends that the Malaysian legislature enacts, with modifications, the provision in s.3(13) of the (Singaporean) Conveyancing and Law of Property Act (Chapter 61). Section 3(13) reads:

> On a sale of property a stipulation shall be implied that the purchaser shall be entitled to the benefit of any insurance against fire which may be then subsisting thereon in favour of the vendor.

To further safeguard the position of the purchaser of an insured property, it is recommended that the new provision in the Insurance Act 1996 provides that a purchaser who has paid the full purchase price shall be entitled to the benefit of any insurance against fire and all other risks which is effected on the property. The benefits of the insurance policy should be automatically assigned to him when he pays the full purchase price.

3.5.2 Assignment of the proceeds of a life policy

In Part 3.5.1,[188] the writer has highlighted that the English Court of Appeal in *The Mount I* has held that an assignment of the proceeds of a general policy may be created under s.136 of the Law of Property Act 1925 (UK) only if the insured event has happened. The said s.136 is *in pari materia* with s.4(3) of the Civil Law Act 1956. The writer submits that this does not apply to an assignment over the proceeds of a life policy. It may be created even before the death of the life insured because the event will definitely occur in the future. Only its timing is uncertain.

[188] *Supra*, at 117-118.

One pertinent issue is whether an assignment over the life policy proceeds can be effected pursuant to the Policies of Assurance Act 1867 (UK). According to Merkin, the 1867 Act governs only an assignment over a life policy.[189] Thus, an assignment over a life policy proceeds may be created under s.4(3) of the Civil Law Act 1956 or in equity. If the assignment is over only a part of the proceeds, it can be created only in equity.

This Part discusses the rights of an assignee of the proceeds of a life policy, with emphasis on his position where there are conflicting interests. The discussion is carried out in two phases, namely, before and after the Insurance Act 1996 came into effect.

3.5.2.1 Position in Malaysia before the Insurance Act 1996

Prior to 1997, the statute that regulated life insurance matters was the Insurance Act 1963. There was no provision that governed the rights or duties of an assignee of the proceeds of a life policy. In this Part, the writer will discuss the rights of an assignee and analyse the priority between an assignee and a competing interest holder.

(a) Rights of the assignee of the proceeds of a life policy

The repealed Insurance Act 1963 did not regulate the rights of an assignee of the proceeds of a life policy. Thus, his rights under the assignment were similar to the rights of an assignee of the proceeds of a general policy. They were discussed in Part 3.5.1.1(b).[190]

[189] See Merkin, *supra*, note 73, at para. D-0035. According to the Court of Appeal in *Re Turcan*, *supra*, note 1, an assignment of the policy is different from an assignment of its proceeds.
[190] *Supra*, at 118.

(b) Priority between the assignee of the proceeds of a life policy and a competing interest holder

A life policy could be sold, used as a security or given as a gift. Its owner could effect various dealings with regard to the policy or its proceeds. He could nominate another person to receive the policy proceeds upon his death, or create an assignment or trust over the policy or its proceeds. In this connection, it is noted that an insurer did not owe a duty to the intended assignee to notify him of any prior transaction on the policy or its proceeds.[191] The assignee who was second in time, might not be aware of his precarious position until he claimed the proceeds. Thus, it is important to analyse the priority between the assignee and a competing interest holder. The repealed Insurance Act 1963 did not regulate their priority.

(i) Priority between the assignees of the proceeds of a life policy

Where there were competing assignees to the policy proceeds, it was uncertain which of the priority rules, namely the *nemo dat quod non habet* or the rule in *Dearle* v. *Hall*, applied. This is now academic in view of s.168 of the Insurance Act 1996.

(ii) Priority between the assignee of the proceeds of a life policy and a nominee

Prior to the Insurance Act 1996, the assignee would enjoy priority in a contest between him and a nominee of the policy proceeds. Due to the following reasons, it was immaterial whether the assignment was created before or after the nomination.

First, the nomination was a contract between the policy owner and the insurer where the policy owner authorised the insurer to pay the policy proceeds to the nominee. The nominee had no recourse if the policy proceeds were not given to him. He had no right

[191] *The Good Luck*, *supra*, note 168, at 264-265.

to sue the policy owner and insurer, for he was not a party to the contract.[192] On the other hand, the assignee of the policy proceeds had a right to sue the insurer for the proceeds. If s.4(3) of the Civil Law Act 1956 applied, he could even sue the insurer directly. If not, he had a right to sue the insurer in the name of the assignor, or sue the insurer and join the assignor as a co-defendant. Apart from suing the insurer, the assignee also had a right to sue the assignor if the assignor breached the assignment.

Secondly, unlike an assignee who would take the proceeds as a beneficiary, an ordinary nominee would take the proceeds as an executor unless it was proven that the policy owner intended him to take as a beneficiary.[193] Even if the nominee was to benefit from the proceeds, he was a volunteer. Thus, the nomination could be revoked by the policy owner because the nomination was an incomplete gift. It would take effect only upon the policy owner's death. The policy owner revoked it when he assigned the policy proceeds.

(iii) Priority between the assignee of the proceeds of a life policy and a beneficiary of a trust

In a contest between the assignee of the proceeds of a life policy and the beneficiary of a trust, the first in time would have priority. It was immaterial whether the trust was an ordinary trust or a trust under s.23 of the Civil Law Act 1956. This is because in both an assignment and a trust, the policy owner had divested his beneficial interest in the policy proceeds to the assignee and the beneficiary of the trust respectively. Thus, the first in time should enjoy priority unless the assignee or beneficiary, as the case may

[192] Although the High Court in *Manonmani* v. *Great Eastern Life Assurance Co Ltd* [1991] 1 MLJ 364 held that a nominee could sue the insurer, the writer is of the opinion that the decision was *per incuriam*. The doctrine of privity does not permit a third party to a contract to sue on the contract. For further discussion, see Pt. 2.3.2, *supra*, at 38-39.

[193] *Manonmani* v. *Great Eastern Life Assurance Co Ltd*, *ibid*. See also Pt. 2.3.1, *supra*, at 37-38.

be, who was the first in time and *sui juris*, had agreed to postpone his priority;[194] or the policy owner had revoked the earlier assignment or earlier trust. In this respect, it must be noted that the policy owner could revoke an assignment unilaterally only if the assignment was equitable, voluntary and not perfected.[195] A trust could be revoked if the policy owner had reserved a power of revocation.[196]

(iv) Priority between the assignee of the proceeds of a life policy and any other competing interest holder

As discussed above, the owner of a life policy might have effected various transactions on the policy or its proceeds. There could be situations where he effected different transactions on the policy and its proceeds to different persons. Since there was no statutory provision before the Insurance Act 1996 came into force to regulate their priority, there was uncertainty whether the rule in *Dearle* v. *Hall* or the *nemo dat quod non habet* rule applied.

3.5.2.2 Position in Malaysia under the Insurance Act 1996

With effect from 1 January 1997, the Insurance Act 1963 was repealed and substituted with the Insurance Act 1996. Section 168 of the 1996 Act, which is found in Part XIII of the Act, regulates the priority between competing claimants of the proceeds of an own-life or personal accident policy effected by the policy owner on his *own life*

[194] With regard to the position of a trust under s.23 of the Civil Law Act 1956, the settlor could not deal with the policy for the benefit of anyone, except the beneficiary. See Suffian J in *Re Man bin Mihat, Decd.* [1965] 2 MLJ 1, at 2-3. The courts in *Re A Policy of The Equitable Life Assurance Society of the United States and Mitchell* (1911) 27 TLR 213 and *Re Fleetwood's Policy* [1926] 1 Ch 48 held that all the powers and options of the policy owner under the policy, which include the right to assign its benefits, must be exercised for the benefit of the beneficiary.

[195] See Pt. 3.2.2.2, *supra*, at 79.

[196] McGhee, *supra*, note 31, at para. 20-40. See also Pt. 4.3.6 with regard to the revocation of a trust under s.23 of the Civil Law Act 1956, *infra*, at 174.

providing payment of policy moneys on his death.[197] Section 168 does not affect the rights of an assignee, including the priority rules of competing claimants, of the proceeds of a policy effected on the life of another person. For ease of reference, both a life policy and a personal accident policy insuring the life of the policy owner are referred to in this Part as "an own-life policy".

Section 168 of the Insurance Act 1996 reads as follows:

> (1) Notwithstanding a nomination under section 163 or the creation of a trust under subsection 166(1), where the policy moneys, wholly or partly, have been pledged as security or assigned to a person, the claim of the person entitled under the security or the assignee shall have priority over the claim of the nominee and subject to the rights under the security or the assignment being preserved, the licensed insurer shall pay the balance of the policy moneys to the nominee.
>
> (2) Where more than one person are entitled under the security or the assignment, the respective rights of the persons entitled under the security or the assignment shall be in the order of priority according to the priority of the date on which the security or the assignment was created, both security and assignment being treated as one class for this purpose.

It is noted that the provision refers to policy moneys, rather than policy proceeds. They refer to the same thing, for the phrase "policy moneys" is defined in s.2 of the Act to include "any benefit, whether pecuniary or not, which is secured by a policy".

It is also to be noted from the opening sentences of s.168(1) and (2) that the policy proceeds which are subject to an assignment, may also be subject to an ordinary nomination, a trust under s.166[198] or another assignment. The Act recognises that there may be situations of competing claimants for the same proceeds. Thus, it is important to analyse the scope of s.168 and its prescribed priority rule.

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[197] Since Part XIII of the Insurance Act 1996 also applies to a personal accident policy effected by the policy owner on his own life providing payment of policy moneys on his death, the discussion in Part 3.5.2.2 applies, too, to an assignment of the proceeds of a personal accident policy.

[198] A trust is created under s.166 where the owner of an own-life policy nominates his spouse or child or parent (unless the parent is nominated at a time when he has a living spouse or child) to receive the policy proceeds payable upon his death. Such a nominee is known as a beneficiary of a trust under s.166. The writer will discuss the requirements and effects of a trust under s.166 in Pt. 4.4.2 and Pt. 4.4.3, *infra*, at 179-206.

(a) Scope of section 168

There are two pertinent issues with regard to the application of s.168, namely, whether s.168 covers both legal and equitable assignments of policy proceeds created by the owner of an own-life policy; and secondly, whether it is relevant that the assignor is given any consideration for the assignment. These issues are examined below.

(i) Legal and equitable assignments

Part 3.2.2 discussed that generally, there are two types of assignments, legal and equitable. A legal assignment is created when the elements in s.4(3) of the Civil Law Act 1956 are fulfilled. If any of the elements is missing, then the assignment takes effect in equity. The effects of a legal assignment and an equitable assignment are different. One important issue is whether s.168 of the Insurance Act 1996 covers both legal and equitable assignments. The writer is of the opinion that it does for the following reasons.

First, s.168(1) reads "... where the policy moneys, *wholly or partly*, have been pledged as security or assigned to a person ...".[199] This clearly indicates that it is immaterial whether the assignment is over all or only a part of the policy proceeds payable under the policy. Where the policy owner assigns only a portion of the policy proceeds to the assignee, the assignment does not fulfil one of the important ingredients in s.4(3) of the Civil Law Act 1956, that is, it must be absolute. Even if it fulfils the other requirements, namely, that the assignment is written, unconditional and has been notified to the insurer, it is not a legal assignment.

[199] The writer's own emphasis.

Secondly, s.168 appears not to place any emphasis on the notification of the assignment to the insurer.[200] Sub-section (2) clearly provides that the priority of competing assignments is regulated according to the order of their creations. Since a legal assignment is an equitable assignment first,[201] it is submitted that s.168(2) refers to the date of execution of the instrument.[202] And if the assignment is not written, its date of creation is inferred from the facts and circumstances surrounding the transaction.[203] Thus, the notice of the assignment, which is relevant for the purpose of s.4(3) of the Civil Law Act 1956, appears to be irrelevant for the purpose of s.168 of the Insurance Act 1996.

In conclusion, the writer submits that s.168 covers both legal and equitable assignments. Both are of equal standing under the provision. It is immaterial whether the assignment of the proceeds of an own-life policy which is competing against another interest over the same proceeds, is legal or equitable.

(ii) Consideration for the assignment

The next important issue is whether it is relevant for the purpose of s.168 that the assignor has been given any consideration for the assignment. The answer to this lies in the phrase "the policy moneys, wholly or partly, have been pledged as security or

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[200] However, according to Rafiah Salim in her article, "Part XIII of the Insurance Act 1996: Payment of Policy Moneys Under a Life Insurance Policy or Personal Accident Insurance Policy" [1997] 24 *JMCL* 55, at 67, the assignment is created when the insurer is notified of the assignment. Unfortunately, such is not prescribed in s.168 or any provision in the Insurance Act 1996, and as discussed in Part 3.2.2.2, *supra*, at 79, the courts have recognised the creation of an assignment even where the debtor was not notified of it. The assignment takes effect in equity.

[201] An equitable assignment includes an assignment which is written, absolute and unconditional. It becomes a legal assignment when the debtor receives a written notice of the assignment. It remains an equitable assignment if notice is not given to the debtor.

[202] *Re Columbian Fireproofing Co Ltd* [1910] 2 Ch 120. This was followed by the case of *Selibin Tin Syndicate Ltd* v. *The Registrar of Companies* (1921) 2 FMSLR 262. Both cases pertained to the registration of charges created by companies.

[203] Legh-Jones, (*et al.*), *supra*, note 59, at para. 24-85; Merkin, *supra*, note 127, at para. D-0016; and Surridge and Murphy, *supra*, note 125, at para. 7-8.

assigned to a person" appearing in s.168(1). The proceeds of a life policy may pledged by way of delivery of the policy together with an assignment as a security the payment of a debt or performance of a promise. There is consideration given to assignor for the pledge. As for the term "assignment", it includes a security, a sal the proceeds, and even a gift by the assignor to the assignee. Thus, the writer is of view that for the purpose of s.168, it is immaterial whether the assignor has been gi any consideration, nominal or otherwise, for the assignment. It covers an assignm which is a gift from the assignor to the assignee.

(b) Rights of the assignee of the proceeds of an own-life policy

Section 168 of the Insurance Act 1996 regulates the priority rule in a contest bet the assignee of the proceeds of an own-life policy and certain interest holders, bu silent on the assignee's general rights. The writer submits that his rights are simila those enjoyed by an assignee of the proceeds of a general policy. They were discus in Part 3.5.1.1(b).[204]

(c) Priority between the assignee of the proceeds of an own-life policy and a competing interest holder

Section 168 prescribes the priority rule in a contest between the assignee of an own policy proceeds with first, another assignee; secondly, an ordinary nominee; thirdly, a beneficiary of a trust under s.166. The rule is analysed below. As s.168 not regulate the priority between the assignee and other categories of interest hol the uncertainty whether the rule in *Dearle* v. *Hall* or the *nemo dat quod non hab* applies to them, still prevails.[205]

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[204] *Supra*, at 118.
[205] See Pt. 3.2.3, *supra*, at 85-87.

(i) Priority between the assignees of the proceeds of an own-life policy

Section 168(2) of the Insurance Act 1996 prescribes that the priority of competing assignees over the same proceeds of an own-life policy is regulated by the dates of their respective creations. Thus, it appears that the rule in *Dearle* v. *Hall* does not apply. Instead, the basic rule, namely competing interests rank in the order of their creations, is applied strictly without exception. In a contest between competing assignees, the assignee who is first in time enjoys priority. An assignee who is the second in time of creation but first to give notice, does not enjoy priority.

The position of an assignee is further affected because there is no source of reference to enable him to obtain information on the status of the policy. A check with the insurer may not reveal any prior interest because the insurer has no duty to respond. Furthermore, an assignee of policy proceeds has no incentive to serve the notice immediately. It appears that an assignee does not enjoy any benefit from the giving of the notice to the insurer, for the notice does not put a brake on the defences and equities available to the insurer[206] or give the assignee a better priority.

In addition, even if the prior assignee has served the notice of assignment on the insurer, the insurer has no duty or obligation to inform a potential assignee. This is despite s.47 of the Insurance Act 1996 which provides, *inter alia*, that a member of the public *who has an interest* in a policy, can request for information as to whether the insurer has entered the policy into its register or whether a claim has been lodged with the insurer. There are weaknesses in the application of s.47. First, a potential assignee has no right under s.47, for s.47(4) confers the right to information only on a person who already has an interest or claim on the policy. Secondly, a potential assignee will

[206] See Pt. 3.5.1.1(b), *supra*, at 118.

want information on whether the policy is free from encumbrances and not merely whether the insurer has entered the policy in its register. Thirdly, a claim is lodged with the insurer only upon, and not before, the insured event. By then, it might be too late.

In conclusion, the first assignee in time enjoys priority. The circumstances surrounding the competing assignments are irrelevant. It is submitted that the current position does not protect the assignees. Their priority should be regulated by the dates of notification to the insurer. In addition, the insurer should keep a register of interests and any member of the public may, with the policy owner's consent, check with the insurer on the status of the policy.

(ii) Priority between the assignee of the proceeds of an own-life policy and an ordinary nominee

Section 163(3)(a) encourages the policy owner to create an assignment over the policy proceeds in favour of his nominee where he intends his nominee who is not his spouse, child, or parent (unless the parent is nominated at a time when he has a living spouse or child), to receive the policy proceeds as a beneficiary.[207] Where an assignment over the policy proceeds is created by the policy owner, the assignee has priority over the ordinary nominee. It is immaterial whether the assignment is created prior or subsequent to the nomination.

(iii) Priority between the assignee of the proceeds of an own-life policy and a beneficiary of a trust

This paragraph examines the position of the assignee where the policy owner has created a trust under s.166 of the Insurance Act 1996 over the policy proceeds. Section

[207] Section 163(3)(a) of the Insurance Act 1996 requires an insurer to prominently display in the nomination form that the policy owner is to assign the policy benefits to his nominee if he wishes his nominee to receive the policy moneys as a beneficiary.

168 modified the position at common law that in a contest between the assignee of the proceeds of a life policy and the beneficiary of a trust, the first in time enjoys priority. Section 168 dictates that the assignee has priority even where the trust was created prior to the assignment. However, due to the following, it is difficult to reconcile s.168 where the trust was created prior to the assignment.

Once a trust is created, the policy proceeds payable on the policy owner's death form the trust property. The legal title and beneficial ownership of the proceeds are vested in the trustee and the beneficiary respectively. The policy owner is divested of all legal title to and beneficial interests in the proceeds. Thus, he can no longer deal with the said proceeds, unless through the trustee. Section 166(4) of the Insurance Act 1996 permits the policy owner, with the trustee's consent, to assign or pledge *the policy*, but not the policy proceeds, as security. As was held by the court in *Re Turcan*,[208] an assignment of a policy is different from an assignment of the policy proceeds.[209] Thus, it is submitted that the policy owner may not assign or pledge the policy proceeds if he has created a s.166 trust. The Act does not confer on the trustee the discretion to consent to the creation of such assignment or pledge.[210] If the trustee consents to its creation, he breaches his duty unless the assignment or pledge benefits the beneficiary of the trust, or the beneficiary who is *sui juris* consents to the postponement of his rights to rank after the assignment.

[208] *Supra*, note 1.
[209] Section 168 regulates the priority of assignments of the policy proceeds, not assignments of the policy.
[210] The rights and obligations of the trustee of a trust under s.166 will be discussed in Pt. 4.4.2.6, *infra*, at 190-191.

Thus, although s.168 requires the insurer to release the policy moneys to the assignee, the beneficiary may seek to recover the moneys subject to the trust from the assignee[211] if the assignee either is a volunteer or has notice of the breach of trust.[212]

3.6 Rights of an Assignee Against the Insurance Guarantee Scheme Fund

This Part studies the rights of an assignee of a general policy or its proceeds against the Insurance Guarantee Scheme Fund for general insurance business ("the IGSF for general insurance business") and an assignee of a life insurance policy or its proceeds against the Insurance Guarantee Scheme Fund for life insurance business ("the IGSF for life insurance business"). The IGSF for general insurance business and the IGSF for life insurance business are collectively called "the IGSF". Apart from the issues raised in Part 2.4.2.3,[213] the following issues are also pertinent to the rights of an assignee when the insurer is wound-up on the ground of insolvency. They are the assignee's rights to claim compensation from the IGSF if the policy has become a claim before the insurer's winding-up and if the policy has not become a claim at that point in time.

3.6.1 When the policy has become a claim

Bank Negara Malaysia ("BNM") may utilise the moneys in the IGSF to meet the liabilities of an insolvent insurer to its policy owners and persons entitled through them.[214] The issue to be considered is whether an assignee of a policy or its proceeds is

[211] *Halsbury's Laws of England*, Vol. 48, (4th ed, 2000 Reissue), Butterworths, London, at para. 986.
[212] It is immaterial that the assignee has given valuable consideration for the property. Such assignee is then a constructive trustee of the proceeds for the beneficiary. See *Barnes* v. *Addy* (1874) LR 9 Ch App 244; and *Halsbury's Laws of Malaysia*, Vol. 5, (2000), MLJ, Kuala Lumpur, at para. 90.077.
[213] *Supra*, at 58-67.
[214] The phrase "person entitled through him (the policy owner)" was discussed in Pt. 2.4.2.3(a), *supra*, at 60.

a person who is qualified to claim from the scheme fund if the policy becomes a claim before the insurer is wound-up on the ground of insolvency.

In a legal assignment of a policy, the assignee replaces the assignor as the owner of the policy and is entitled to the benefits under the policy. Therefore, it is clear that the legal assignee is a qualified claimant. This is further supported by the definition for the phrase "the policy owner" in s.2 of the Insurance Act 1996.[215] The phrase means the person who has legal title to a policy and includes, *inter alia*, the assignee where the policy has been assigned.

The next issue is whether the assignee of an equitable assignment is also a qualified claimant. The definition of "the policy owner" does not specify that the assignee must be a legal assignee. Thus, it does not specifically exclude an assignee in equity. Although the position of the equitable assignee is uncertain, the writer submits that the definition should be interpreted liberally to include him. The ideal situation will be to amend the provision to expressly include an assignee in equity.

In an assignment over the policy proceeds, the assignor remains the 'policy owner'.[216] He transfers only his rights to receive the policy proceeds to the assignee. If it is a legal or statutory assignment, the relevant statutory provision requires the insurer to pay the

[215] The definition for the phrase "the policy owner" in s.2 of the Insurance Act 1996 is as follows:
"'policy owner' means the person who has legal title to a policy and includes –
(a) where a policy has been assigned, the assignee;
(b) the personal representative of a deceased policy owner, where such personal representative is entitled as against the insurer to the benefit of a policy;
(c) in relation to a policy providing for the payment of annuity, an annuitant; and
(d) where under a policy, moneys are due or payable, whether periodically or otherwise, the person to whom the moneys are due or payable".

[216] The assignor in an assignment of policy proceeds transfers merely his right to claim under the policy.

assignee.[217] Since a legal assignee of the policy proceeds has direct recourse against the insurer for the policy proceeds, it follows that he can claim compensation from the IGSF when the insurer is wound-up. The legal assignee is deemed to be a person entitled through the policy owner.

However, the position of an assignee of the policy proceeds in equity is different. The insurer is neither contractually nor statutorily liable to him. As the equitable assignee has no direct recourse against the insurer, he is neither a policy owner nor a person entitled through the policy owner. It thus follows that he is not entitled to claim compensation from the IGSF.

3.6.2 When the policy is terminated

This Part analyses the position of an assignee of a policy or its proceeds in relation to the IGSF where the insured event has not occurred. In this connection, it is noted that s.121 of the Insurance Act 1996 provides that a general policy shall cease from the date of the insurer's winding-up order. Thus, if the policy has not become a claim before the insurer is wound-up, the assignee of a general policy can claim from the IGSF compensation equivalent to the amount of premium paid in proportion to the unexpired period of the policy.[218] All other protection conferred by the policy is lost. The assignee of the proceeds of a general policy is even more unfortunate for he loses not only the protection, but he is also not entitled to the refund of the proportionate premium because it is not part of the policy proceeds.

[217] However, it must be noted that this does not apply in an assignment created by s.47 of the Law of Property Act 1925 (UK). It is still uncertain whether the provision applies in Malaysia. See the discussion in Pt. 3.5.1.2(b), *supra*, at 124.
[218] Section 121(1)(a) of the Insurance Act 1996.

As for a *life policy* issued by an insurer which is wound-up on the ground that it is insolvent, the policy, too, shall cease to be effective unless the insurer's liquidator transfers the insurer's assets and liabilities, including the life policy, to another insurer. If it is transferred, the new insurer will take over the policy. Thus, the assignee of the proceeds of the life policy or the policy itself which has been transferred to another insurer, will enjoy the protection conferred by the new policy.[219] If the life policy is not transferred to another insurer, the assignee of the policy or its proceeds[220] will receive the actuarial valuation reserve of the policy.[221] This reserve will be much less than the amount receivable from the insurer had the insurer remained solvent.

This thesis recommends that if the policy is for a term of not more than one year, the policy should cease only on its expiry. For a policy for a period of more than one year, BNM should have the power to compel a solvent insurer to takeover the said policy. These measures are to safeguard the position of not only the policy owner, but also the assignee and all other third parties who may be prejudiced by the policy's early termination.

3.7 Concluding Remarks

Part 3.7 highlights the major weaknesses in the current legal framework on the rights of an assignee in an assignment in connection with an insurance policy. First, except for assignments of the proceeds of an own-life policy and personal accident policy, it is uncertain whether the priority of competing assignees is governed by the *nemo dat*

[219] *Nesbitt* v. *Berridge* 55 ER 111.
[220] The assignee of the proceeds of a life policy will receive the reserve. Following the principle in *Re Fleetwood's Policy*, *supra*, note 194; and *Fostescue* v. *Barnett*, *supra*, note 34, the reserve is deemed to be the policy proceeds.
[221] Section s.121(1)(b) of the Insurance Act 1996.

quod non habet rule or the rule in *Dearle* v. *Hall.* With regard to the competing assignees of the proceeds of an own-life policy or a personal accident policy, the effect of s.168 is that their priority is regulated by the *nemo dat* rule. The writer has discussed and highlighted the weaknesses of this rule in this Chapter and has thus, recommended that the priority of competing assignees should be determined by the dates of receipt of the notices of the assignments by the insurer. Towards this end, the insurer should be required to keep a register of policies, which includes particulars of assignments and other interests created by the policy owner. The register would then serve as a source of reference to anyone who wishes to obtain information on the status of the policy's encumbrances with the policy owner's consent and upon payment of a small fee to the insurer. Thus, with the register, the assignee who first notifies the insurer, regardless of whether he is an assignee in law or equity, will gain priority. It is immaterial that there is a prior assignee, for the prior assignee will be estopped from claiming priority due to his failure to notify the insurer of his interest.[222]

The second weakness is with regard to the requirement of insurable interest for a life policy. Section 152 of the Insurance Act 1996 requires the policy inceptor to have insurable interest in the life insured on two occasions, when the policy is incepted and when the policy becomes a claim. The insurer is liable to pay the lower of the sum insured and the value of the policy inceptor's insurable interest when the policy becomes a claim. As a result, it appears that the insurer of a life policy is legalised to pay a sum lesser than what it has bargained at the policy's inception. It is submitted that s.152 should be reformed. It should be sufficient that the policy inceptor has or expects to have insurable interest when the life policy is incepted. If he enjoys

[222] Guest A.G. (*el at.*) (Ed.), *Benjamin's Sale of Goods*, (6th ed., 2002), Sweet & Maxwell, London, at para. 7-001.

insurable interest in the life insured before the insured event, the policy is valid and he can recover the sum insured. Where the policy is incepted with the intention of assigning it to a particular person, the intended assignee should also be required to have insurable interest in the life insured before the insured event.

Thirdly, the current procedure for an assignment under the English Marine Insurance Act 1906 causes uncertainty. It is proposed that the Malaysian legislature enacts a comprehensive Act which contains clear provisions on the procedure for an assignment of a marine policy and its proceeds.

Fourthly, there are occasions where an assignment of the policy proceeds takes effect upon the occurrence of an event prescribed in a statutory provision, such as when the insured becomes insolvent or when the purchased property is damaged or destroyed. With regard to the former situation, there are provisions in two statutes in Malaysia pertaining to assignments of rights in favour of selected third parties in an insurance policy when the insured becomes insolvent. The local statutes are the Road Transport Act 1987 and the Workmen's Compensation Act 1952. Apart from that, it is trite that the Third Parties (Rights against Insurers) Act 1930 (UK), which is a statute of general application in the UK, also applies in Malaysia by virtue of s.5 of the Civil Law Act 1956. However, steps are being taken to reform the 1930 Act in the UK. When the new Act is enacted, it may apply in Penang, Malacca, Sabah and Sarawak, but the existing TP(RI) Act 1930 (UK) may continue to apply in the other states in Malaysia. As a result, there may be no uniformity in the law on the rights of a third party claimant of a liability policy when the insured becomes insolvent. It is recommended that the Malaysian legislature enacts a statute to protect the rights of such third party claimants. The legislature may refer to the reports of the English Law Commission on the Act,

and adopt the recommendations made therein which are suitable to the Malaysian legal environment.

Fifthly, there is no local statute which confers on the purchaser of a property which is damaged after the contract of sale but before its completion, the benefits of an insurance policy effected on the property. In the UK, there are two statutory provisions, namely, s.83 of the Fires Prevention (Metropolis) Act 1774 (UK) and s.47 of the Law of Property Act 1925 (UK). It is uncertain whether they apply in Malaysia. Thus, the writer recommends that the Malaysian legislature should either amend the National Land Code 1965 and the Sale of Goods Act 1957 that the risk of loss and damage to the property does not pass to the purchaser until after the completion of the contract; or amend the Insurance Act 1996 by adding a new provision that any insurance policy effected on the property are assigned to the purchaser upon the purchaser paying the full purchase price.

Sixthly, it is proposed that the Part XIV of the Insurance Act 1996 be amended to expressly confer rights on the legal and equitable assignee of a policy or its proceeds to claim compensation from the Insurance Guarantee Scheme Fund when the insurer is wound-up on the ground of insolvency. Further, a policy should not be automatically terminated when the insurer is wound-up. Instead, if the policy is for a term of not more than one year, it should remain effective until its contractual expiry. If it is for more than one year, Bank Negara Malaysia should be empowered to require a solvent insurer to take-over the policy. These proposals, when implemented, will protect not only the policy owners, but all rightful claimants which include assignees.

Seventhly, the spirit of s.163(3)(a) of the Insurance Act 1996 is to encourage a policy owner to assign the policy benefits to his nominee who is not his spouse, child or parent (unless the policy owner nominates his parent when he has a living spouse or child) if he intends the nominee to receive the policy benefits beneficially. Unfortunately, the stamp duty imposed on an assignment of a life policy or its proceeds as a gift is high. It countermands the spirit of s.163(3)(a) and should be reviewed.

Further, the rights of an assignee may be affected when the assignor becomes a bankrupt. Section 52 of the Bankruptcy Act 1967 (Act 360, Rev. 1988) provides that if the policy owner becomes a bankrupt within two years of the assignment, the assignment which is a gift to the assignee, is void against the Official Assignee. Even where the assignment is created between two to five years before the bankruptcy, the assignee has to prove that the assignment was perfected at a time when the policy owner could settle his debts without using any benefits from the policy. Thus, where the policy owner becomes a bankrupt within five years after the creation of an assignment, the assignee's rights under the assignment are not firm if he is a volunteer.

In this connection, the owner of an own-life policy who wishes to benefit his spouse or child, or his parent if he has no spouse or child living, is advised to create a statutory trust instead. This is because a statutory trust is not subject to s.52 of the Bankruptcy Act 1967. The concept of statutory trust over a life policy will be dealt with in the next Chapter of this thesis.

CHAPTER FOUR

RIGHTS OF THE BENEFICIARY OF A STATUTORY TRUST AS A THIRD PARTY

4.1 Introduction

Chapter 2 of this thesis revealed that generally, the nominee of an own-life or a personal accident policy receives the moneys payable on the death of the policy owner as an executor and not as a beneficiary. One of the exceptions is where the policy owner has assigned either the policy or its proceeds to the nominee. This was dealt with in Chapter 3. Another exception is where the policy owner is a non-Muslim and the nominee is the policy owner's spouse or child, or his parent who is nominated when he does not have a spouse or child living. In this situation, s.166 of the Insurance Act 1996 (Act 553) prescribes that a trust of the policy moneys payable upon the policy owner's death is created in the nominee's favour. It is a statutory trust and the rights of its beneficiaries will form the subject of analysis in this Chapter.

This Chapter will first, narrate the evolution of the statutory trust provisions in England and in Malaysia respectively. This will be followed by an examination on the sole provision which prescribed the creation of a statutory trust over a life policy in Malaysia before the Insurance Act 1996 came into effect, namely s.23 of the Civil Law Act 1956 (Act 67, Rev. 1972). The writer will then deal with the position of the beneficiary of a statutory trust created under s.166 of the Insurance Act 1996. Since there now exist two statutory trust provisions in Malaysia, namely s.23 of the Civil Law Act 1956 and s.166 of the Insurance Act 1996, this Chapter will analyse whether the latter supercedes or co-exist with the former. A comparison study between the two

provisions will also be made. This Chapter will reveal that there is much uncertainty with regard to the beneficiary's current position and that thus, reforms are desired.

4.2 Statutory Trust over an Own-Life Policy

One of the exceptions to the doctrine of privity is a trust of contractual rights,[1] where the promisee constitutes himself a trustee of the promisor's promise for a third party. The third party, being the beneficiary, will enjoy the benefits of the contract.[2] However, since the legal title to the contractual rights is still vested in the promisee, the promisee must be a party to any action in court pertaining to the contract when the promisor breaches his promise. If the promisee refuses to enforce the contractual rights against the promisor, the beneficiary may apply to the court for leave to sue the promisor directly in the promisee's name.[3]

With regard to a life policy, the policy owner may create a trust over the policy or its proceeds in favour of a third party. He may do so by effecting the policy for the third party's benefit. However, this method is not fool-proof as the courts' decisions have been inconsistent. In some cases, the courts have held that a trust was created in favour of the third party and in some cases, the third party was denied all rights to the policy.[4] Alternatively, the policy owner may create a trust in favour of the third party by expressly declaring that he and his executors or administrators shall hold all the benefits and moneys payable under the policy as trustees for the third party. The

[1] Beale H.G. (*et al.*) (Ed.), *Chitty on Contracts*, (29th ed., 2004), Sweet & Maxwell, London, at paras. 18-074 to 18-082; Merkin, Robert (Ed.), *Privity of Contract: The Impact of the Contracts (Rights of Third Parties) Act 1999*, (2000), LLP, London, at paras. 2-18 to 2-25; and Beatson J., *Anson's Law of Contract*, (28th ed., 2002), Oxford University Press, Oxford, at 439-443.
[2] Grubb, Andrew (Ed.), *The Law of Contract*, (1999), Butterworths, London, at 919.
[3] Oakley, A.J., *Parker and Mellows: The Modern Law of Trusts*, (7th ed., 1998), Sweet & Maxwell, London, at 636-637.
[4] See the discussion in Merkin, *supra*, note 1; and Beatson, *supra*, note 1, at 440-442.

declaration of trust can be inserted in the policy[5] or be made in a separate document.[6] However, it is pertinent to note that a simple declaration of trust may be insufficient to meet the requirements of a trust. A trust clause or document must be watertight to have the desired effect.[7] In addition, the validity of a trust may be affected by factors other than the method of its creation. For example, the trust may be avoided if it is effected to defraud the policy owner's creditors.[8]

To overcome the uncertainties discussed above, most Commonwealth jurisdictions, including Malaysia, have legislated that a trust is created when a person effects a policy on his life for the benefit of his spouse and children or any of them. The statutory provision simplifies the creation of the trust. A separate document is not required. As per Dixon CJ and Kitto J in their joint judgment in *Wood* v. *James and Ors*:[9]

> It is the Act which creates the trust, but it does so by operating upon the policy, and accordingly it is from the policy alone that the beneficial interests to be taken under the trust are to be ascertained.

A trust created pursuant to a statutory provision is commonly referred to as a 'statutory trust'. Since its beneficiaries are restricted to the policy owner's spouse and children, the life policy subject to the trust is known as a 'family' or 'matrimonial' life policy.[10]

This Part narrates the evolution of the statutory trust provisions in England and Malaysia respectively.

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[5] Section 172 of the Insurance Act 1996 does not permit a trust to be created in favour of an ordinary nominee in this manner. See the discussion in Pt. 2.4.2.1, *supra*, at 53.

[6] See Finlay, A.M., "'Family' Life Insurance Policies under the Married Women's Property Act, 1882" (1938) 2 *MLR* 266.

[7] As per Mellish LJ in *Holt* v. *Everall* (1876) 2 ChD 266, at 275. To create a trust, the person must declare his intention to create the trust clearly and unequivocally, identify the property, the objects and the beneficiaries with certainty.
See also Hayton, David J., *Underhill and Hayton Law Relating to Trusts and Trustee*, (14th ed., 1987), Butterworths, London, at 39.

[8] Finlay, *supra*, note 6.

[9] [1954] 92 CLR 142, at 146.

[10] Finlay, *supra*, note 6.

4.2.1 Evolution of the statutory trust provision in England

The genesis of the statutory trust device was s.10 of the Married Women's Property Act 1870 (UK). In 1882, the English legislature enacted s.11 of the Married Women's Property Act 1882 ("the MWPA Act 1882 (UK)") to substitute it. Section 11 of the MWPA 1882 (UK) is still relevant today. Its importance is not dislodged by the Contracts (Rights of Third Parties) Act 1999 (UK) which allows a third party to enforce the term of a contract that confers a benefit on him. This is because the 1999 Act does not confer on the third party the benefits found in s.11 of the MWPA 1882 (UK). It does not create a trust in his favour. Therefore, where a person has incepted a policy on his life for the benefit of his spouse and children or any of them, the beneficiary should exercise the rights conferred on her by s.11 of the MWPA 1882 (UK), and not by the Contracts (Rights of Third Parties) Act 1999 (UK). It is submitted that the importance of s.11 of the MWPA 1882 (UK) in one's estate-planning was reaffirmed when the legislature extended its application to civil partners.[11]

4.2.2 Evolution of the statutory trust provision in Malaysia

Section 11 of the MWPA 1882 (UK) was adopted by the legislatures in most Commonwealth countries.[12] Malaysia is no exception. The provision was first enacted in s.73 of the Straits Settlements'[13] Conveyancing and Law of Property Ordinance 1886 (Cap 118). Though the 1886 Ordinance was repealed by the Civil Law Ordinance 1956 (No. 5 of 1956),[14] the provision on statutory trust survived. It was incorporated in s.23 of the 1956 Ordinance. When the Civil Law Ordinance 1956 was revised in 1972,

[11] Section 70 of the Civil Partnership Act 2004 (UK).
[12] For example, s.7 of the Married Women's Property Act (c. 115) (Bahamas); s.25 of the Married Persons Act (c. 219) (Barbados); s.11 of the Married Persons (Property) Act (c45:04) (Guyana); and s.73 of the Conveyancing and Law of Property Act (Chapter 61) (Singapore).
[13] The Straits Settlements was formed in 1826 and consisted of two states in Malaya, namely Penang and Malacca, and Singapore.
[14] This Ordinance was applicable in West Malaysia only.

the statutory trust device was again retained. The revised statute is known as the Civil Law Act 1956[15] and the statutory trust provision is found in s.23 of the Act. Section 23, which is *in pari materia* with s.11 of the MWPA 1882 (UK), was the sole provision on statutory trust before the Insurance Act 1996 came into effect.

However, when the legislature enacted the Insurance Act 1996 to replace the Insurance Act 1963 (Act 89) (Repealed) with effect from 1 January 1997,[16] it also included a statutory trust provision in s.166.[17] As will be shown in Part 4.4.2,[18] the scope and effects of s.166 are different from that of s.23 of the Civil Law Act 1956.

4.3 Position in Malaysia before the Insurance Act 1996 - Section 23 of the Civil Law Act 1956

Before the Insurance Act 1996, there was only one statutory trust device which could be used by the owner of an own-life policy, namely, s.23 of the Civil Law Act 1956. As will be discussed in Part 4.4.1,[19] the writer is of the opinion that s.23 of the Civil Law Act 1956 continues to apply despite s.166 of the Insurance Act 1996. Thus, the writer will use the present tense when discussing the trust under s.23.

This Part analyses first, the qualifications of a person who is eligible to effect a trust under s.23 or to benefit from it; secondly, the rights of the beneficiary against the trustee, the insurer and the settlor's creditors respectively; and thirdly, whether the settlor can revoke the trust.

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[15] This Act was extended to East Malaysia and hence, covers the whole of Malaysia.
[16] PU(B) 580/96.
[17] There was no provision pertaining to the creation of a statutory trust in the repealed Insurance Act 1963.
[18] *Infra*, at 179-203.
[19] *Infra*, at 175-178.

For ease of reference, the provision which "creates"[20] the trust, that is s.23 of the Civil Law Act 1956, is reproduced below:

> (1) A policy of assurance effected by any man on his own life and expressed to be for the benefit of his wife or of his children or of his wife and children or any of them, or by any woman on her own life and expressed to be for the benefit of her husband or of her children or of her husband and children or any of them, shall create a trust in favour of the objects therein named, and the moneys payable under any such policy shall not as long as any object of the trust remains unperformed form part of the estate of the insured or be subject to his or her debts.
>
> (2) If it is proved that the policy was effected and the premiums paid with intent to defraud the creditors of the insured, they shall be entitled to receive out of the moneys payable under the policy a sum equal to the premiums so paid.
>
> (3) The insured may by the policy or by any memorandum under his or her hand appoint a trustee or trustees of the moneys payable under the policy, and from time to time appoint a new trustee or new trustees thereof, and may make provision for the appointment of a new trustee or new trustees thereof and for the investment of the moneys payable under any such policy.
>
> (4) In default of any such appointment of a trustee the policy immediately on its being effected shall vest in the insured and his or her legal personal representatives in trust for the purposes aforesaid.
>
> (5) If at the time of the death of the insured or at any time afterwards there is no trustee, or it is expedient to appoint a new trustee or new trustees, a trustee or trustees or a new trustee or new trustees may be appointed by the High Court.
>
> (6) The receipt of a trustee or trustees duly appointed, or in default of any such appointment or in default of notice to the insurance office the receipt of the legal personal representative of the insured, shall be a discharge to the office for the sum secured by the policy or for the value thereof in whole or in part.

Since this provision is *in pari materia* with s.11 of the MWPA 1882 (UK), the writer will discuss the decisions pertaining to the English provision, where relevant, to shed light on the scope of s.23 of the Civil Law Act 1956.

4.3.1 Settlor

This Part examines the qualifications of the person who is eligible to effect a trust under s.23 of the Civil Law Act 1956.

First and foremost, only the owner of an own-life policy can create a trust under s.23 in favour of his or her spouse and children or any of them. The policy owner's gender and

[20] *Wood* v. *James and Ors*, *supra*, note 9.

marital status are immaterial. A widower or divorcee can create a trust under s.23 in favour of his children. For ease of reference, the discussion in this Chapter will be carried out on the basis that the settlor is a male.

A trust under s.23 may also be created by the owner of an endowment policy effected on his own life,[21] for the courts have held that a policy which provides for the payment of a sum of moneys upon the policy owner's death comes within the scope of s.23.[22] It is immaterial that the policy also provides for the payment of moneys upon the happening of other events. Thus, it should also cover a personal accident policy providing payment of moneys on the policy owner's death.

Secondly, since approximately 60% of the population in Malaysia are Muslims,[23] one major area of concern is whether a Muslim policy owner can create a trust under s.23. If a Muslim cannot create such a trust, then his intended beneficiaries will not enjoy the benefits conferred by the provision. In this connection, it is important to determine whether the policy under s.23 is a trust *inter vivos* or a testamentary disposition. It is a trust *inter vivos* if the settlor intends the trust to operate in his lifetime. It is a gift to the beneficiary through an immediate transfer of interest. The trust property will not form part of the settlor's estate. If it is a testamentary disposition, it operates only after the settlor's death. Until then, the settlor can continue to deal freely with the trust property.

If the trust under s.23 is a gift or a trust *inter vivos* in favour of the identified beneficiary, a Muslim policy owner can create it. This is because it is trite that a

[21] *Re Bahadun bin Haji Hassan, Deceased* [1974] 1 MLJ 14.
[22] *Re Bahadun bin Haji Hassan, Deceased, ibid.*; *Re Gladitz* [1937] 1 Ch 588; *Ioakimidis* v. *Hartcup* [1925] 1 Ch 403; and *Eng Li Cheng Dolly* v. *Lim Yeo Hua* [1995] 3 SLR 363.
[23] Department of Statistic's Press Statement on 6 November 2001, "Population, Distribution and Basic Demographic Characteristics Report: Population and Housing Census", at para. 12. See webpage *http://www.statistics.gov.my/English/frameset_pressdemo.php* on 18 July 2005.

Muslim may during his lifetime, dispose any or all of his properties, either by way of a gift *inter vivos* or directly, to his heirs or strangers.[24] As the trust is valid, the beneficiary will enjoy the benefits of the policy to the exclusion of the Muslim settlor's other heirs. However, if the trust under s.23 is a testamentary disposition, a Muslim policy owner cannot create it. This is because a Muslim cannot bequeath any part of his estate to any of his heirs, unless all of them consent to it.[25] The beneficiaries of a trust under s.23 are the Muslim settlor's heirs.

In *Re Man bin Mihat, Deceased*[26] and *Re Bahadun bin Haji Hassan, Deceased*,[27] the High Court was called upon to decide whether a Muslim could create a trust under s.23. The courts held that he could do so. In *Re Man bin Mihat, Deceased*, the policy owner effected a policy on his own life. The proceeds would be paid to him if he survived when the policy matured and to his named wife if he did not. The policy owner died before the maturity of the policy and the issue before the court was whether the policy moneys belonged to his wife as a beneficiary or formed part of his estate. Suffian J decided the case in favour of the policy owner's wife despite the provision found in s.25 of the Civil Law Ordinance 1956, which read, "(n)othing in this Part[28] shall affect the disposal of any property according to Muslim law". According to Suffian J, the provision did not "disentitle the wife from taking (the) moneys beneficially". The policy owner created a trust when he effected the policy and the

[24] *Re Man bin Mihat, Deceased* [1965] 2 MLJ 1, at 3.
[25] The courts in *Siti binti Yatim* v. *Mohamed Nor bin Bujai* (1928) 6 FMSLR 135 and *Amanullah bin Haji Ali Hasan* v. *Hajjah Jamilah binti Sheik Madar* [1975] 1 MLJ 30 held that the wills of the respective Muslim testators were contrary to the Islamic law and thus, void.
[26] *Supra*, note 24.
[27] *Supra*, note 21.
[28] Section 23 was within the Part referred to.

beneficial interest in the policy belonged to his wife since then. The learned judge held that:[29]

> (Since) it is lawful for a Muslim to alter the prescribed shares of his heirs by disposing outright during his lifetime part or the whole of his property to a favoured wife, either directly by way of a gift *inter vivos* or indirectly through trustees … there should be no objection in principle to the validity of a similar gift made not by himself but by statute.
>
> Indeed it is quite common for a Muslim to buy land for his minor children and have himself registered in the Land Office records as trustee, though the effect would be to augment the share received by those children in his property after his death. During his lifetime the land is trust property and his death does not alter its character, for thereafter the land remains trust property and his administrator holds it for the purposes of the trust. In my judgment the statutory trust created in favour of the wife in the instant case also retains its character as a trust after his death, and for so long as any object of the trust remains unperformed the trust cannot be defeated and may, if necessary, be enforced by the widow. The beneficial interest in the policy belonged to the wife since the date of the taking out of the policy and no beneficial interest in it accrued or arose on the death of the husband.

In *Re Bahadun bin Haji Hassan, Deceased*, the policy owner effected an endowment policy for his wife's benefit, provided she survived him. Abdul Hamid J followed the precedent set by Suffian J and held that the policy moneys did not form part of the policy owner's estate. The trust under s.23 was a gift and not a testamentary disposition. Therefore, the moneys should be paid to the widow for her own benefit. The learned judge said:[30]

> (W)hen the deceased took out a life assurance policy with the Sun Life Assurance Company of Canada it was his intention that the respondent should receive the moneys due under the policy in the event of his death prior to the date of maturity of the policy provided of course the respondent survived him. If the respondent should predecease him and he should die prior to the date of maturity of the policy the money was to go to his estate. To construe in any other way would be untenable.
>
> On the authority *Re Man bin Mihat, Deceased, supra*, I am also of the view that there was nothing in Muslim Law to prevent the deceased from making such a disposition in his lifetime of the policy money to the respondent on his death. There was a completed gift even though the gift was contingent upon the life assured predeceasing the respondent before the maturity of the life policy.
>
> It is my finding that the disposition was in the circumstances a gift by the deceased to the respondent and such gift does not constitute a disposition by will.

[29] *Supra*, note 24, at 3.
[30] *Supra*, note 21.

A number of commentators have criticised the aforesaid decisions.[31] They opine that a Muslim cannot effect a trust under s.23 in view of s.25 of the Civil Law Act 1956, which provides that the disposal of any property according to Muslim law shall not be affected by Part VII of the Act. Section 23 is found in this Part. If the legislature had intended to exclude the application of the provision in s.25 to a trust created under s.23, it would have expressly provided so.

In addition, some commentators[32] hold the opinion that the trust property is the policy moneys. Since the policy moneys will come into existence only on the settlor's death, their disposal can only effectively take place after his death. Thus, unlike a gift *inter vivos*, such a disposal should be subject to the Muslim law of inheritance.[33]

Further, P. Balan and Ahilemah Joned,[34] and Nik Ramlah[35] correctly point out that the application of s.23 of the Civil Law Act 1956 to Muslims can also be questioned on constitutional grounds. According to Article 74 and List 2 of the Ninth Schedule to the Federal Constitution, Muslim personal law including that relating to gifts and non-charitable trusts are matters which are solely within the jurisdiction of the respective states' legislative assemblies. Thus, s.23 of the Civil Law Act 1956 being a federal legislation, should not apply to Muslims.

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[31] P. Balan and Ahilemah Joned, "Amanah Yang Berbangkit Di Bawah Seksyen 23 Akta Undang-undang Sivil 1956" [1983] 10 *JMCL* 201, at 213-215; Nik Ramlah, Mahmood, *Insurance Law in Malaysia*, (1992), Butterworths, Kuala Lumpur, at 220-222; and Rafiah, Salim, "Part XIII of the Insurance Act 1996: Payment of Policy Money Under a Life Insurance Policy or Personal Accident Insurance Policy" [1997] 24 *JMCL* 55, at 81-82.

[32] Nik Ramlah, *ibid.*, at 220-222; and Rafiah, *ibid.*
However, according to the principle in *Re Fleetwood's Policy* [1926] 1 Ch 48, any dealings in a policy which is covered by s.11 of the MWPA (UK), must be for the benefit of the beneficiary. If the principle in *Re Fleetwood's Policy* applies in Malaysia, a trust under s.23 is over the policy itself and it is effective during the settlor's lifetime. See also *Cousins* v. *Sun Life Assurance Society* [1933] 1 Ch 126, at 137.

[33] Nik Ramlah, *supra*, note 31, at 221; and Rafiah, *supra*, note 31, at 78-82.

[34] Balan and Ahilemah, *supra*, note 31, at 214-215.

[35] Nik Ramlah, *supra*, note 31, at 222, (n) 38.

Although the decisions in *Re Man bin Mihat, Deceased* and *Re Bahadun bin Haji Hassan, Deceased* are High Court decisions and do not bind another High Court judge, they caused much uneasiness among the religious authorities. In 1973,[36] the National Council of Religious Affairs in Malaysia issued a *fatwa* to the effect that nominees of insurance policies "can receive the money of the deceased ... to be divided among the persons who are entitled to them according to the Muslim Law of Inheritance".[37] However, a *fatwa* is only a pronouncement which does not have any legal effect. It has legal effect only if it is enacted by the respective states' legislatures. The only state that has enacted a law that gives effect to the fatwa is Malacca.[38] Thus, in the other states, the 'beneficiary' of a trust created by a Muslim under s.23 of the Civil Law Act 1956 is not legally but only morally bound to carry out the 1973 *fatwa* to distribute the moneys received by him according to the Muslim law.[39] It is unfortunate that Parliament did not take steps to settle the controversy by amending s.23 to expressly stipulate whether the trust is a trust *inter vivos* or a testamentary disposition. The problem still continues after the enactment of the Insurance Act 1996.

In conclusion, it is submitted that although the High Court's decisions are questionable on a number of grounds, it remains the law in all states other than Malacca.

4.3.2 Beneficiary

Though a trust under s.23 of the Civil Law Act 1956 is also known as a 'family trust', it can be created in favour of only selected members of the settlor's family. The beneficiaries are limited to the settlor's husband or wife ("the spouse") and children.

[36] The judgment in *Re Bahadun bin Hassan, Deceased* was delivered on the 4 January 1972 but was reported only in 1974.
[37] Rafiah, *supra*, note 31, at 82.
[38] In 1974, the state of Malacca amended its Administration of Muslim Law Enactment 1959 (En. 1/1959) to incorporate the *fatwa*.
[39] Rafiah, *supra*, note 31, at 85.

Thus, the third parties who are entitled to the benefits conferred by s.23 are limited to the policy owner's spouse and children. His other family members, such as his parent[40] and nephew,[41] are excluded. Where the policy owner effects the policy for the benefit of his spouse, children and others, it is uncertain whether a s.23 trust is created in favour of the spouse and children. According to the court in *Re Parker's Policies*,[42] such policy is not within s.11 of the MWPA 1882 (which is *in pari materia* with s.23 of the Civil Law Act 1956). The beneficiaries will not enjoy the protection of the section. However, according to *Re Clay's Policy of Assurance*,[43] the spouse and children named or described in the policy are protected by the provision.

This Part examines the meaning of the terms "husband", "wife" and "children".

4.3.2.1 Settlor's husband or wife

Usually, the terms "husband" and "wife" do not cause much confusion. It usually means the legal spouse, and does not include the common law spouse. This was held by the West Indian courts in *Re Osborne*[44] and *Ramnarine* v. *Kowsilia*[45] when interpreting the scope of similar West Indian statutory trust provisions.[46] In *Re*

[40] In *Manonmani* v. *Great Eastern Life Assurance Co Ltd* [1991] 1 MLJ 364, the policy owner effected two polices after his marriage. He named his mother as the beneficiary for the first policy, and his wife and son as the beneficiaries for the second policy. Upon the policy owner's death, his mother claimed the insurance moneys of the first policy. The court held that a trust under s.23 was created over the policy in favour of his wife and child. The court did not make any conclusion in respect of the other policy. Thus, by implication, no trust was created under s.23 over the policy which the policy owner incepted for the benefit of his mother.

[41] In *Kishabai* v. *Jaikishan* [1981] 2 MLJ 289, the policy owner effected a policy on his life for the benefit of his nephew. It was endorsed on the policy that the trustee would hold the proceeds in trust for the nephew. BTH Lee J held that although a trust was created in favour of the nephew as all the prerequisites of a valid ordinary trust were present, it was not a trust under s.23.

[42] [1906] 1 Ch 526.

[43] [1937] 2 All ER 548, at 550.

[44] (1991) 2 OECS Law Rep 215, as cited in Anderson, Winston, "Designation of Beneficiaries Under Policies of Life Assurance" [1993] 22 *AALR* 221, at 232 and 241.

[45] Unreported judgment of the Supreme Court of Guyana (1971, No 3033), as cited in Anderson, *ibid.*, at 232 and 241.

[46] The West Indian's provisions on statutory trusts originated from s.11 of the MWPA 1882 (UK). See Anderson, *ibid.*,at 236.

Osborne, the policy owner effected a policy on his life for the benefit of his common law wife of 6 years. Upon his death, the court refused to find a statutory trust in favour of the named beneficiary. In *Ramnarine* v. *Kowsilia*, the policy owner and nominee cohabited for 20 years. Although the court sympathised with the nominee, it did not extend the statutory protection to her.

One issue in Malaysia is whether the policy owner may effect a policy under s.23 in favour of his 'wife', whom he married according to the necessary customary or religious rites, when the law of the country requires the marriage to be registered. This problem does not arise where the policy owner is a Muslim, as a Muslim marriage is valid if it is solemnised according to *Hukum Syarak*. It is immaterial that the marriage is not solemnised and registered in accordance with the relevant statute.[47] Thus, if a Muslim is permitted to create a trust under s.23, he may do so in favour of a person who is recognised as his wife by *Hukum Syarak*.

However, the problem is pertinent where the policy owner is a non-Muslim. This is because in Malaysia, the marriages of all non-Muslims must be registered pursuant to the Law Reform (Marriage and Divorce) Act 1976 (Act 164) with effect from 1 March 1982.[48] In *Chai Siew Yin* v. *Leong Wee Shiong*,[49] the Federal Court held that a non-Muslim customary marriage which is solemnised after that date but not registered, is not valid.

[47] For example, see s.34 of the Islamic Family Law (Federal Territories) Act 1984 (Act 303). See also *Re The Estate of Shaikh Mohamed bin Abdul Rahman bin Hazim* [1974] 1 MLJ 184.
[48] Section 27 of the Law Reform (Marriage and Divorce) Act 1976.
[49] (Unreported). See The Star on 30 January 2004.

The issue of whether a policy owner could create a statutory trust in favour of her 'husband' whom she married according to their customary rites was raised in the Trinidad and Tobago case of *Rajkumar* v. *First Federation Life Insurance Company Ltd.*[50] The court held that since they did not register their marriage under the relevant applicable law, their marriage was not legally recognised. Thus, no statutory trust was created when the policy owner effected a policy on her own life, naming her 'husband' as the beneficiary.

However, the writer submits that the issue may receive a different treatment in Malaysia because of the court's liberal interpretation of the term "wife" in cases involving s.7 of the Civil Law Act 1956. Section 7 confers rights on a deceased's wife, husband, parent and child to claim compensation for loss or damage caused to them by the deceased provider's death. The term "wife" in s.7(2) was the subject of contention in *Chong Sin Sen* v. *Janaki a/p Chellamuthu.*[51] In the instant case, the respondent went through a customary marriage with the deceased on 31 August 1991. The marriage was not registered pursuant to the Law Reform (Marriage and Divorce) Act 1976. The deceased was subsequently killed in an accident and the respondent filed an action against the appellant pursuant to s.7 of the Civil Law Act 1956. The appellant claimed that the respondent was not the deceased's wife under s.7 since the marriage was void for want of registration. Therefore, she had no *locus standi* to bring the action against the appellant. The High Court held otherwise. Mohd Ghazali J went through the relevant provisions in the Law Reform (Marriage and Divorce) Act 1976 and noted that although on the face of it, the customary marriage was void, the appellant was not

[50] (1970) 16 WIR 447, as cited in Anderson, *supra*, note 44, at 232-233 and 241-242.
[51] [1997] 5 MLJ 411.

precluded from bringing an action under s.7 of the Civil Law Act 1956. Since the word 'wife' was not defined in the Civil Law Act 1956, the learned judge held that:[52]

> that word should be read as applicable to those things to which they would in their natural sense apply. I cannot find anything in the (Civil Law Act 1956) which provides that the term 'wife' as found in s.7(2) should be confined to a woman who is a party to a marriage solemnised and/or registered under any prevailing Act relating to marriages and divorce. That being the case, I would think that it is for the court to interpret that word as found in the (Civil Law Act 1956) as best as it may.

Mohd Ghazali J, apart from citing a number of English cases on the interpretation of statutes, also referred to the 5th edition of *Craies on Statute Law* which laid down the principle that "in the interpretation of statutes the courts decline to consider other statutes proceeding on different lines and including different provisions" and continued:[53]

> I would decline to consider the provisions of (the Law Reform (Marriage and Divorce) Act 1976) which to me is a statute which proceeds on different lines and includes different provisions which deals with a different subject matter....
>
> I am unable to see how (the Law Reform (Marriage and Divorce) Act 1976) ought to have any influence upon the question which I have to decide, i.e. whether the respondent falls within the contemplation of the word 'wife' found in s.7(2) of the (Civil Law Act 1956). I do not think that I should speculate on what the intention of the legislature was with regard to s.7(2), i.e. as to whether such a term should only be restricted to a 'married woman' who has undergone a marriage solemnised and registered in accordance with the prevailing Act relating to marriages.
>
> What the legislature intended to be or not to be done can only be ascertained from what it has chosen to enact, either in express words or by reasonable and necessary implications. In my opinion, I do not think that the word 'wife' found in s.7(2) of the (Civil Law Act 1956) should be restricted to a woman whose marriage has been solemnised and registered pursuant to the provisions of any prevailing Act relating to marriage and divorce. The Married Women Act 1957 provides that a 'married woman' includes any woman who has undergone a customary marriage – to me, such a 'married woman' would fall within the contemplation of the word 'wife' as found in s.7(2) of the (Civil Law Act 1956).

Thus, the court, instead of restricting the definition of the word "wife" to a woman whose marriage was recognised by the Law Reform (Marriage and Divorce) Act 1976, referred to the Married Women Act 1957 (Act 450, Rev. 1990) and recognised the woman whom the deceased married according to customary rites as his wife.

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[52] *Ibid.*, at 417.
[53] *Ibid.*, at 419-420.

The High Court's decision in *Chong Sin Sen* was approved and followed by the Court of Appeal in *Joremi Kimin and Anor* v. *Tan Sai Hong*.[54] In this case, the Court of Appeal held that the respondent, who went through a customary marriage with the deceased in Singapore, was the wife of the deceased within the meaning of s.7(2) of the Civil Law Act 1956. It was immaterial that their marriage was not registered in Singapore or in Malaysia.

The writer submits that the intention of the legislature behind the enactment of both s.7 and s.23 of the Civil Law Act 1956 was to ensure that the spouse of a deceased is provided for. Since the courts have extended the statutory protection of s.7 to those whose marriages were solemnised according to their respective customs or religions, a similar extension should also apply to s.23. In this respect, the writer refers to the case of *Craig Williamson Pty Ltd* v. *Barrowcliff*,[55] where Hodges J held that:

> I think it is a fundamental rule of construction that any document should be construed as far as possible so as to give the same meaning to the same words wherever those words occur in that document, and that that applies especially to an Act of Parliament.

Thus, it is submitted that a policy owner may create a trust under s.23 in favour of his 'wife' whom he marries according to the necessary customary rites, even though their marriage is not registered pursuant to the Law Reform (Marriage and Divorce) Act 1976. It should be immaterial that their marriage is not valid under the Act. The 'wife' should enjoy the protection conferred by s.23 of the Civil Law Act 1956. To achieve certainty, it is proposed that clear definitions of the terms "wife" and "husband" in s.23 should be enacted to include the settlor's customary and common law wife.

[54] [2001] 1 CLJ 526, at 530-532.
[55] [1915] VLR 450, at 452.

The next vital issue concerns the legal protection when there is a change in the status of the beneficiary in relation to the settlor, for example, when the settlor and beneficiary divorce, or when the policy owner remarries after the death of his spouse-beneficiary. The question is whether the spouse at the time the trust is created or the spouse at the time the policy moneys are payable, is the rightful beneficiary of the moneys. The former is the rightful beneficiary if she obtains an immediate vested interest in the policy when the trust is created. Her interest will not be defeated by the termination of their marriage by death or divorce. However, if she merely obtains a contingent interest in the policy, she will lose the benefits of the trust upon her divorce or her death. This issue will be discussed under two situations, namely, when the spouse is named and when she is described.

(a) Spouse is named

When a person creates a trust under s.23 in favour of a named spouse, the latter obtains an immediate vested interest in the policy unless there is a qualification attached to the policy. The court will give effect to the clear intention of the settlor.

In *Cousins* v. *Sun Life Assurance Society*,[56] the husband effected a policy on his life for the benefit of his named wife. His wife predeceased him and the insurer brought a test case to the court to determine whether the policy moneys should go to the wife's estate. The Court of Appeal held that since the named beneficiary acquired an immediate interest in the policy, her death did not affect her interest. Lord Hanworth MR held that the statement, "This policy is issued for the benefit of Lilian Cousins, the wife of the

[56] *Supra*, note 32.

life assured, under the provisions of the Married Women's Property Act, 1882" created:[57]

> a trust in her favour. It would seem from those words that she took a vested interest in the policy moneys when the policy was created ... On the plain terms of the policy there remains the trust to pay over the moneys due under the policy to the executors of Lilian Cousins, with the result that the trust in her favour was not ended by her death. There is still a trust which is unperformed, and in those circumstances, the terms of the Act negative any interest passing to the husband in the events which have happened.

The outcome is similar where the settlor divorces his wife after he has effected a policy on his life for her benefit. In the Singaporean case of *Eng Li Cheng Dolly* v. *Lim Yeo Hua*,[58] the settlor named his then wife as the beneficiary. They divorced and two years later, the settlor died, leaving a will. All his personal and other properties were bequeathed in equal shares to his fiancée and brother. The issue before the court was whether the policy moneys formed part of the settlor's estate. Selvam J held that "a wife who (was) named a beneficiary (obtained) an immediate trust in her favour which (was) not defeated by a subsequent divorce".[59] For the purpose of s.73 of the Conveyancing and Law of Property Act (Chapter 61) (Singapore) ("the Conveyancing Act (Singapore)"), which is *in pari materia* with s.23 of the Civil Law Act 1956, there is no difference between the beneficiary's death and divorce. The named beneficiary is the rightful beneficiary of the policy moneys unless the policy stipulates otherwise.

[57] *Ibid.*, at 134. Lawrence LJ also held a similar opinion. The learned judge said at page 137-138:
> "Under the 1882 Act a policy effected by a man on his own life, and expressed to be for the benefit of a named wife, operates in my judgment as a valid declaration of trust *inter vivos* in favour of the wife, giving her a vested absolute beneficial interest in the policy and the moneys thereby assured from the time when the policy is effected. ... He has chosen to effect a policy simply for the benefit of his then living wife, and has thus created a trust, of which it cannot be said that its purpose came to an end, or that, in the words of the section, there was no longer any object of the trust remaining to be performed when his wife died in his lifetime; there being a vested interest in the wife that interest passed on her death to her executors as part of her estate".

[58] *Supra*, note 22.

[59] *Ibid.*, at 366.

Nevertheless, it should be re-emphasised that s.23 of the Civil Law Act 1956 was enacted to provide for the settlor's dependants in the event of his death.[60] Where the settlor remarries after his divorce from or the death of his wife, it is probable that the settlor, upon his remarriage, intended his widow to benefit from the policy moneys. His dependant at the time of his death will most likely be his widow, and not his former wife or deceased wife's estate. However, following the decisions in *Cousins* v. *Sun Life Assurance Society* and *Eng Li Cheng*, if the settlor's former wife acquires an immediate interest in the policy, the policy moneys will go to her or her estate, and not to the settlor's widow. These may sometimes cause unsatisfactory results.

Thus, if the settlor wishes to provide for his new wife, he has to effect another policy for her benefit. He cannot even surrender the existing policy which is subject to a trust under s.23 and use its surrender value proceeds to pay for the new policy.[61] If he does so, his former wife or her estate can trace the policy moneys unless one of the following circumstances applies.

The first situation is where the former wife has died, and the settlor is the sole heir to her estate. In this connection, it must be noted that prior to the amendment to s.6(1) of the Distribution Act 1958 (Act 300, Rev. 1983), which took effect on 31 August 1997, the husband of a woman who died intestate was the sole heir to her estate. However, if a man died intestate, his widow was not the sole heiress. She was entitled to only one half of the estate if he left no issue, and only one-third if he left an issue.[62] Currently, the spouse of a person who dies intestate is not the sole heir unless the intestate dies

[60] As per Kekewich J in *Re Browne's Policy* [1903] 1 Ch 188, at 190-191.
[61] *Re Fleetwood's Policy*, *supra*, note 32. The wife may leave her property, by will, to a person other than the settlor. If she dies intestate, her estate will be apportioned according to the Distribution Act 1958 (Act 300, Rev 1983).
[62] Section 6(1)(i) of the Distribution Act 1958.

leaving no issue and parent.[63] Thus, with effect from 31 August 1997, the settlor is the sole heir only if the beneficiary bequeaths all her estate to him or if the beneficiary dies intestate, leaving no issue and parent.

Another situation is where the policy owner surrenders the policy after he has obtained a court order pursuant to s.76 of the Law Reform (Marriage and Divorce) Act 1976 to vary or revoke the trust at the time of the decree of his divorce from his wife.[64] Once the trust is revoked, he can deal with the policy in any manner he deems fit.

Another issue is whether a trust under s.23 is created where the policy owner marries the person after he named her as his beneficiary under the policy. Surridge and Murphy suggest that where the policy owner wishes to effect a policy under s.11 of the MWPA 1882 in favour of his fiancée, "it may be suitable to express the interest of his fiancée as contingent on her marriage to"[65] him. As s.11 of the MWPA 1882 is *in pari materia* with s.23 of the Civil Law Act 1956, it is submitted that the suggestion by Surridge and Murphy also applies in Malaysia. However, until there is a court decision on the issue, the position remains unclear.

(b) Spouse is described

Section 23 of the Civil Law Act 1956 states that a policy effected for the benefit of the policy owner's spouse and children or any of them will "create a trust in favour of the

[63] Section 6(1)(a) of the Distribution Act 1958.

[64] Section 76(3) of the Law Reform (Marriage and Divorce) Act 1976 reads,

> "The court shall have power, when granting a decree of divorce or judicial separation, to order the division between the parties of any assets acquired during the marriage by the sole effort of one party to the marriage or the sale of any such assets and the division between the parties of the proceeds of sale".

[65] Surridge, Robert J. and Brian Murphy, *Houseman and Davies' Law of Life Assurance*, (12th ed., 2001), Butterworths Tolley, London, at para.10-67.

objects therein *named*".[66] Nevertheless, the courts have held that a trust under s.23 is created even where the beneficiary is not named, but described, for example where the policy is effected 'for the benefit of my widow' or 'for the benefit of my wife'.[67]

Where the policy is effected 'for the benefit of my widow', it is clear that the settlor intends to provide for the wife[68] who survives him.[69] The issue is whether the person who answers to the description 'my wife' when the policy is effected obtains an immediate or contingent interest in the policy. The English courts held that whether the said spouse takes an immediate interest in the policy when the settlor effects the policy 'for the benefit of my wife' depends on the wording of the policy.[70]

In *Re Browne's Policy*,[71] the settlor effected a life policy "for the benefit of his wife and children in conformity with the provisions of the Married Women's Property Act, 1882". His wife died and he remarried. Subsequently he died, leaving his second wife and children from both marriages. Kekewich J held that the settlor intended to benefit

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[66] The writer's own emphasis.

[67] In *Re Browne's Policy*, *supra*, note 60, the settlor effected a policy "for the benefit of his wife and children in conformity with the provisions of the Married Women's Property Act, 1882". The court held at page 190 that though no one was:

> "in the strict sense 'named' in this policy, ... (t)here is no reason why the trust should not include objects as yet unascertained, and, of course, the ordinary marriage settlement creates a trust of that character. Therefore what the Act means is that there is a trust created by the policy in favour of the persons designated thereby".

[68] Note the discussion on the word "wife" in Pt. 4.3.2.1, *supra*, at 156-160.

[69] In *Re Parker's Policies*, *supra*, note 42, the settlor took out policies on his life for the benefit of his widow. His wife died and he remarried. He died and the second wife applied to the court for a direction on the distribution of the policy moneys. Swinfen Eady J had to decide whether the second wife was the 'widow' for the purpose of the policy and said at page 530, "In my judgment, 'widow' means the person who at the death of the husband shall become the widow". Thus, where such a phrase is found in the policy, the wife at the inception of the policy does not have an immediate vested interest, but only an interest subject to a contingency that she remains his wife at the time of his death. Her interest will terminate upon their divorce or she predeceasing him".

[70] However, Nik Ramlah, *supra*, note 31, at 216-217, holds the opinion that:

> "if the policy refers only to the husband and wife or children of the (settlor) without naming them, then the beneficiaries only have a contingent interest; only those who fit such a description at the time the policy moneys become payable will benefit from the policy".

[71] *Supra*, note 60.

the wife who survived him and thus, his wife at the time the policy was effected, merely took an contingent interest therein:[72]

> (I)t has been recognised by legal authority, that a married man speaking of his wife intends his wife at that time, and does not contemplate one whom he may marry after her death ...But, in construing an instrument intended to make provision for a wife after the husband's death, this seems to lose weight, and is countervailed by the consideration that he in all probability intended to provide for her who survived him, and for that reason stood in need of the provision. ... I hold that by his wife and children, the settlor intended his surviving wife (if any) and his surviving children, whether by his then living or any after-taken wife.

The difference in wording brought about a different ruling in *Re Griffith's Policy*.[73] In *Re Griffith's Policy*, the policy owner effected a policy on his own life "for the benefit of his wife, or if she be dead between his children in equal proportions". His wife at the inception of the policy died and he remarried. Joyce J distinguished the facts from those in *Re Browne's Policy* and held that "those words (in the policy) seem to point to the wife who was living with him when the policy was effected"[74] and not to the wife who survived him. Emphasis was placed on the phrase "for the benefit of his wife, or if she be dead".

Another issue is whether the settlor's former spouse or his widow will benefit from the policy moneys where he effects the policy for the benefit of an unnamed spouse, divorces her and remarries. The writer submits that the answer also depends on whether the former spouse took an immediate vested interest in the policy. The phrase "so long as any object of the trust remains unperformed" in s.11 of the MWPA 1882 (UK), which is *in pari materia* with s.23 of the Civil Law Act 1956, was held by the English Court of Appeal in *Cousins* v. *Sun Life Assurance Society*[75] to refer to the purpose of the trust. The trust is created to provide for the beneficiary upon the settlor's death.

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[72] *Ibid.*, at 190-191.
[73] [1903] 1 Ch 739.
[74] *Ibid.*, at 742.
[75] *Supra*, note 32.

That is the purpose of the trust, and it can be performed only upon his death. The beneficiary's death or the change in the settlor's marital relationship with the beneficiary will not terminate the trust unless the policy provides so.

In conclusion, where the settlor effects a policy for the benefit of an unnamed spouse, the latter acquires an immediate interest in the policy unless the wording of the policy provides otherwise. If the unnamed spouse has acquired an immediate interest, her rights cannot be adversely affected because the settlor cannot deal with it to her detriment. As discussed in Part 4.3.2.1(a),[76] this is unfortunate because the purpose of s.23 of the Civil Law Act 1956 is to protect the settlor's dependant in the event of his death, who is most likely his widow and not his former wife or deceased wife's estate.

4.3.2.2 Settlor's children

Apart from his spouse, a settlor can also create a trust under s.23 of the Civil Law Act 1956 in favour of his children by either naming or describing them. Where the settlor merely describes his children as the beneficiaries, it is a question of fact whether his children at the policy's inception or his children who survive him are the beneficiaries of the policy moneys. Much depends on the wording of the policy. Another pertinent issue is whether the settlor's illegitimate and adopted children can be the beneficiaries of the trust. It is to be stressed that unless it is otherwise provided, the term "children" in a statute is to be interpreted to mean the lawful children of the policy owner.[77] Thus, the relevant statutory provisions must be studied.

[76] *Supra*, at 163.
[77] Denbow, Claude H., *Life Insurance Law in the Commonwealth Caribbean*, (1984), Butterworths, London, at 123.

In England, s.19(1) of the Family Law Reform Act 1969 (UK)[78] provides that the word "children" in s.11 of the MWPA 1882 (UK) includes illegitimate children. With regard to an adopted child, it is noted, too, that in the UK, a child adopted pursuant to the Adoption Act 1976 (UK)[79] or any of its predecessors, the Adoption Act 1958 (UK),[80] the Adoption Act 1950 (UK)[81] or the Adoption of Children Act 1926 (UK),[82] is deemed to be the lawful child of the adoptor. Thus, a settlor can effect a trust under s.11 of the MWPA 1882 (UK) in favour of his illegitimate and adopted children. However, he cannot do so for a child adopted outside the legislation[83] or for his godchild.[84]

In Malaysia, the term "children" is not defined in the Civil Law Act 1956. It should thus, mean that the owner of an own-life policy may create a trust under s.23 in favour of his lawful children, namely his legitimate[85] and legally adopted children.[86] This is unfortunate, for an illegitimate child or a child adopted outside the legislation will not

[78] The Family Law Reform Act 1969 (UK) came into effect on 1 January 1970.
[79] Section 39 of the Adoption Act 1976 (UK).
[80] Section 13 of the Adoption Act 1958 (UK).
[81] Section 10 of the Adoption Act 1950 (UK).
[82] Section 5 of the Adoption of Children Act 1926 (UK).
[83] In *Re Clay's Policy of Assurance*, supra, note 43, the policy owner effected a policy for the benefit of his named wife "and if not living at that time then for the benefit of Elizabeth Elvira Clay, daughter of the assured, should she survive Mignon Elvira Clay (the assured's wife) and be living if and when the policy moneys become payable". Elizabeth was adopted by the policy owner and his wife, albeit not pursuant to any statute as the adoption took place before the Adoption of Children Act 1926 (UK) came into force. Even though Elizabeth was adopted before there was any legislation pertaining to the adoption of a child, the policy owner and his wife adopted Elizabeth so far as they could. The policy owner had put himself in *loco parentis* to Elizabeth. Yet, the court refused to read a trust for Elizabeth into the policy. According to the court, it was quite well established that "children" meant lawful children. Elizabeth was not a child of the policy owner in any legal sense, although he had in some way put himself in the position of a parent.
The court's decision could be due to the fact that s.10 of the Adoption of Children Act 1926 (UK) did provide for a person to 'legalise' his *de facto* adoption of a child and the policy owner did not do so.
[84] In *Re Sinclair's Life Policy* [1938] Ch 799, a man took out a policy on his life wherein the insurer promised 'to pay on November 1 in the year 1936 to the policy owner's godson Hervey Cecil Rowan Hopwood ... the sum of ...'. Although there was evidence that the policy owner intended the policy moneys for the godson, the court found that no statutory trust under s.11 of the MWPA 1882 (UK) or ordinary trust was created.
[85] The Family Law Reform Act 1969 (UK) does not apply in Malaysia.
[86] Sections 9(2) and (3) of the Adoption Act 1952 provides that the legal status of an adopted child is the same as that of the natural children of his adoptive parents. See also s.16(2) of the Adoption Ordinance of Sabah and s.2(2) of the Adoption Ordinance of Sarawak.

enjoy the benefits of s.23. It is to be noted that a child is deemed legitimate if he was born during the subsistence of a valid marriage between his mother and any man or within 280 days of the dissolution of his mother's marriage.[87] Section 4 of the Legitimacy Act 1961 (Act 60, Rev. 1971) also provides for the automatic legitimation of an illegitimate child if his natural parents marry subsequent to his birth. A child is legally adopted only if his adoption complies with the procedure prescribed in the Adoption Act 1952 (Act 257, Rev. 1981),[88] the Adoption Ordinance of Sabah (Ord 23/1960) (Reprint 1973), or the Adoption Ordinance of Sarawak (Cap 91).

4.3.3 Rights of the beneficiary against the insurer

The next pertinent issue is whether the beneficiary has recourse against the insurer for the policy moneys. The writer submits that since the legal title to the policy is vested in the trustee, only the trustee has the right to sue the insurer. This is supported by s.23(6) of the Civil Law Act 1956 which provides that "the receipt of a trustee ... shall be a discharge to the insurer for the sum secured by the policy". Only the trustee can give a good discharge to the insurer.

It is uncertain whether the beneficiary who is *sui juris*, can put an end to the trust and require the insurer to pay the moneys to him[89] because his rights and entitlements are prescribed in s.23 itself. Nevertheless, it is submitted that even if the beneficiary cannot put an end to the trust, he can apply to the court for leave to sue the insurer directly in the trustee's name.[90] Alternatively, he can apply to the court for the appointment of a

[87] Section 112 of the Evidence Act 1950 (Act 56, Rev. 1971).
[88] Section 1(2) stipulates that the Adoption Act 1952 applies to West Malaysia only.
[89] According to the rule in *Saunders* v. *Vautier* 41 ER 482, where all the beneficiaries under a trust are *sui juris* and absolutely entitled, they can terminate the trust and require the trustee to comply with their instruction.
[90] Oakley, *supra*, note 3, at 636-637.

new trustee pursuant to s.23(5),[91] or an order that the trustee should claim the policy moneys from the insurer.

4.3.4 Rights of the beneficiary against the trustee

Since the insurer is to release the policy moneys to the trustee for his onward transmission to the beneficiary, it is important to identify the trustee. Section 23(3) of the Civil Law Act 1956 provides that the settlor can appoint a trustee at or after the policy's inception. If the settlor fails to do so, ss.(4) provides that the policy shall vest in the settlor and his personal representatives as trustees. Thus, upon the settlor's death, the insurer will release the policy moneys to his personal representatives who have extracted the Grant of Probate or Letters of Administration. The personal representatives as the trustees, will remit the moneys to the beneficiary. However, in Malaysia, the process leading to the extraction of the Grant of Probate or Letters of Adminstration may be tedious and time consuming. Thus, if the settlor fails to appoint a trustee before his death, there will be delay in the receipt of the moneys by the beneficiary. This may result in the beneficiary suffering financial hardship. To resolve this, the beneficiary has the recourses as discussed in Part 4.3.3.[92]

The next issue is whether the trustee can deal with the policy, and if in the affirmative, the effects of any dealings made by the trustee. If the trustee's rights are unfettered, the beneficiary's position is prejudiced.

[91] Section 23(5) of the Civil Law Act 1956 reads:

> "If at the time of the death of the insured or at any time afterwards there is no trustee, or it is expedient to appoint a new trustee or new trustees, a trustee or trustees or a new trustee or new trustees may be appointed by the High Court".

[92] *Supra*, at 169-170.

It appears that as the legal owner, the trustee is entitled to exercise all the rights given to the policy owner unless the policy prohibits it. They include the right to deal with, vary and even surrender the policy. It appears that the trustee may also assign or pledge the policy as security. However, it is submitted that since the beneficial interests in the policy are vested in the beneficiary, any transaction effected by the trustee must be for the purpose of the trust and in the beneficiary's best interest. This opinion is based on *Re Fleetwood's Policy*.[93]

It must be stressed that since the purpose of the trust under s.23 is to provide finance to the beneficiary on the policy owner's death, it is rare that the beneficiary benefits from any transaction on the policy. If the beneficiary neither benefits nor freely consents to the transaction,[94] he may sue the trustee for breach of trust. The beneficiary may also sue the insurer as a constructive trustee if it permits the transaction with knowledge of the breach.[95] Alternatively, the beneficiary may seek to recover the trust property from the party in whose favour the transaction is made if the latter is a volunteer or has notice of the breach.[96]

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[93] *Supra*, note 32. In the instant case, the husband effected a policy for the benefit of his wife if she survived him. After the couple separated, the husband exercised the option to surrender the policy for cash. The insurer paid the moneys into court after having failed to obtain the joint receipt of both settlor and beneficiary. The court held that the trust continued to attach to the cash surrender value. In the absence of an agreement between the settlor and beneficiary, the moneys had to remain in court until the death of either one of them. It is to be noted that the wife did not have an immediate vested interest, but only an interest subject to the contingency that she survived the policy owner. Therefore, if she predeceased the policy owner, the policy moneys would be paid to him.
See also *Re A Policy of The Equitable Life Assurance Society of the United States and Mitchell* (1911) 27 TLR 213.

[94] The English Court of Appeal in *Re Pauling's Settlement Trusts (No. 1)* [1964] 1 Ch 303 held that the trustee could not rely on any consent given by the beneficiary, who although has attained the age of majority, acted under the influence of another.

[95] *Karak Rubber Co Ltd* v. *Burden and Ors (No 2)* [1972] 1 All ER 1210.

[96] It is immaterial that the person in whose favour the transaction is made has given valuable consideration for the property. See *Barnes* v. *Addy* (1874) LR 9 Ch App 244; and *Halsbury's Laws of Malaysia*, Vol 5, (2000), MLJ, Kuala Lumpur, at para. 90-077.

4.3.5 Rights of the beneficiary in relation to the settlor's creditors

In general, the moneys payable on a life policy effected by a person belongs to him. They are his assets[97] and are subject to the claims of his creditors. Thus, an important issue is whether the beneficiary of a trust under s.23 of the Civil Law Act 1956 has priority over the settlor's creditors to the policy moneys. In this connection, it is noted that a trust under s.23 is a gift from the policy owner to his beneficiary. It is a voluntary settlement and s.52 of the Bankruptcy Act 1967 (Act 360, Rev. 1988) provides, *inter alia*, that a voluntary settlement will be void if the settlor becomes a bankrupt[98] within two years of the settlement. It is immaterial that the settlor is solvent at the time of the settlement. A voluntary settlement will also be void if the settlor becomes a bankrupt between two to five years after the settlement unless first, the settlor could pay all his debts without the aid of the trust property at the time of the settlement; and secondly, the settlor's interest in the property has passed to the trustee of the settlement.

However, fortunately for the beneficiary, s.52 of the Bankruptcy Act 1967 does not apply to a trust under s.23 of the Civil Law Act 1956. This is because s.23(1) stipulates that the policy moneys are not subject to the control of the settlor or his creditors and shall not form part of his estate. The trust is not void even if the settlor effects the policy and pays the premium with intent to defraud his creditors. Instead, s.23(2) provides that the creditors are entitled to receive only the amount of premiums paid with intent to defraud them. The protection conferred on the beneficiaries despite the settlor's bankruptcy originated from s.10 of the Married Women's Property Act 1870 (UK). As per Mellish LJ in *Holt* v. *Everall*,[99] s.10 modified s.91 of the Bankruptcy Act

[97] *Re William Phillips' Insurance* (1883) LR 23 Ch 235, at 247.
[98] The bankruptcy of a person is deemed to have commenced, not from the date of the Adjudicating Order made against him, but from the time he committed the act of bankruptcy which resulted in a Receiving Order made against him. See s.47(1) of the Bankruptcy Act 1967.
[99] (1876) LR 2 ChD 266, at 276.

1869 (UK). Section 91 of the 1869 Act was the genesis of s.52 of the (Malaysian) Bankruptcy Act 1967.

As stated earlier, the settlor's creditors can only claim a sum equivalent to the premiums paid "with intent to defraud" them. The next issue is what constitutes an "intent to defraud" for the purpose of s.23(2) of the Civil Law Act 1956. There is no judicial interpretation on the meaning of the said phrase. The learned author, Malcolm Clarke, suggests that the phrase "with intent to defraud" that appears in s.11 of the Married Women's Property Act 1882 (UK), which is *in pari materia* with s.23 of the Civil Law Act 1956, refers to fraud as is understood in the law of bankruptcy.[100] In this connection, reference may be made to s.172(1) of the English Law of Property Act 1925 which has a similar phrase. The provision reads:

> Save as provided in this section, every conveyance of property, made whether before or after the commencement of this Act, with intent to defraud creditors, shall be voidable, at the instance of any person thereby prejudiced.

Pennycuick VC in *Lloyds Bank Ltd* v. *Marcan and Ors*,[101] held that the word "defraud" in s.172(1) carried "the meaning of depriving creditors of timely recourse to property which would otherwise be applicable for their benefit". The person who sought to avoid the settlement must prove the settlor's intention.[102]

The judicial definition given to the said phrase in s.172 of the Law of Property Act 1925 (UK) is of persuasive authority in Malaysia. If it applies in Malaysia, the beneficiary of a trust created under s.23 of the Civil Law Act 1956 still enjoys priority over the policy proceeds. However, he is required to account to the settlor's creditors a

[100] Clarke, Malcolm A., *Law of Insurance Contracts*, (Looseleaf) (Service Issue No 1, 30 April 2000), LLP, London, at para. 5-4A3.
[101] [1973] 1 WLR 339, at 344.
[102] *Lloyds Bank Ltd* v. *Marcan and Ors*, *ibid.*, at 346. It is to be noted that in this case, both counsels accepted this as the proposition in law.

sum equivalent to the premiums which were paid with moneys that would otherwise be used by the settlor to repay his debts to his creditors if the creditors proved the following. First, the settlor is made a bankrupt within five years after he effected the trust and at a time when he was not able to pay his debts in full; and secondly, the premiums were paid for the initiation and continuation[103] of the policy. It is immaterial whether the beneficiary had knowledge or notice of the settlor's intent.[104]

4.3.6 Revocation

In the preceding Parts, the writer has discussed the position of the beneficiary of a trust under s.23 in relation to the trustee, the insurer and the settlor's creditors. If the trust is revoked, the beneficiary loses all benefits conferred on her by s.23. The issue is whether the settlor of the trust can revoke it. The general principle is that a settlor cannot revoke the trust unless he has reserved for himself a power of revocation. This rule also applies to a trust under s.23. If the beneficiary has acquired an immediate interest in the policy,[105] the trust remains effective even after the termination of the beneficiary's marriage with the settlor by death or divorce. The settlor cannot revoke the trust unless first, he has reserved for himself a power of revocation; or secondly, he has obtained a court order pursuant to s.76 of the Law Reform (Marriage and Divorce) Act 1976 to revoke the trust upon his divorce from the beneficiary.[106]

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[103] The first premium initiates the policy whereas the subsequent premiums are paid to continue the policy.

[104] McDonnell, Denis Lane and John Monroe, *Kerr On The Law Of Fraud and Mistake*, (7th ed., 1952), Sweet & Maxwell, London, at 307-308.

[105] As discussed in Pts. 4.3.2.1(a) and (b), whether the beneficiary acquires an immediate or contingent interest depends on the wording of the policy. *Supra*, at 161-167.

[106] See Pt. 4.3.2.1(a), *supra*, at 164.

4.4 Position in Malaysia under the Insurance Act 1996

The Insurance Act 1996, which came into effect on 1 January 1997, includes a provision on the creation of a statutory trust over an own-life policy. It is found in s.166. In this Part, it will be revealed that many of the advantages conferred on the beneficiary of a trust under s.23 of the Civil Law Act 1956 were omitted from or diluted in the statutory trust under s.166 of the Insurance Act 1996.

This Part analyses first, whether s.23 of the 1956 Act continues to apply after the Insurance Act 1996 came into force; secondly, the requirements of a trust under s.166 of the Insurance Act 1996 and its weaknesses compared to a trust under s.23 of the 1956 Act; and thirdly, the position of the beneficiary of a statutory trust when the insurer is wound-up on the ground of insolvency.

4.4.1 Applicability of section 23 of the Civil Law Act 1956

The purpose of s.23 of the Civil Law Act 1956 and s.166 of the Insurance Act 1996 is the same, namely, to simplify the creation of a trust over an own-life policy in favour of the settlor's family members. However, their coverage is different. In some aspects, the coverage of s.166 is wider and in other aspects, it is narrower than s.23. The issue is whether s.23 of the 1956 Act has been superceded by s.166 of the Insurance Act 1996, or whether the two provisions co-exist and complement each other. There are three possible interpretations.

One possible interpretation is that s.23 of the Civil Law Act 1956 has been rendered superfluous and no longer applies. Any trust which was created under s.23 ceased to

have any effect on 1 January 1997. If this interpretation is correct, then the beneficiary of the trust lost all protection conferred by the provision with effect from that date.

A second possible interpretation is that after the coming into force of the Insurance Act 1996, the owner of an own-life policy can no longer create a trust under s.23 of the Civil Law Act 1956. If he wishes to effect a statutory trust, he has to comply with the procedure prescribed by s.166 of the Insurance Act 1996. Nevertheless, the beneficiary of a trust created under s.23 prior to 1 January 1997 continues to enjoy the protection conferred on him by the section.

A third possible interpretation is that the owner of an own-life policy has the option to create a trust under either s.23 of the Civil Law Act 1956 or s.166 of the Insurance Act 1996. If the trust is created pursuant to s.23 of the 1956 Act, without complying also with the procedure prescribed for a trust under s.166 of the Insurance Act 1996, it has the effect of a trust under s.23. If it complies with the procedure prescribed by s.166 of the Insurance Act 1996, it takes effect as a trust under s.166. This is due to s.172 of the Insurance Act 1996 which provides, *inter alia*, that the provisions in Part XIII of the Act which includes s.166, shall override any contradicting provisions in the policy or any other written law relating to the disposition of the estate of a deceased.

The first interpretation, namely that s.23 of the Civil Law Act 1956 no longer applies, finds support in *Shunmuga Vadevu S Athimulam and Ors* v. *The Malaysian Co-operative Insurance Society Ltd and Anor*.[107] According to Abdul Hamid Mohamad J, the provision in s.23 has been rendered superfluous by s.166 of the Insurance Act 1996. The Insurance Act 1996 is a later Act and specific in nature on the matters on

[107] [1999] 1 CLJ 231.

insurance. Hence, where there is a conflict between the Civil Law Act 1956 and the Insurance Act 1996, effect should be given to the latter.[108]

With all due respect to the learned judge in *Shunmuga*, the writer is of the view that his statement was *obiter dictum* and *per incuriam*. First, the issue before the court was not on the applicability of s.23 of the Civil Law Act 1956. In this case, the policy owner effected a life policy for the benefit of his wife and son. No trustee was appointed. Subsequently, he nominated the second defendant as the beneficiary. The court had to decide whether the first nomination in favour of his wife and son, was revoked by the second nomination. Unfortunately, the judge did not indicate when the policy owner effected the first and second nominations respectively. If the first nomination was made before 1997, it was a trust created under s.23. If it was made after 1996, it could be a trust created under either s.23 of the Civil Law Act 1956 or s.166 of the Insurance Act 1996. If it was a trust created pursuant to s.23, the settlor was, by default of any appointment, the trustee.[109] If it was a trust created under s.166, the beneficiary was the trustee by default.[110] The learned judge held that the second nomination was void because the first nomination was a trust. By virtue of a s.166(3), the trustee by default was the beneficiary and her consent was not obtained. Section 166(4) was not fulfilled.[111] The writer is of the view that in this case, it was immaterial whether the settlor or the beneficiary was the trustee by default. This is because any dealings on the policy must be for the benefit of the beneficiary. Since the second nomination revoked the trust, it was detrimental to the beneficiary. The beneficiary could challenge it.

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[108] *Ibid.*, at 237.
[109] See Pt. 4.3.4, *supra*, at 170.
[110] See Pt. 4.4.2.6, *infra*, at 191-192.
[111] *Supra*, note 107, at 237.

Secondly, there is strong support for the continuation of s.23 notwithstanding s.166 of the Insurance Act 1996. The Insurance Act 1996 recognises the continued existence of a trust under s.23 of the 1956 Act. Section 162 of the Insurance Act 1996 defines the term "policy" in Part XIII to include a life policy under s.23 of the Civil Law Act 1956. Further, s.23 is not listed in the Schedule to the Insurance Act 1996 as one of the repealed or modified statutory provisions.[112]

Thirdly, it is doubted that the legislature intended to forfeit the rights conferred on the beneficiary of a trust under s.23 with effect from 1 January 1997. If the legislature had intended so, it would have used clear language to avoid any uncertainty. Further, even if s.23 was repealed, s.30(1) of the Interpretation Acts 1948 and 1967 (Act 388, Cons and Rev. 1989) provides that the repeal would not "affect any right, privilege, obligation or liability acquired, accrued or incurred under the repealed law".

It is submitted that the provisions in the Insurance Act 1996 support the third interpretation, that is, s.23 of the Civil Law Act 1956 co-exists with s.166 of the Insurance Act 1996. However, it is difficult to forecast whether a court will uphold[113] a trust created under s.23, for the co-existence of s.23 and s.166 does give rise to problems.[114] Pending any clear judicial interpretation, the rights of the beneficiary of a trust under s.23 are uncertain. It is unfortunate that the present ambiguity was not avoided when the Insurance Act 1996 was enacted. The Act should have expressly provided for the continuity of s.23 of the Civil Law Act 1956.

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[112] The other repealed statutes stated in the Schedule are the Life Assurance Companies (Compulsory Liquidation) Act 1962 (Act 1/1962) and the Life Assurance Companies (Compulsory Winding-Up) Rules 1963 (LN 250/1963). The Schedule also provides that consequential amendments were made to s.217 and s.218 of the Companies Act 1965 (Act 125, Rev. 1973) when the Insurance Act 1996 came into effect.

[113] *Shunmuga Vadevu S. Athimulam and Ors* v. *The Malaysian Co-operative Insurance Society Ltd and Anor*, *supra*, note 107, was merely *obiter dictum*.

[114] They will be dealt with in Pt. 4.4.3 and Pt. 4.5, *infra*, at 204-205 and 209 respectively.

4.4.2 Trust under section 166 of the Insurance Act 1996

A trust under s.166 of the Insurance Act 1996 is created when a non-Muslim policy owner nominates his spouse or child, or his parent (when he has no spouse or child living at the time of nomination), to receive the policy moneys payable upon his death.[115] It is effected by complying with the procedure for an ordinary nomination which is prescribed in s.163(1) of the 1996 Act.[116] The said nominee will enjoy the rights stipulated in s.166, instead of the rights of an ordinary nominee under s.167 of the Act.[117] For ease of reference, s.166 is reproduced below:

> (1) A nomination by a policy owner, other than a Muslim policy owner, shall create a trust in favour of the nominee of the policy moneys payable upon the death of the policy owner, if-
>
> (a) the nominee is his spouse or child; or
>
> (b) where there is no spouse or child living at the time of nomination, the nominee is his parent.
>
> (2) Notwithstanding any written law to the contrary, a payment under ss.(1) shall not form part of the estate of the deceased policy owner or be subject to his debts.
>
> (3) The policy owner, by the policy, or by a notice in writing to the licensed insurer, may appoint trustees of the policy moneys and where there is no trustee –
>
> (a) the nominee who is competent to contract; or
>
> (b) where the nominee is incompetent to contract, the parent of the incompetent nominee and where there is no surviving parent, the Public Trustee,
>
> shall be the trustee of the policy moneys and the receipt of a trustee shall be a discharge to the licensed insurer for all liability in respect of the policy moneys paid to the trustee.
>
> (4) A policy owner shall not deal with a policy to which ss.(1) applies by revoking a nomination under the policy, by varying or surrendering the policy, or by assigning or pledging the policy as security, without the written consent of the trustee.
>
> (5) Nothing in this section shall prejudice a creditor of a policy owner from applying to the court for a declaration that this section, wholly or partly, is inapplicable to any particular policy on the ground that the premiums under that policy were paid to defraud the creditor.

This Part examines first, the qualification of a person who may create a trust under s.166 or benefit from it; secondly, whether the policy or its moneys constitute the trust property; thirdly, the position of the beneficiary in relation to the settlor, the insurer,

[115] Section 166(1) of the Insurance Act 1996. What distinguishes an ordinary nomination from a trust under s.166 is the relationship between the policy owner and his nominee.
[116] See Pt. 2.4.1.4, *supra*, at 49.
[117] The rights of an ordinary nominee were discussed in Pt. 2.4.2, *supra*, at 53-67.

the trustee and the settlor's creditors respectively; and fourthly, the circumstances when the trust is revoked.

4.4.2.1 Settlor

Only a person who fulfils the following three requirements may create a trust under s.166 of the Insurance Act 1996.

First and foremost, the settlor of a trust under s.166 must be the policy owner. The phrase "policy owner" is defined in s.2 to mean the legal owner of the policy and to include, among others, his assignee and when he is deceased, his personal representatives. The writer submits that for the purpose of s.166, the definition must be read together with s.162 of the Insurance Act 1996. Section 162 provides that the word "policy" in Part XIII of the Act where s.166 is found, refers to a life policy and a personal accident policy effected by a person on his own life providing for payment of policy moneys on his death. Thus, only a person who is effecting or has effected a life policy or a personal accident policy on his life may create a trust under s.166. It cannot be created by the assignee of a life or personal accident policy by nominating his family members to receive the said moneys payable on the policy inceptor's death.

Secondly, s.166 excludes its application to a Muslim policy owner. Thus, a Muslim policy owner who nominates his spouse, child or parent does not create a trust in the nominee's favour. Section 167(2) reinforces the position by stipulating that the nominee of a Muslim policy owner shall receive the moneys payable on the policy owner's death as an executor. The nominee has a duty to settle the policy owner's debts and distribute the balance, if any, to his heirs according to Islamic law. It is submitted that the legislature took cognisance of the criticisms of the High Court's

decisions in *Re Man bin Mihat, Deceased* and *Re Bahadun bin Haji Hassan, Deceased*[118] when it enacted s.166.

Thirdly, only a person who has attained the age of 18 years may create a trust under s.166. This is because an ordinary nomination becomes a statutory trust where the nominee is his spouse or child, or his parent who is nominated when he has no spouse or child living. Since s.163(1) of the Insurance Act 1996 does not confer on a policy owner who has not attained the age of 18 years the capacity to effect a nomination,[119] it follows that such policy owner does not have the capacity to effect a trust under s.166. This is unsatisfactory for the following reasons.

The first reason is that under the Law Reform (Marriage and Divorce) Act 1976, a girl who has attained the age of 16 years may marry provided the relevant authority authorises the solemnisation of her marriage.[120] The second reason is that although s.153 of the Insurance Act 1996 permits a person below the age of 18 years to effect a policy on her life, s.163(1) does not allow her to effect a trust under s.166 in favour of her spouse or child. The third reason is that a person below the age of 18 years who has a child, whether legitimate or illegitimate, or an adopted child,[121] is not able to effect a trust under s.166 in favour of the child. Finally, an unmarried person is not permitted to effect a trust under s.166 in favour of either one or both of his parents.[122]

[118] These were dealt with in Pt. 4.3.1, *supra*, at 152-155.
[119] See Pt. 2.4.1.2, *supra*, at 45-47.
[120] Section 10 of the Law Reform (Marriage and Divorce) Act 1976.
[121] According to the definition of "child" in s.2 of the Insurance Act 1996, the child could be adopted under any local or foreign law or under any recognised custom. See Pt. 4.4.2.2(b), *infra*, at 185.
[122] See Pt. 4.4.2.2(c), *infra*, at 185-186.

4.4.2.2 Beneficiary

The beneficiaries of a trust under s.166 are limited to the settlor's spouse, children and parent. As discussed in Part 2.4.1.3,[123] one of the weaknesses of section 163(1) is that the nominee must be named. His particulars must be submitted to the insurer.[124] Thus, a policy owner cannot create a trust under s.166 in favour of 'my spouse', 'my child' or 'my mother'. It follows that he cannot create such a trust in favour of his future spouse and children or any of them. This is different from a trust under s.23 of the Civil Law Act 1956 where the beneficiary can be either named or described.

In this Part, the writer will examine the meaning of the terms "spouse", "child" and "parent" in s.166.

(a) Settlor's spouse

The word "spouse" is not defined anywhere in the Insurance Act 1996. As the word has no technical meaning, it should be understood in the same manner as it is understood in the common sense; a married woman in relation to her husband, and a married man in relation to his wife.[125]

A few pertinent issues arise. The first issue is whether the term "spouse" means a legal spouse, or whether the term includes a customary spouse. It is submitted that in the absence of any specific requirement, the owner of an own-life policy should be allowed to effect a trust under s.166 in favour of both his legal and customary spouses. This is in line with the interpretation proposed by the writer for the term "wife" in s.23 of the

[123] *Supra*, at 48.
[124] *Supra*, at 48-49.
[125] *Words and Phrases Judicially Defined in Canada Courts and Tribunals*, Vol 7, (1993), Thompson, Canada.

Civil Law Act 1956.[126] Further, s.2 of the Married Women Act 1957 interprets the phrase 'married woman' to include "any woman married in accordance with the rites and ceremonies required by her religion, manners or customs".[127]

The second issue is whether a trust under s.166 is revoked upon the termination of the settlor's marriage with the beneficiary by death or divorce. Section 164 of the Insurance Act 1996[128] prescribes that the beneficiary's death terminates the trust created in her favour.[129] Section 164 applies to s.166 because of the inclusion by express words. Where the deceased is the sole beneficiary, her interest reverts to the settlor. Where she is only one of the beneficiaries, her share in the moneys will be distributed among the surviving nominees[130] unless the settlor nominates a substitute. This is different from a trust under s.23 of the Civil Law Act 1956 where a named beneficiary takes an immediate vested interest in the policy unless otherwise stipulated. Once vested, her interest is not defeated even when she predeceases or divorces the settlor.

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[126] See Pt 4.3.2.1, *supra*, at 160.

[127] *Chong Sin Sen* v. *Janaki a/p Chellamuthu*, *supra*, note 51, at 420.

[128] Section 164 of the Insurance Act 1996 reads as follows:

"(1) A nomination, including a nomination to which section 166 applies, shall be revoked-

(a) upon the death of the nominee, or where there is more than one nominee, upon the death of all the nominees, during the life-time of the policy owner;

(b) by a notice in writing given by the policy owner; or

(c) by any subsequent nomination.

(2) Subject to subsection (1), a nomination shall not be revoked by a will or by any other act, event or means.

(3) Where there is more than one nominee and one of the nominees predeceases the policy owner, in the absence of any subsequent nomination by the policy owner disposing of the share of the deceased nominee, the licensed insurer shall pay the share to the remaining nominees in proportion to their respective shares".

[129] The position under s.166 of the Insurance Act 1996 is similar to the position under s.10 of the Married Women's Property Act 1870 (UK). See *Re Collier* [1930] 2 Ch 37. If *Cousins* v. *Sun Life Assurance Society*, *supra*, note 32, were to be decided pursuant to s.166, the court would hold that the trust in favour of the deceased wife was terminated by her death. Upon her death, the policy moneys would revert to the settlor.

[130] Whether a surviving nominee receives the policy moneys as a beneficiary or an executor depends on his relationship with the policy owner. If the nominee is related to the policy owner in the manner prescribed in s.166(1), he receives his share as a beneficiary. Otherwise, he receives it as an executor.

However, with regard to whether the trust under s.166 is automatically revoked when the settlor and beneficiary divorce or separate, s.164(2) clearly provides that the trust is not terminated by "a will, or by any other act, event or means". This includes a divorce or separation.

A consequential issue is whether the settlor can revoke the trust unilaterally. Section 166(4) provides that the settlor may do so with the trustee's written consent". However, the writer takes the stand that notwithstanding s.166(4), the trustee's consent to its revocation may amount to a breach of trust unless it is for the beneficiary's benefit,[131] or the beneficiary has given her free consent.[132] It is doubtful that a revocation would benefit the beneficiary since it extinguishes her right to receive her share in the policy moneys. Therefore, if the trustee consents to the revocation without the beneficiary's free consent, the beneficiary can sue the trustee for breach of trust. She can also trace the policy moneys.[133] However, the position of the beneficiary is not completely secure upon her divorce from the settlor, for the latter can apply to the court to revoke the trust pursuant to s.76(3) of the Law Reform (Marriage and Divorce) Act 1976.

A third issue is whether an ordinary nomination is converted to a trust under s.166 if the ordinary nominee marries the policy owner after the nomination has been effected. Section 166 does not deal with this situation, and it is submitted that it is uncertain whether such nominee will receive the policy moneys as an executor or as a beneficiary. Judicial interpretation is necessary.

[131] See Pt. 4.4.2.8, *infra*, at 203.
[132] *Re Pauling's Settlement Trusts (No 1)*, *supra*, note 94. The beneficiary must be *sui juris* to give his consent.
[133] See Pt. 4.3.4, *supra*, at 171.

(b) Settlor's children

A trust under s.166 can also be created in favour of the settlor's child. The term "child" is defined in s.2 of the Insurance Act 1996. It expressly includes a person's illegitimate child, step-child, and child adopted under any written law in Malaysia or any place outside Malaysia, or under a custom recognised by a class of persons in or outside Malaysia. It is submitted that if the case of *Re Clay's Policy of Assurance*[134] were to be decided in Malaysia today, the court would hold that a trust was created under s.166 of the Insurance Act 1996 in favour of the policy owner's adopted child.

(c) Settlor's parents

When the legislature enacted s.166, it took the opportunity to extend the coverage of the statutory trust to the settlor's parents provided he has "no spouse or child living at the time of nomination".[135] Thus, if the parent is nominated after the policy owner's marriage[136] or has fathered or adopted a child, the parent will receive the moneys as an executor. It is submitted that this restriction is not in line with the concept of a caring society. The duty of a child towards his parents does not end upon his marriage. He should continue to care and provide for his parents before as well as after he starts his own family. The legislature should not place such a restriction, but leave it to the discretion of the individual policy owner whether to create a statutory trust in favour of his parents.

It is also noted that the term "parent" is not defined anywhere in the Insurance Act 1996. It is uncertain whether the term covers only the settlor's natural parents or is extended to include his step-parents and adoptive parents, or whether it has the same

[134] *Supra*, note 43. See also *supra*, note 83.
[135] Section 166(1)(b) of the Insurance Act 1996.
[136] Unless he becomes a widower or divorcee, with no living child.

meaning as in s.3 of the Distribution Act 1958. Section 3 of the Distribution Act 1958, which is applicable in West Malaysia and Sarawak,[137] defines a parent as a person's natural father or mother, or his lawful father or mother under the Adoption Act 1952. It is hoped that for the purpose of s.166, the term "parent" is given an extensive meaning corresponding with the definition given to the term "child" in s.2 of the Insurance Act 1996. Since a trust is created pursuant to s.166 when the policy owner nominates his legitimate or illegitimate child, step-child or adopted child to receive the policy moneys, a trust should also be created if the policy owner nominates his natural parent or his adoptive parent under any local or foreign law or under any recognised custom. Similarly, a trust under s.166 should also be created where the nominee is the policy owner's step-parent. The writer recommends that the Insurance Act 1996 be amended to give the above definition to the term "parent". This will ensure that a wider range of third parties enjoy the benefits conferred by s.166.

4.4.2.3 Trust property

Another important issue is what constitutes the trust property. The courts have held that the trust property of a trust under s.23 of the Civil Law Act 1956 is the policy itself.[138]

With regard to the position of a policy which is subjected to s.166 of the Insurance Act 1996, Rafiah is of the opinion that the policy owner may surrender the policy with the trustee's consent. However, the surrender value must be given to the trustee.[139] If this is the correct position, the trust under s.166 is over the policy itself. However, the wording of s.166(1) appears to indicate that the trust under s.166 covers only the policy moneys payable upon the policy owner's death. Sub-section (1) reads, *inter alia*, "A

[137] Section 1(2) of the Distribution Act 1958.
[138] *Re Man bin Mihat, Deceased*, supra, note 24, at 3; and *Re Fleetwood's Policy*, *supra*, note 32.
[139] Rafiah, *supra*, note 31, at 65

nomination by a policy owner ... shall create a trust in favour of the nominee of the *policy moneys payable upon the death of the policy owner* ...".[140] Other interests in the policy, such as its surrender value, appear to be excluded from the trust. This is further supported by the fact that a trust under s.166 is created following the procedure for effecting a nomination. In an ordinary nomination under the Insurance Act 1996, the nominee has no right over the interests in the policy other than the policy moneys payable upon the policy owner's death. Since a trust under s.166 is created when the policy owner nominates his spouse or child, or his parent at a time when he has no spouse or child living, it should follow that the trust property comprises of only the policy moneys payable upon the policy owner's death.

4.4.2.4 Rights of the beneficiary against the settlor

In this Part, the writer examines the beneficiary's rights against the settlor. Towards this, it is important to identify the status of the trust under s.166, namely, whether it is a trust *inter vivos* or a testamentary disposition. The former comes into existence during the settlor's lifetime, whereas the latter shall operate only after the settlor's death. With regard to a trust under s.23 of the Civil Law Act 1956, the courts have consistently held that it is a trust *inter vivos* over the policy itself. It takes effect immediately upon its creation.[141] If it is a testamentary disposition, there is no immediate transfer of interest to the beneficiary upon nomination. The settlor can continue to deal freely with the policy to the beneficiary's detriment. Thus, for the protection of the beneficiary, the writer submits that the trust under s.166 should be a trust *inter vivos*.

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[140] The writer's own emphasis.

[141] See *Re Fleetwood's Policy*, *supra*, note 32, where the court held that though the settlor had reserved a right to surrender the policy, he could not defeat the beneficial interest of the beneficiary. The trust continued to attach to the cash surrender. The decision was affirmed by Suffian J in *Re Man bin Mihat, Deceased*, *supra*, note 24. See also *Cousins* v. *Sun Life Assurance Society*, *supra*, note 32; and *Re Bahadun bin Haji Hassan, Deceased*, *supra*, note 21.

However, there is no decided cases on the status of a trust under s.166 of the Insurance Act 1996. The editor of Halsbury's Laws of Malaysia expresses the opinion that the legislature intended the trust under s.166 to be a testamentary disposition.[142] Unfortunately, the legislature's intention was not clearly expressed. There are grounds to support the contention that a trust under s.166 is a testamentary disposition, as well as grounds to support the contention that it is a trust *inter vivos*. As a result, the position of the beneficiary is uncertain.

The grounds in support of the contention that a trust under s.166 is testamentary in nature are as follows. First, the trust is revoked upon the beneficiary's death.[143] Secondly, as discussed in Part 4.4.2.3,[144] the trust property appears to be the policy moneys payable on the policy owner's death. The beneficiary will enjoy the moneys payable only upon the happening of the said event. Contrary to Rafiah's opinion,[145] the other benefits and rights under the policy do not appear to be included in the trust. Thirdly, s.166(4) permits the settlor to revoke the trust with the trustee's written consent. In *Eccles Provident Industrial Co-operative Society Ltd* v. *Griffiths*,[146] Lord Mersey said that a nomination, which takes effect upon the death of the nominator and which may be revoked by the nominator, is testamentary in nature. Fourthly, s.166(4) also permits the settlor, with the trustee's written consent, to vary or surrender the

[142] *Halsbury's Laws of Malaysia*, Vol. 4, (2002 Reissue), MLJ, Kuala Lumpur, at para. 60.283:
"It is clearly mentioned that (the statutory trust under s.166) only applies to policy owners who are not Muslim policy owners. This seems to indicate that the Malaysian legislature is of the view that such a statutory trust of an insurance policy, would amount to a testamentary disposition and considers the earlier judicial decision as wrong".
[143] Section 164(1) of the Insurance Act 1996.
[144] *Supra*, at 186-187.
[145] Rafiah, *supra*, note 31, at 65. See also *supra*, at 186.
[146] [1912] AC 483.

policy or assign or pledge the policy as security. Upon completion of any of the said dealings, the trust may be revoked or rendered worthless.[147]

However, if Rafiah's opinion that the surrender value must be given to the trustee[148] is correct, then the second and fourth grounds supporting the contention that the trust under s.166 is a testamentary disposition do not hold. Further, the writer submits that the application of s.166(4) itself is a ground that the trust under s.166 is a trust *inter vivos*. Section 166(4) does not confer on the settlor absolute power to deal with the policy. He could do so only with the trustee's prior consent. Thus, the trustee is required to act not only upon the settlor's death, but also upon the settlor's desire to deal with the policy. If no trust has arisen before the settlor's death, there is no need to obtain the trustee's consent. Further, as will be discussed in Part 4.4.2.6,[149] the trustee does not have absolute discretion. He has obligations towards the beneficiary. The beneficiary has recourses if the trustee consents to a transaction which is prejudicial to him. They were discussed in Part 4.3.4.[150] In addition, by nominating his spouse or child, or his parent at a time when he does not have any spouse or child living, to receive the moneys payable upon his death, the policy owner is in effect making a declaration of trust that he has transferred his beneficial interest in the said moneys to the beneficiary.

In conclusion, the writer reiterates that for the protection of the beneficiary, the trust under s.166 should be a trust *inter vivos*.

[147] The surrender of the policy results in its cancellation and therefore, no money becomes payable by the insurer upon the settlor's death. The concept of assignment was discussed in Chapter 3.
[148] Rafiah, *supra*, note 31, at 65.
[149] *Infra*, at 190-191.
[150] *Supra*, at 171.

4.4.2.5 Rights of the beneficiary against the insurer

Even though the beneficiary is to benefit from the policy moneys payable upon the settlor's death, he has no cause of action against the insurer for the policy moneys. Section 166(3) expressly provides that the insurer is to release the moneys to the trustee. The right to give a good discharge to the insurer for the policy moneys is vested in the trustee. Thus, unless the beneficiary is also the trustee, he will not receive the policy moneys directly from the insurer. However, he can apply to the court for leave to sue the insurer directly in the trustee's name or for an order directing the trustee to sue the insurer. His rights against the insurer are the same as those of the beneficiary of a trust under s.23 of the Civil Law Act 1956.

4.4.2.6 Rights of the beneficiary against the trustee

The identity of the trustee is important to the beneficiary for the following reasons. First, if the trustee breaches his duty, the beneficiary can sue him for breach of trust. The trustee is required to act on two occasions, namely when the settlor dies and when the settlor wishes to deal with the policy. The first occasion was discussed in Part 4.4.2.5.[151] With regard to the second occasion, s.166(4) of the Insurance Act 1996 provides that the settlor must obtain the written consent of the trustee before he deals with the policy. As discussed in Part 4.4.2.4,[152] the trustee's discretion is not absolute. The trustee must be cautious when he exercises his discretion, for any dealing on the policy will affect the payment of the policy moneys to the beneficiary. The trustee may consent to the dealing only if it benefits the beneficiary, or the beneficiary is *sui juris* and has himself consented to the dealing having priority over the policy moneys. If the trustee breaches his fiduciary duty, the beneficiary has two options. He has a right to

[151] *Supra*, at 190.
[152] *Supra*, at 189.

trace the policy moneys to the interest holder. The interest holder is liable to account to the beneficiary unless the latter is a *bona fide* purchaser for value or has no notice of the trust. Alternatively, the beneficiary may trace into the substituted assets in the trustee's hands. He may either claim the value of the consideration given to the trustee for the dealing or the assets which were acquired with the said consideration.[153]

Secondly, if the trustee's identity is uncertain when the settlor dies, there will be delay in the remittance of the policy moneys by the insurer. As discussed above, the trustee has the right to give a good discharge for the policy moneys, and it follows that the insurer is to remit the moneys to him. If the trustee fails to take action against the insurer, the beneficiary may apply to the court for an order to compel the trustee to do so. However, the beneficiary can do this only if the trustee's identity is known to him. The writer will discuss the position where the settlor fails to appoint a trustee.

It was noted in Part 4.3.4[154] that if the settlor of a trust under s.23 of the Civil Law Act 1956 fails to appoint a trustee, ss.(4) provides that the policy will vest in the settlor and his personal representatives as trustees. This will cause some financial hardship to the beneficiary because the insurer will release the policy moneys to the settlor's personal representatives only after the extraction of the Grant of Probate or Letters of Administration. Section 166(3) of the Insurance Act 1996 overcomes this weakness by providing that in default of the appointment of a trustee by the settlor, the beneficiary who is competent to contract shall be the trustee. If he is not competent to contract,[155] his parent shall be the trustee. If the incompetent beneficiary has no surviving parent,

[153] McGhee, John, *Snell's Equity*, (31st ed., 2005), Sweet & Maxwell, London, at paras. 28-35 to 28-36.
[154] *Supra*, at 170.
[155] According to s.11 of the Contracts Act 1950, a person does not have capacity to contract if he has not attained the age of majority, is of unsound mind or is disqualified from contracting by any law to which he is subject. A person attains the age of majority when he reaches the age of 18 years. See s.2 of the Age of Majority Act 1971 (Act 21).

the Public Trustee[156] shall be the trustee. Thus, the beneficiary does not need to wait for the extraction of the Grant of Probate or Letters of Administration by the policy owner's personal representatives before he receives the moneys. However, it is submitted that there are some uncertainties with regard to the application of s.166(3). These will be discussed below.

For ease of reference, s.166(3) of the Insurance Act 1996 is reproduced in full below:

> The policy owner, by the policy, or by a notice in writing to the licensed insurer, may appoint trustees of the policy moneys and where there is no trustee-
> (a) the nominee who is competent to contract; or
> (b) where the nominee is incompetent to contract, the parent of the incompetent nominee and where there is no surviving parent, the Public Trustee,
> shall be the trustee of the policy moneys and the receipt of a trustee shall be a discharge to the licensed insurer for all liability in respect of the policy moneys paid to the trustee.

(a) 'Public Trustee'/Public Trust Corporation

The appointment of the Public Trustee as the trustee by default where the beneficiary is incompetent to contract and has no surviving parent leaves much to be desired. The following points may be noted.

First, the Public Trustee Act 1950 (Act 247, Rev. 1981) was repealed when the Public Trust Corporation Act 1995 (Act 532) came into effect on 1 August 1995.[157] The Public Trustee, being a corporation sole established under the Public Trustee Act 1950, ceased to exist on the same date.[158] The Public Trustee's property, rights and liabilities in respect of the administration of trusts and estates were vested in the Public Trust Corporation.[159] As such, it is misleading for the Insurance Act 1996 to make reference

[156] It is to be noted that the office of the Public Trustee ceased to exist on 1 August 1995 when the Public Trust Corporation took over its function on the same day. For further details, see Pt. 4.4.2.6(a), *infra*, at 192-193.
[157] PU(B) 351/95.
[158] Section 43(2) of the Public Trust Corporation Act 1995.
[159] See PU(B) 352/95 for the Vesting Order.

to the office of the Public Trustee that ceased to exist 16 months before the Act came into force, for the lawful body now is the Public Trust Corporation. For the purpose of this Chapter, reference henceforth will be made to the office of the Public Trust Corporation, instead of the Public Trustee.

Secondly, the powers of the Public Trust Corporation are limited. Section 19 of the Public Trust Corporation Act 1995 provides that where the Corporation holds property for the benefit of a minor, the Corporation may, at its sole discretion, release property up to the value of RM20,000 to the minor's parent, guardian or any person as the Corporation in its discretion determines, for the purpose of the minor's maintenance. Thus, the Corporation has power to distribute the policy moneys for the maintenance of a beneficiary who is still a minor. According to s.2 of the Age of Majority Act 1971 (Act 21), a person attains the age of majority when he reaches the age of 18 years.

It is pertinent to consider the position of persons who are of unsound mind or disqualified from contracting, for incapacity to contract is not limited to minors only.[160] A beneficiary who is of unsound mind[161] or disqualified from contracting by any law to which he is subject does not have the capacity to contract even though he has attained the age of majority. For a beneficiary who is so incapacitated, s.20 of the Public Trust Corporation Act 1995 confers on the Corporation the right to distribute the trust property if it forms part of a deceased's estate. Unfortunately, s.166(2) of the Insurance Act 1996 provides that the policy moneys which are subject to a trust under s.166 do not form part of the deceased's estate. Therefore, it appears that the Corporation has no

[160] Section 11 of the Contracts Act 1950.
[161] See s.12 of the Contracts Act 1950 for what constitutes a person who is of sound mind for the purpose of contracting.

power to distribute the policy moneys for the maintenance of a beneficiary who has attained the age of majority but is of unsound mind or disqualified from contracting.[162]

The next issue is whether the Public Trust Corporation is empowered by s.12 of the Public Trust Corporation Act 1995 to distribute the said trust property which it holds for the benefit of an incompetent beneficiary who has attained the age of majority. Section 12 provides that the Corporation has the capacity as a natural person and thus, has the same powers, duties and liabilities as a private person. It is noted that the powers of a trustee who is a private person are usually laid down in the instrument of appointment and the Trustee Act 1949 (Act 208, Rev. 1978). Unfortunately, the Trustee Act 1949, though it contains many supplemental powers, does not provide for the maintenance of an adult beneficiary.

Thus, both Public Trust Corporation Act 1995 and Trustee Act 1949 do not provide for the maintenance of an incompetent beneficiary who has attained the age of majority. When managing a trust for the benefit of such a beneficiary, the Corporation has to apply to the court for direction under s.38 of the Public Trust Corporation Act 1995. This will result in delay and more expenses being incurred. Due to the legislature's oversight, the said beneficiary will receive less than what is due to him under the trust. He is thus prejudiced.

[162] Section 20 of the Public Trust Corporation Act 1995 provides that:

> "Where, upon the conclusion of the administration of the estate of a person dying testate or intestate, there remains with the Corporation funds of which it is unable to dispose immediately by distribution in accordance with law by reason of the inability of the person entitled to give a discharge, through lack of legal capacity or otherwise, or by reason of any other cause which to the Corporation appears sufficient, the Corporation may apply the same for the benefit of that person and may for the purpose exercise all the powers under s.19".

The writer suggests that the Public Trust Corporation Act 1995 should be amended to provide for the maintenance of a beneficiary who is incompetent to contract. His age should not be material.

(b) Position of a parent who is incompetent

Section 166(3)(b) of the Insurance Act 1996 provides that where no trustee of the policy moneys is appointed and the beneficiary is incompetent to contract, his parent shall be the trustee. The issue is whether the parent shall be appointed the trustee by default even though he himself is incompetent to contract. Section 166(3)(b) provides that the Public Trust Corporation will be appointed the trustee only where the beneficiary does not have a surviving parent. Thus, it appears to be immaterial that the incompetent beneficiary's parent is suffering from a mental disorder, or of unsound mind, or is a bankrupt. It is to be noted that the Trustee Act 1949 does not prohibit a person who is mentally disordered or of unsound mind to act in the capacity of a trustee. A bankrupt is also not prohibited by either the Bankruptcy Act 1967 or the Trustee Act 1949 to act as a trustee.[163] If this is the correct interpretation, only the court can remove such 'incompetent' parent who is statutorily appointed.[164]

However, it is submitted that since an incompetent beneficiary will not be the trustee by default, it is doubted that the legislature intended to allow his incompetent parent to be the trustee by default. It should be implied that only a person who is competent to contract may be a trustee by default. This is further supported by s.170(a), which in the writer's opinion, applies where the settlor fails to appoint a trustee, and both the

[163] It is to be noted that s.45(1)(b) of the Trustee Act 1949 gives the court the discretion to appoint a new trustee in substitution for a trustee who is a bankrupt. Section 45(1)(b) reads, "the court *may* make an order …". Further, s.48(1)(a) of the Bankruptcy Act 1967 provides that the policy moneys held in trust by the bankrupt do not form part of his property.

[164] The court has an inherent jurisdiction to do so. See s.45(1)(b) of the Trustee Act 1949.

beneficiary and his parent are incompetent to contract. Since both beneficiary and his parent are not able to give a good discharge for the policy moneys, the moneys should be dealt with according to the procedure in s.170(a). According to s.170(a), if the beneficiary is (1) a minor; or (2) certified by a medical practitioner in the public service to be of unsound mind and has no committee to manage his estate; or (3) incapable of managing himself, his property and affairs, his entitlement under the trust created pursuant to s.166 may be released by the insurer in the following manner. Where the policy moneys do not exceed RM10,000, the insurer has to satisfy itself that the recipient will apply the moneys for the maintenance and benefit of the said beneficiary. Where the policy moneys exceed RM10,000, the moneys will be released to the Public Trust Corporation.

The writer proposes that s.166(3)(b) of the Insurance Act 1996 should be amended to provide that only a person who is competent to contract may be appointed as a trustee by the policy owner or by default.

4.4.2.7 Rights of the beneficiary in relation to the settlor's creditors

As discussed in Part 4.3.5,[165] s.52 of the Bankruptcy Act 1967 provides that a voluntary settlement is void if the settlor becomes a bankrupt within two years of the settlement. It is also void under certain circumstances if the settlor becomes a bankrupt between two and five years after the settlement. However, the origin of the statutory trust device, s.10 of the Married Women's Property Act 1870 (UK), protected the beneficiary. The trust was not void even where the settlor effected the policy and paid the premiums with the intention to defraud his creditors.

[165] *Supra*, at 172.

The issue is whether the beneficiary of a trust under s.166 of the Insurance Act 1996 is similarly protected against the claims of the settlor's creditors when the settlor becomes a bankrupt. It appears to be so from s.166(2). It provides that the policy moneys do not form part of the settlor's estate and are not subject to his debts. This is notwithstanding any written law, which includes the Bankruptcy Act 1967. This is further supported by the fact that the Official Assignee's rights in the policy cannot be greater than that of the settlor prior to his bankruptcy. As discussed in Part 4.4.2.6,[166] the settlor does not have absolute power to deal with the policy. Thus, the Official Assignee's rights to deal with the policy will also be restricted if the settlor is made a bankrupt prior to his death.

However, the position of the beneficiary may be affected by s.166(5), which reads:

> Nothing in this section shall prejudice a creditor of a policy owner from applying to the court for a declaration that this section, wholly or partly, is inapplicable to any particular policy on the ground that the premiums under that policy were paid to defraud the creditor.

It is difficult to interpret s.166(5), for Parliament's intention in enacting it appears vague and uncertain. In the absence of any court decision, the writer submits that there are two possible interpretations.

The first possible interpretation is that the court may declare that s.166 or any part of the provision to be inapplicable to a policy if any of its premiums is paid by the settlor to defraud his creditors. If s.166 does not apply to the policy, then the policy moneys payable on the settlor's death are not subject to a trust. The settlor remains the legal and beneficial owner of the whole policy and its proceeds at the time of his bankruptcy. Consequently, all interests in the policy vest in the Official Assignee. The beneficiary

[166] *Supra*, at 190-191.

loses all interests conferred on him by s.166. However, this interpretation is difficult to implement, for it is doubtful that a court could declare only part of s.166 to be inapplicable.

A second possible interpretation is that the court may declare the trust over the whole or any part of the policy moneys void if any of the premiums is paid by the settlor to defraud his creditors. If the court declares the trust over only a portion of the policy moneys as void, only the declared portion will revert to the settlor's estate for distribution among his creditors upon the settlor's death. Thus, the beneficiary will lose only part of his entitlement under the trust.

The second interpretation is also not without difficulty because s.166(5) does not provide any formula for the court to adopt when determining the amount of policy moneys which should revert to the settlor's estate. Thus, if the second interpretation is correct, it is uncertain whether the court will prorate the policy moneys according to the total premiums paid by the settlor to defraud his creditors or apply the principle in the English case of *Re Harrison and Ingram*.[167]

In *Re Harrison and Ingram*, Mr. Harrison effected four policies on his life in 1877. In the same year by a post-nuptial settlement, he assigned the policies and all their proceeds to a trustee upon trust to invest the proceeds and pay their income to his wife. There was a proviso that Mr. Harrison could appropriate for his own absolute use and benefit any bonuses on the policy. In November 1899, a Receiving Order was obtained against Mr. Harrison. Two days later, he died insolvent. It was subsequently discovered that Mr. Harrison became insolvent in 1889. The trustee of the bankruptcy sought a

[167] [1900] 2 QB 710.

declaration that the settlement of 1877 was a voluntary settlement and that under s.47 of the Bankruptcy Act 1883 (UK),[168] he was entitled to so much of the policy moneys as represented by the premiums paid by Mr. Harrison within ten years preceeding the date of his bankruptcy.[169] However, the Court of Appeal held that no proportionate part of the policy moneys was represented by the payment of any particular premium. It is hoped that the Malaysian courts when interpreting s.166(5) will observe and follow the views expressed by Lord Alverstone MR, who delivered the Court of Appeal's decision, that:[170]

> (N)o part of the payments can be regarded as being settlements within the 47th section. The policies were settled as far back as 1877, they having already been in existence for some years, and the payments made by the bankrupt were payments made to the insurance company to prevent the lapsing of the policies. The view taken by the learned judge seems to have been that each payment of premium secured a certain part of the money assured by the policies. We cannot take this view. The whole of the premiums were paid to keep up the policies, and no proportionate part of the moneys payable under the policies is represented by the payment of any particular premium. Nor do we think the actual amounts paid for premiums can be regarded as 'settlements' within the meaning of the 47th section. The amounts so paid were not intended to be earmarked or kept separate, nor, as we have said, can they now be said to be represented by any specific amount. We think the amounts must be treated either as moneys paid by the bankrupt to keep up the policies as between himself and the insurance company, or as moneys paid to enable the trustees to keep the policies alive.
>
> For this reason, we are of (the) opinion that the trustee of the bankrupt is not entitled to any part of the moneys paid by the insurance company.

If the Malaysian court adopts Lord Alverstone MR's views, the beneficiary of a trust under s.166 will receive the whole policy moneys except for the amount of premiums paid to defraud the settlor's creditors. To paraphrase Mellish LJ's *obiter dictum* in *Holt* v. *Everall*,[171] the creditors will get only what they are fairly entitled to. Only the amount representing the premiums paid in defraud of the creditors shall be repaid to them out of the moneys payable under the policy.

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[168] Section 47 of the Bankruptcy Act 1883 (UK) is *in pari materia* with s.52 of the Malaysian Bankruptcy Act 1967.

[169] This is because s.47 of the Bankruptcy Act 1883 (UK) provided that any voluntary settlement made by a bankrupt within ten years before his bankruptcy was void unless the beneficiaries under the settlement could prove that the settlor could pay all his debts without the aid of the property comprised in the settlement.

[170] *Supra*, note 167, at 718-719.

[171] *Supra*, note 99, at 276.

The Court of Appeal's decision in *Re Harrison and Ingram* reveals another interesting point. The premiums, though paid at a time when the settlor was insolvent, were not regarded as settlements within s.47 of the English Bankruptcy Act 1883. The court was of the opinion that the premiums should be treated as moneys paid by the settlor or the trustee to keep the policy alive. By doing so, the court protected a *bona fide* arrangement in favour of the beneficiary. The policy was effected at a time when the settlor was financially sound but the subsequent events changed his financial situation. The settlor continued to pay the premiums to fulfil his bargain in an existing contract between him and the insurer, for under the insurance policy, he was to pay the premiums at the agreed intervals. As a result, the creditor could not claim that the premiums were voluntary settlements under s.47 of the English Bankruptcy Act 1883. Section 47 of the English Bankruptcy Act 1883 is *in pari materia* with s.52 of the Malaysian Bankruptcy Act 1967.

It is further submitted that there is another ground in support of the contention that the premiums should not be considered as voluntary settlements. The premiums are paid to effect or continue an insurance policy on the life of the settlor. Upon the settlor's death, the beneficiary will be paid the policy moneys. She will use them for her housekeeping, school fees, entertainment or living expenses. In this connection, reference is made to *Re Kastropil*[172] where French J held that it would be difficult to characterise these items as 'settlements' within s.120 of the Bankruptcy Act 1966 (Australia), which corresponds with s.52 of the Malaysian Bankruptcy Act 1967.

[172] [1992] 109 ALR 568, at 575. See Rose, Dennis, *Australian Bankruptcy Law*, (10th ed., 1994), Law Book Co, Sydney, at 162.

In the writer's view, the second interpretation, that the court may declare only the portion of the policy moneys which is equivalent to the premiums paid to defraud the creditors as not subject to the trust created under s.166, is to be preferred. It is in line with the spirit of a statutory trust. It is also in line with the fundamental principle that a trustee has a duty to preserve the trust property entrusted to him and he should be reimbursed out of the trust property for all expenses incurred in doing so.[173] Thus, where the settlor is also the trustee, he pays the premium as a trustee to maintain the trust property. Otherwise, the benefits under the policy will be modified accordingly.[174] The subject matter of the trust property will thus, be affected. Consequently, if the trustee pays the premiums, the beneficiary will forfeit to the creditors only the said amount. The beneficiary will receive the balance of the policy moneys.

As discussed in section 4.3.5,[175] s.23 of the Civil Law Act 1956 also has a saving provision to protect the beneficiary in the event the settlor becomes a bankrupt. It is found in ss.(2):

> If it is proved that the policy was effected and the premiums paid with intent to defraud the creditors of the insured, they shall be entitled to receive out of the moneys payable under the policy a sum equal to the premiums so paid.

The differences between s.23(2) of the Civil Law Act 1956 and s.166(5) of the Insurance Act 1996 are dealt with below.

The first difference is on the importance placed on the settlor's financial status when the policy under the trust is incepted. Section 23(2) of the Civil Law Act 1956 applies

[173] *Halsbury's Laws of England*, Vol. 48, (4th ed., 2000 Reissue), Butterworths, London, at para. 789.
[174] Section 156 of the Insurance Act 1996 provides that a policy that has been in force for three years or such lesser period as may be agreed by the insurer, will not lapse or be forfeited due to the non-payment of premium. It shall continue to have effect subject to any modification implemented by the insurer in accordance with its system.
[175] *Supra*, at 172.

where it is proven that the settlor effected the policy and paid the premiums with the intent to defraud his creditors. Both conditions must be met. However, under s.166(5) of the Insurance Act 1996, it appears that the settlor's creditor may apply to the court even where the settlor incepted the policy when he was solvent. It is submitted that this does not provide the same protection which was given to the beneficiaries under the original statutory trust device pursuant to s.10 of the Married Women's Property Act 1870 (UK). The policy may be effected with the noble intention to provide for his family members in the event of his death. However, if he continues to pay the premiums to maintain the policy after his financial situation changes, his creditors can apply to the court to avoid the trust under s.166. As discussed above, the extent of the court's power is still uncertain.

The second difference is on the intention of the settlor when he incepts the policy and pays the premiums. If the trust is created under s.23 of the Civil Law Act 1956, the creditor who applies for a court order under ss.(2) must prove the settlor's intention to defraud his creditors when he incepts the policy and pays the premium. However, under s.166(5) of the Insurance Act 1996, it appears that the settlor's actual intention is immaterial.[176] The creditor needs to prove that "the premiums under that policy were paid to defraud the creditor". A settlor who pays the premium at a time when his liabilities exceed his assets may be held to have done so to defraud his creditors. It appears that the settlor's creditor may apply to the court to avoid the policy if the payment of the premium results in the creditor not receiving his payment on its due date.

[176] *Cf. Re Wise* (1886) 17 QB 290.

4.4.2.8 Revocation

The next pertinent issue is whether the settlor may revoke the trust and terminate the beneficiary's rights to the trust property. In this connection, it is noteworthy that the settlor of a trust under s.166 cannot reserve for himself a power of revocation. This is due to s.172(1) of the Insurance Act 1996 which provides that Part XIII of the Act overrides any terms to the contrary in the policy. Section 166 is found in Part XIII.

However, s.166(4) permits the revocation of the trust with the trustee's consent. But, as discussed in Parts 4.4.2.2(a),[177] 4.4.2.4[178] and 4.4.2.6[179], the writer questions its effectiveness. The writer is of the opinion that the trustee cannot consent to the revocation of the trust unless the beneficiary is *sui juris* and has agreed to it. Nevertheless, as was also discussed in Part 4.4.2.2(a),[180] a trust under s.166 is revoked upon the beneficiary's death, or by a court's order.

Comparatively, whether a trust under s.23 of the Civil Law Act 1956 is revocable depends on the terms of the trust. It is revocable if the settlor has reserved for himself a power of revocation. It is also revoked upon the beneficiary's death if the beneficiary did not acquire an immediate interest in the policy.

4.4.3 Rights of the beneficiary of a statutory trust against the Insurance Guarantee Scheme Fund

As discussed in Part 2.4.2.3,[181] the insurance guarantee scheme fund ("the IGSF") was established to meet the liabilities of an insurer which is wound-up on the ground of insolvency, to its policy owners and persons entitled through them. The issues which

[177] *Supra*, at 184.
[178] *Supra*, at 189.
[179] *Supra*, at 190-191.
[180] *Supra*, at 183-184.
[181] *Supra*, at 58.

were raised by the writer in Part 2.4.2.3[182] apply here too. Apart therefrom, it has to be considered whether the beneficiary of a trust under either s.23 of the Civil Law Act 1956 or s.166 of the Insurance Act 1996 is a qualified claimant to enjoy direct recourse against the IGSF.

As discussed in Part 4.4.2.5,[183] if the policy is subject to a trust under s.166, the insurer is required to remit the policy moneys payable on the policy owner's death to the trustee. Unless the beneficiary of the trust is also its trustee, he has no right to sue the insurer for the moneys. If he has no right to sue the insurer, it follows that he does not have direct recourse against the IGSF when the insurer is wound-up.

With regard to the beneficiary of a trust under s.23 of the Civil Law Act 1956, his position is uncertain due to the following reasons. First, it is uncertain whether s.23 still applies. Secondly, even assuming that s.23 co-exists with s.166 of the Insurance Act 1996, it is submitted that the effectiveness of a trust under s.23 may be affected by the provision in s.172 of the Insurance Act 1996. Section 172 provides that Part XIII prevails over the terms of the policy and *any other written law*, rule of law, practice and custom in relation to the administration of estate. Further, s.162 defines the term "policy" in Part XIII of the Insurance Act 1996, to include a policy under s.23 of the Civil Law Act 1956. It appears that the insurer, to obtain a good discharge, has to comply with the procedure prescribed in Part XIII even where the policy is subject to s.23 of the Civil Law Act 1956. The insurer is required to pay the moneys to the person who is nominated pursuant to s.163.[184] In the absence of a nominee, the insurer is to pay the moneys according to the procedure prescribed in s.169 of the Act. However,

[182] *Supra*, at 58-67.
[183] *Supra*, at 190.
[184] See s.165 of the Insurance Act 1996.

according to Rafiah,[185] the insurer is obliged to honour the terms of s.23 of the Civil Law Act 1956 by applying the claims procedure set out in Part XIII of the Insurance Act 1996. The insurer is required to pay the policy moneys to the trustee appointed under s.23. It is submitted that until there is clear judicial interpretation, it is uncertain whether the insurer is required to pay the policy proceeds to the trustee according to s.23(6) of the Civil Law Act 1956 or the procedure prescribed in Part XIII of the Insurance Act 1996. If s.23(6) continues to apply, the beneficiary has no recourse against the IGSF unless he is also the trustee. Similarly, if the procedure prescribed in Part XIII of the Insurance Act 1996 prevails, the beneficiary has no recourse against the insurer unless he is also nominated according to the procedure laid down in s.163 of the 1996 Act.

It must also be stressed that complications are bound to arise even if the beneficiary is nominated pursuant to s.163. This is because there might be two statutory trusts over the policy, namely a trust under s.23 of the Civil Law Act 1956 and a trust under s.166 of the Insurance Act 1996, if the nomination is effected at the same time as the trust under s.23. In view of s.172 of the Insurance Act 1996, the trust under s.166 may be construed to prevail over the trust under s.23. Thus, the writer submits that the nomination of the beneficiary of a trust under s.23 should be effected subsequent to the creation of the trust. This problem will be further discussed in Part 4.5.[186]

Another issue is whether the beneficiary of a statutory trust over a life policy is entitled to the policy's actuarial reserve which is payable to the policy owner when the policy

[185] Rafiah, *supra*, note 31, at 62.
[186] *Infra*, at 209.

ceases to be in force. As discussed in Part 2.4.2.3(d),[187] a life policy issued by an insurer shall cease to be in force upon its winding-up, unless the policy is transferred to another insurer. Section 166(1) of the Insurance Act 1996 provides that the trust is over "the policy moneys payable upon the death of the policy owner". It appears that contrary to Rafiah's opinion,[188] the other interests in the life policy, including the policy's actuarial reserve, are not subject to the trust. If that is correct, the beneficiary of the trust under s.166 will lose all protection conferred by the provision where first, the insurer is wound-up before the policy owner's death; and secondly, the policy is not transferred to another insurer. In contrast, the position of the beneficiary of a trust created under s.23 of the Civil Law Act 1956 is better. Following the principle in *Re Fleetwood's Policy*,[189] the policy's actuarial reserve will be subject to the trust.

With regard to the beneficiary of a trust under s.23 of the Civil Law Act 1956 or s.166 of the Insurance Act 1996 over a personal accident policy, it is certain that the beneficiary loses all protection conferred by the provision where the insurer is wound-up on the ground of insolvency before the policy owner's death. This is because the insurer's liquidator has no power to transfer the policy to another insurer. Following s.121, the policy automatically lapses upon the winding-up of the insurer.

4.5 Concluding Remarks

Prior to the Insurance Act 1996, the owner of an own-life policy who wished to create a trust over the policy in favour of his spouse or child, could do so pursuant to s.23 of the Civil Law Act 1956. The legal position has become complex and confusing after

[187] *Supra*, at 67.
[188] Rafiah, *supra*, note 31, at 65.
[189] *Supra*, note 32. See the discussion in Pt. 4.3.4, *supra*, at 171.

the enactment of the Insurance Act 1996, for there are now two statutory provisions in Malaysia which provide that a trust is created when a person effects a policy on his own life for the benefit of selected members of his family. They are s.23 of the Civil Law Act 1956 and s.166 of the Insurance Act 1996.

In *Shunmuga Vadevu S. Athimulam and Ors* v. *The Malaysian Co-operative Insurance Society Ltd and Anor*,[190] the learned trial judge held the opinion that s.166 of the Insurance Act 1996 had superceded s.23 of the Civil Law Act 1956. With all due respect, the writer does not agree. The writer is of the opinion that the *obiter dictum* was *per incuriam*. The writer holds the opinion that s.23 of the Civil Law Act 1956 and s.166 of the Insurance Act 1996 co-exist and complement each other. The writer's opinion is based on the provisions in the 1996 Act. First, Part XIII of the Act, in which s.166 is found, recognises the existence of a policy under s.23 of the Civil Law Act 1956. Secondly, s.23 of the Civil Law Act 1956 is not listed as one of the provisions repealed by the Insurance Act 1996. However, until there is clear judicial interpretation, there is uncertainty whether s.166 of the Insurance Act 1996 supercedes or co-exists with s.23 of the Civil Law Act 1956. Thus, there is much uncertainty today regarding this area of the law. The Parliament urgently needs to make the position clear.

This Chapter has discussed the scope and effect of s.23 of the Civil Law Act 1956 and s.166 of the Insurance Act 1996, and has highlighted their differences. Many of the advantages conferred on the beneficiary of a trust under s.23 of the Civil Law Act 1956 were omitted from or diluted in the statutory trust device found in s.166 of the Insurance Act 1996.

[190] *Supra*, note 107.

First and foremost, the validity of a trust under s.166 may be affected if the policy owner pays the premiums to defraud his creditor. It appears that the trust may be avoided pursuant to s.166(5) if the creditor proves that the policy owner pays the premiums at a time when his liabilities exceed his assets. It is immaterial that the policy owner has no direct or actual intention to defraud his creditors. In fact, the settlor's financial status when he incepts the policy is immaterial for the purpose of s.166.

Secondly, it appears that the trust under s.166 is over the policy moneys payable upon the policy owner's death. It appears to exclude the other interests in the policy, such as its surrender value or actuarial reserve. If this is the correct interpretation, the beneficiary will not be able to enjoy the protection conferred on her by s.166 if the insurer is wound-up before the settlor's death and the policy is not transferred to another insurer. Further, there is likelihood that the trust is a testamentary disposition since the trust property is determined after the settlor's death. If it is a testamentary disposition, the settlor can continue to deal with the policy to the beneficiary's detriment. This is because a testamentary disposition operates only after the settlor's death.

Thirdly, there are some uncertainties with regard to the application of s.166(3) on the appointment of a trustee by default. These uncertainties may cause delay in the remittance of the policy moneys, for the insurer is required to pay them to the trustee. Section 166(3) provides that in default of the appointment of a trustee by the settlor, the trustee by default shall be the beneficiary who is competent to contract, the beneficiary's surviving parent or the Public Trust Corporation, in that order of priority. It appears that a parent who is incompetent to contract can be a trustee by default. If

this is the correct interpretation, the beneficiary may be prejudiced if the incompetent trustee manages the trust property to the beneficiary's detriment. This is because the beneficiary may have no effective remedy against the trustee.

Further, the Public Trust Corporation, which is appointed the trustee by default if the beneficiary is incompetent to contract and has no surviving parent, has power to distribute the trust property which it holds for a beneficiary who is a minor. The Corporation does not have such power where the beneficiary has attained the age of majority, but is of unsound mind or disqualified from contracting. This is prejudicial to the beneficiary, for the Corporation has to apply to the court for directions. The beneficiary will receive his moneys only after the court's directions. Further, since the legal expenses incurred will be deducted from the trust property, he will receive less than what is due to him under the trust.

A policy owner who still wishes to effect a trust pursuant to s.166 despite its shortcomings, must ensure that he complies with the procedure prescribed in s.163 of the Insurance Act 1996. On the assumption that s.23 is still applicable, a policy owner who wishes to effect a trust pursuant to the provision must clearly indicate in the policy that he is creating a trust under s.23. Further, he must take cognisance of s.172 of the Insurance Act 1996 which provides that Part XIII of the Act prevails over the terms in the policy, and any other written law, practice and custom in relation to the matters on the administration and distribution of the policy owner's estate.

It is obvious that having two effective statutory trust devices at the same time causes confusion and complication to the insuring public. To overcome this, this thesis recommends that the legislature enacts one statutory trust device to replace both s.23 of

the Civil Law Act 1956 and s.166 of the Insurance Act 1996. This could be done by amending s.166 of the Insurance Act 1996. The amended s.166 should encompass the advantages offered by both existing devices.[191] Until a new statutory device is enacted, the public should be advised on the advantages and disadvantages of the trusts under s.23 and s.166 respectively to enable them to make informed decisions best suited to their personal needs. The public should also be warned about the uncertainty as to whether s.23 of the Civil Law Act 1956 is still applicable.

[191] This will be discussed in Chapter 7, *infra*, at 387-390.

CHAPTER FIVE

RIGHTS OF THIRD PARTIES IN MOTOR INSURANCE

5.1 Introduction

At common law, a person who is awarded damages by the court against a tortfeasor for his loss and injuries can enforce his judgment against that tortfeasor only. This may cause great hardship to him if the tortfeasor is unable to satisfy the judgment. Even if the tortfeasor's liability is insured, the injured person may not be in a better position. This is because the insurer may require the insured to pay the judgment sum to the injured person before reimbursing or indemnifying him. Even where the insurer has agreed with the insured to satisfy the judgment sum awarded against him, the judgment creditor cannot enforce the agreement against the insurer. This is due to the doctrine of privity. However, in the area of motor insurance, the legislature had intervened and enacted provisions to make it mandatory for the user of a vehicle to be insured against certain liabilities towards an injured person, and to confer enforceable rights on an injured person and certain third parties.

In England, the provisions incorporating the aforesaid protection were first enacted in the Road Traffic Act 1930 (UK) ("the RTA 1930 (UK)"). Its preamble read, "An Act to … make provision for the protection of third parties against risks arising out of the use of motor vehicles". The RTA 1930 (UK) was repealed by and substituted with the Road Traffic Act 1960 (UK). The latter was subsequently repealed by and substituted with the Road Traffic Act 1972 (UK). Currently in the United Kingdom, the provisions conferring protection on a third party against risks arising from the use of a motor vehicle on a road

or other public place, are found in Part VI of the Road Traffic Act 1988 (UK) ("the RTA 1988 (UK)").

The relevant provisions in the RTA 1930 (UK) were imported, with modifications, by many Commonwealth countries including Malaysia. In Malaysia, the said provisions were first incorporated into the Road Traffic Enactment 1937 (FMS No 17 of 1937). The Enactment was extended to the whole of West Malaysia by the Road Traffic Ordinance 1958 (Ord. No. 49 of 1958) ("the RTO 1958"). When the Ordinance was repealed by and substituted with the Road Transport Act 1987 (Act 333) ("the RTA 1987"), the provisions pertaining to third party rights with some changes, were enacted in Part IV of the Act. The RTA 1987 applies throughout Malaysia.[1]

In this Chapter, the writer will first examine the scope of the compulsory motor insurance scheme in Malaysia. This is followed by an analysis of the rights conferred by the legislature on the third parties to a motor insurance policy. There are three categories of third parties. The first category refers to a person who sustains injury in a motor accident arising from the use of a vehicle on a road. In this Chapter, he is referred to as "the injured third party". Where the injured third party is deceased, the phrase "injured third party" includes his estate or dependants or both, who are vested with causes of action against the tortfeasor. In this Chapter, the tortfeasor is referred to as "the insured" if his liability to the injured third party is insured under a motor policy. The second category of third parties refers to a person whose liability is insured under a motor policy even though he is not the policy owner. In this Chapter, he is referred to as "the authorised driver". A hospital that gives emergency treatment to the injured third party constitutes the third category.

[1] Section 1(3) of the RTA 1987.

Apart from analysing the injured third party's rights against the insurer, this Chapter also analyses his rights which are allied to the statutory provisions, namely his rights against the Motor Insurers' Bureau of West Malaysia ("the MIB (Malaysia)") and the person who permits ("the permitter") an uninsured tortfeasor to use a vehicle on the road. The writer will also deal with the statutory protections conferred on a third party when either the insured or insurer becomes insolvent.

It will be shown that the current legislation pertaining to the rights of third parties in motor insurance law in Malaysia is unsatisfactory. Much could be done by the Malaysian legislature to improve their rights.

5.2 Compulsory Motor Insurance in Malaysia

Section 90 of the RTA 1987 requires a user of a motor vehicle to be insured against the third party risks prescribed in s.91(1). The policy that insures the compulsory third party risks is herein referred to as "the compulsory motor insurance in Malaysia" or "the compulsory motor policy in Malaysia". For convenience, s.91(1) is reproduced below:

> In order to comply with the requirements of this Part, a policy of insurance must be a policy which –
>
> (a) is issued by a person who is an authorised insurer within the meaning of this Part; and
> (b) insures such person, or class of persons as may be specified in the policy in respect of any liability which may be incurred by him or them in respect of the death of or bodily injury to any person caused by or arising out of the use of the motor vehicle or land implement drawn thereby on a road:
>
> Provided that such policy shall not be required to cover –
>
> (aa) liability in respect of the death arising out of and in the course of his employment of a person insured by the policy or of bodily injury sustained by such a person arising out of and in the course of his employment; or
> (bb) except in the case of a motor vehicle in which passengers are carried for hire or reward or by reason of or in pursuance of a contract of employment, liability in respect of the death of or bodily injury to persons being carried in or upon or entering or getting onto or alighting from the motor vehicle at the time of the occurrence of the event out of which the claims arise; or
> (cc) any contractual liability.

This Part of the Chapter examines the requirements of a compulsory motor policy in Malaysia. This is important because s.96 of the RTA 1987 does not confer a right on all injured third parties to recover their judgment sums from the insurer. The right to do so is given to only an injured third party who has obtained judgment against the insured for a liability which is required to be covered by s.91(1). In this connection, it is pertinent to note that only certain third party risks are required to be insured. In addition, certain risks are permitted to be expressly excluded in the policy. It will be demonstrated that the legislature in Malaysia is not proactive in redefining the scope of the compulsory motor policy scheme to be in line with the country's socio-economic and legal developments.

5.2.1 Injured third party

Section 90(1) requires a person to be insured against his liability to a third party who suffers bodily injury, fatal or otherwise, which is caused by or arises out of his use of a motor vehicle on a road. Following the case of *Digby* v. *General Accident Fire and Life Assurance Corporation Limited*,[2] the policy owner himself may also be a third party and thus, may avail himself of the rights conferred by Part IV of the RTA 1987 on a third party against the insurer. An important issue is whether any person is excluded from the scope of the compulsory motor policy. According to *Cooper* v. *Motor Insurers' Bureau*,[3]

[2] [1943] AC 121. In this case, the policy owner at the time of the accident was a passenger in the vehicle driven by her authorised driver. She obtained judgment against her driver. In the policy effected, the insurer agreed to indemnify an authorised driver "in respect of any claim by any person". The House of Lords held that the insurer must indemnify the driver pursuant to the policy as required by s.36(4) of the RTA 1930 (UK) (now s.148(7) of the RTA 1988 (UK) which is *in pari materia* with s.91(3) of the RTA 1987). This is because the phrase "any claim by any person" appearing in the policy included that of the policy owner (see Lord Wright's judgment at pages 141-142). The policy owner was a third party in reference to her authorised driver (see Lord Porter's judgment at page 146). It is to be noted that the policy owner as an injured third party, could not sue the insurer directly because the compulsory motor insurance in the UK then did not include an insured's liability to his passengers. In this connection, see the discussion in Pt. 5.2.1.2, *infra*, at 217.

[3] [1985] 1 All ER 449, where the court held that the compulsory motor insurance did not cover damages for the authorised driver's injury. This is obvious, for s.91(1) of the RTA 1987 refers to third party risks. The driver cannot sue himself for his negligent act.

the user himself is excluded. Similarly, a person who comes within the ambit of proviso (aa) or (bb) to s.91(1)(b), is also excluded.[4] The two provisos are studied below.

5.2.1.1 Insured's employee may be excluded

Proviso (aa) to s.91(1)(b) stipulates that a compulsory motor policy in Malaysia need not cover the insured's liability to his employee for his death or bodily injury "arising out of and in the course of his employment".[5] This is unfortunate, for in practice, motor policies invariably exempt this liability because it is not compulsory. Even where the policy includes this liability, the employee cannot avail himself of the protection of s.96.[6]

In the UK, a similar exclusion to the compulsory motor insurance was permitted by s.145(4)(a) of the RTA 1988 (UK). The exclusion was interpreted by Lord Denning MR in *Vandyke* v. *Fender and Anor*[7] to mean that the compulsory motor insurance was not required to cover the insured's liability to his employee who was obliged by the terms of his employment to travel in the insured's vehicle. However, in 1992, the UK legislature mitigated the harshness of this exclusion by adding ss.(4A) to s.145. The new s.145(4A) provides that a compulsory motor policy must cover an employee who fulfils the following two conditions. First, he is not covered by a policy effected pursuant to the Employers' Liability (Compulsory Insurance) Act 1969 (UK); and secondly, he sustains the injury whilst being carried in or upon the vehicle or entering or getting on to or alighting from the vehicle. Therefore, an injured third party who is not covered by any employer's liability policy effected pursuant to the 1969 Act, may recover the judgment sum awarded against his employer from the motor insurer pursuant to the RTA 1988

[4] The scope of the proviso (cc) to s.91(1)(b) will be examined in Pt. 5.2.2, *infra*, at 222-223.
[5] However, if an injured third party is carried in the vehicle by reason of or in pursuance of a contract of employment, he is required to be covered by a compulsory motor policy in Malaysia pursuant to the exception in proviso (bb) to s.91(1)(b). This will be dealt with in Pt. 5.2.1.2(b), *infra*, at 219-222.
[6] See *New Zealand Insurance Company Ltd.* v. *Sinnadorai* [1969] 1 MLJ 183.
[7] [1970] 2 QB 292, at 305.

(UK). If the vehicle is not covered by a compulsory motor policy, he may recover the awarded judgment sum from the Motor Insurers' Bureau (UK).[8] In other words, in the UK, an injured third party who sustains injury arising out of and in the course of his employment will not go uncompensated.

In Malaysia, the Employees Social Security Act 1969 (Act 4) ("the SOCSO") provides protection to an employee who suffers personal injury caused by, *inter alia*, an accident that happens while he is travelling between his residence and place of work or for any reason connected to his employment.[9] He will receive compensation from the SOCSO scheme. However, not all employees are covered by the SOCSO scheme.[10] There is another employees' compensation scheme prescribed by the Workmen's Compensation Act 1952 (Act 273, Rev. 1982). Section 4(1)(a) requires an employer to compensate his employee who is covered by the Act for his personal injury arising out of and in the course of the said employment. This includes:[11]

> an accident happening to (the employee) while he is ... travelling as a passenger by any vehicle ... to and from his place of work .. notwithstanding that he is under no obligation to his employer to travel by such means ...

To ensure an injured employee receives his compensation, every employer is required to effect an insurance to cover his contingent liability under the Act.[12] Unfortunately, the Workmen's Compensation Act 1952 does not apply to all employees who are excluded from the SOCSO scheme.

In conclusion, the current proviso (aa) to s.91(1)(b) of the RTA 1987 does not protect an injured third party who is the insured's employee. If the injured third party is not covered

[8] This will be discussed in Pt. 5.4, *infra*, at 258-279.
[9] Sections 2(6), s.15 and s.24 of the SOCSO.
[10] See s.5 of the SOCSO and the definition of "employee" in s.2(5) of the SOCSO.
[11] Section 4(1)(b) of the Workmen's Compensation Act 1952.
[12] See Pt. 6.5, *infra*, at 353.

by either of the workmen's compensation schemes discussed above, he may be left uncompensated for his injuries. Thus, it is proposed that the Malaysian legislature emulates the UK's legislature and enacts the provision in s.145(4A) of the RTA 1988 (UK), with the necessary modifications, as an exception to proviso (aa) to s.91(1)(b) of the RTA 1987.

5.2.1.2 Insured's passenger may be excluded

Prior to the enactment of the RTA 1972 (UK), an insured's liability to his passengers was not required to be covered under the compulsory motor insurance applicable in the UK. Currently, a tortfeasor's passenger is conferred the right to recover from the insurer the judgment sum awarded to him against the tortfeasor.[13] In addition, the passenger's rights against the insurer are not affected by "any antecedent agreement or understanding" between him and the tortfeasor to absolve the tortfeasor from liability towards him. It is immaterial that they intend their agreement or understanding to be legally binding.[14] His rights against the insurer are affected only if he is a 'willing' passenger who knows or has reason to believe that the vehicle is stolen or unlawfully taken prior to the commencement of the journey.[15]

In Singapore, the prescribed compulsory motor policy must cover the insured's liability to his passenger unless the passenger is being carried in the course of his employment. This liability is included as one of the mandatory items for compulsory motor insurance with effect from 1 March 1981 when the Motor Vehicles (Third Party Risks and

[13] The writer uses the phrase "the tortfeasor", and not "the insured" when she discusses the current position in the UK. This is because under the RTA 1988 (UK), the insurer which insures the use of the vehicle must satisfy the judgment sum. It is immaterial that the tortfeasor is not the policy owner or his authorised driver. This is a new protection which was not found in the predecessors of the RTA 1988 (UK). See the discussions in Pt. 5.2.4, *infra*, at 228-229 and Pt. 5.3.1.1, *infra*, at 241.

[14] Section 149(2) of the RTA 1988 (UK). However, s.149 does not remove the defences of contributory negligence or illegality. See *Pitts* v. *Hunt and Anor* [1990] 3 All ER 344, at 366.

[15] Section 151(4) of the RTA 1988 (UK).

Compensation) (Amendment) Act 1980 came into force.[16] As in the position in the UK, the insured can no longer exclude his liability towards his passenger.[17]

In Malaysia, the position of the insured's passenger is unsatisfactory. Malaysia has not adopted the statutory reforms in the UK and Singapore. The passenger cannot take advantage of the statutory rights given to a third party by Part IV of the RTA 1987 unless one of the exceptions prescribed in proviso (bb) to s.91(1)(b)[18] applies to him. He will be covered if he is carried either "for hire or reward" or "by reason of or in pursuance of a contract of employment". Only in such a situation he may be able to recover the awarded judgment sum from the insurer.

One major area of concern is whether a passenger in a car-pool arrangement is covered by a compulsory motor policy in Malaysia. This issue is important because it is a common practice in Malaysia to car-pool to work or school. There is no decided case on this issue in Malaysia. This issue is discussed below.

(a) Passenger who is carried "for hire or reward" included

A compulsory motor policy in Malaysia must cover the insured's liability towards his passenger who is carried "for hire or reward". The issue is whether the scope of this expression covers a passenger in a car-pool arrangement. In the House of Lords' case of *Albert* v. *Motor Insurers' Bureau*,[19] Lord Pearson held the view that the word "reward" covers a wider scope compared to the word "hire". It covers:

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[16] Poh, Chu Chai, *Law of Life, Motor and Workmen's Compensation Insurance*, (5th ed., 1999), Butterworths Asia, Singapore, at 357.
[17] Section 5 of the Motor Vehicles (Third-Party Risks and Compensation) Act (Chapter 189); and Poh, *ibid.*, at 398-401.
[18] *Mary Colete John* v. *South East Asia Insurance Bhd* [2004] 7 CLJ 314.
[19] [1972] AC 301, at 330.

> some forms of remuneration or some arrangements for which the words 'for hire' might not be appropriate... The phrase 'for reward' is thus capable of meaning that there is a contractual liability to make a payment, but I do not think it is limited to that meaning.

The court held that the test to be applied is whether there is a systematic carrying of passengers which goes beyond the bounds of mere social kindness. If there is, it is immaterial that neither the tortfeasor nor his passenger intended any contractual relationship. Following this test, an insurer is liable to satisfy the judgement sum awarded to the tortfeasor's passenger in a car-pool arrangement.

Unfortunately, the House of Lords' decision in *Albert* is not binding on the courts in Malaysia because it was decided after the effective date of the Civil Law Act 1956 (Act 67, Rev. 1972).[20] It is of persuasive authority.[21] In fact, the Federal Court in *New Zealand Insurance Company Ltd* v. *Sinnadorai*[22] expressed the opinion that the phrase "for hire or reward" applies to public service vehicles only.[23] Therefore, until there is a decision in Malaysia in respect of the position of a passenger in a car-pool arrangement, there is uncertainty whether the phrase "for .. reward" in proviso (bb) to s.91(1)(b) covers him. The writer submits that the legislature in Malaysia should follow the footsteps of other legislatures and make the insured's liability to his passenger as one of the compulsory third party risks.

(b) Passenger who is carried "by reason of or in pursuance of a contract of employment" included

A compulsory motor policy in Malaysia is also required to cover the insured's liability towards his passenger who is carried "by reason of or in pursuance of a contract of

[20] The effective dates of the Civil Law Act 1956 are 7 April 1956 for West Malaysia, 1 December 1951 for Sabah and 12 December 1949 for Sarawak.
[21] *Jamil bin Harun* v. *Yang Kamsiah and Anor* [1984] 1 MLJ 217, at 219.
[22] *Supra*, note 6, at 185.
[23] See also *Mary Colete John* v. *South East Asia Insurance Bhd*, *supra*, note 18, at 321.

employment". This phrase was the subject of numerous judicial decisions.[24] Lord Denning MR in *Vandyke* v. *Fender and Anor*[25] held that this phrase is:

> much wider than the words "in the course of his employment".[26] I think that passengers are carried in a vehicle "by reason of" a contract of employment whenever such a contract is the cause, or one of the causes of their being carried. If they are carried in it habitually or as a matter of practice, the vehicle must be covered in respect of them.

In the cases where the courts held that the injured third party came within the ambit of "by reason of or in pursuance of a contract of employment", the employer had either provided the vehicle or arranged for or financed the transportation that carried him.[27] It was immaterial that the vehicle was driven by the injured third party's employer or another person.[28]

In the Malaysian case of *Tan Keng Hong and Anor* v. *New India Assurance Co Ltd*,[29] the Privy Council held that whether a passenger is carried "by reason of or in pursuance of a contract of employment" depends solely upon its terms. The contract must have either an express or implied term requiring or entitling him to travel in the said vehicle. He must be

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[24] *Izzard* v. *Universal Insurance Co Ltd* [1937] AC 773; *Baker* v. *Provident Accident and White Cross Insurance Co Ltd* [1939] All ER 690; *Vandyke* v. *Fender and Anor*, *supra*, note 7; *Nottingham* v. *Aldridge and Anor* [1971] 2 All ER 751; and *Tan Keng Hong and Anor* v. *New India Assurance Co Ltd* [1978] 1 MLJ 97.

[25] *Supra*, note 7, at 306.

[26] The phrase "in the course of his employment" appears in proviso (aa) to s.91(1)(b) of the RTA 1987. See the discussion in Pt. 5.2.1.1, *supra*, at 215-217.

[27] See the cases listed in Dass, S. Santhana, "Union Insurance (M) Sdn Bhd v. Chan You Young – Revisited" [2002] 1 MLJ clviii, at clxvi – clxxi.

[28] See the House of Lords' decision in *Izzard* v. *Universal Insurance Co Ltd*, *supra*, note 24, which was accepted by the Privy Council in *Tan Keng Hong and Anor* v. *New India Assurance Co Ltd*, *supra*, note 24, at 98. In *Izzard*, Lord Wright held (at page 783) that in view of proviso (aa), it was rare for an employee of the insured to claim as a passenger. However:

> "the words of the statute are general and unlimited. To insert the words 'with the insured person' (after "by reason of or in pursuance of a contract of employment") would be to insert words of specific limitation beyond what can be inferred from the general tenor of the Act or policy. If these words had been intended they could and should have been expressed, as was done in the previous (proviso (aa)). They are not expressed and in my opinion ought not to be and cannot properly be implied".

See also the Supreme Court's decision in *United Oriental Assurance Sdn Bhd* v. *Lim Eng Yew* [1991] 3 MLJ 429 where the injured third party was the policy owner's employee. The vehicle was driven by an authorised driver. The Supreme Court ordered the insurer to pay the injured third party the awarded judgment sum.

[29] *Supra*, note 24.

in the vehicle for sufficient practical or business reasons. The word 'practical' is used synonymous with 'business'. Thus, he cannot be in the vehicle for personal reasons or convenience. It is submitted that the distinction between being obliged to travel in the vehicle[30] and being required to do so,[31] if any, is subtle. It, thus, makes the difference between the phrases "in the course of his employment"[32] and "by reason of or in pursuance of a contract of employment"[33] vague.

The Malaysian Court of Appeal in *Union Insurance (M) Sdn Bhd* v. *Chan You Young*[34] made the situation more nebulous when it held that a person who hitches a ride to work does so "by reason of or in pursuance of a contract of employment". The court held that he is covered by the clause even though he is not required or entitled to travel in the vehicle under the terms of his contract of employment. The effect of this case protects every employee who hitches a ride *to work!* It widens the scope of the compulsory motor insurance in Malaysia even further.[35] Unfortunately, the decision appears to be *per incuriam*. Instead of determining whether the injured third party's terms of employment

[30] Following Lord Denning MR in *Vandyke* v. *Fender and Anor*, *supra*, note 7, a person who is *obliged* by the terms of his employment with the tortfeasor to travel in the vehicle is excluded from the compulsory motor policy by virtue of s.203(4)(b) of the RTA 1960 (UK). Section 203(4)(b) of the RTA 1960 (UK) was *in pari materia* with proviso (aa) to s.91(1)(b) of the RTA 1987.

[31] Following the Privy Council's decision in *Tan Keng Hong and Anor* v. *New India Assurance Co Ltd*, *supra*, note 24, an injured third party who is *required* by his contract of employment with the tortfeasor or a third party to travel in the vehicle, is covered by the compulsory motor policy by virtue of the exception found in proviso (bb) to s.91(1)(b) of the RTA 1987.

[32] This phrase is used in proviso (aa) to s.91(1)(b) of the RTA 1987. It is not a mandatory item in the compulsory motor insurance in Malaysia. See Pt. 5.2.1.1, *supra*, at 215.

[33] This is the exception to proviso (bb) to s.91(1)(b) of the RTA 1987. It is a mandatory item in the compulsory motor insurance in Malaysia.

[34] [1995] 4 CLJ 92 and [1999] 1 MLJ 593. In this case, the injured third party was employed by a third party. For a discussion on the case, see Dass, *supra*, note 27.

[35] Subsequent to *Chan You Young*, the Persatuan Insurans Am Malaysia issued a circular on 12 June 2001. It proposed a restrictive covenant in the motor policy. The liability of the insurer to a member of the insured's household who is a passenger in the vehicle, is excluded unless he is required by a term of his contract of employment to be carried in the vehicle. The proposed exclusion reads:

> "Liability to any person who is a member of your and/or your authorised driver's household who is a passenger in your vehicle unless it is a term of his/her contract of employment that he/she shall be carried or is required to be carried in or upon your vehicle".

According to Dass, *supra*, note 27, at clxxiv, such covenant may not be effective, for it is against the spirit of s.91(1) of the RTA 1987. The phase "by reason of or in pursuance of" in proviso (bb) to s.91(1)(b) "allows for wider interpretation as shown in the decided cases".

required or entitled her to travel in the vehicle as was decided by the Privy Council in the case of *Tan Keng Hong and Anor* v. *New India Assurance Co Ltd*,[36] the Court of Appeal distinguished the facts in the instant case from *Tan Keng Hong* on the ground that in *Tan Keng Hong*, the injured third party "was off duty and was merely taking a free ride".[37] In the writer's view, such a distinction is immaterial. In *Chan You Young*, the injured third party was being driven by her son to work when the accident happened. Both the injured third parties in *Tan Keng Hong* and *Chan You Young* were not on duty when the accidents happened.

The writer is of the view that the exposition of Jeffrey Tan J in *Mary Colete John* v. *South East Asia Insurance Bhd*[38] reflects the correct position. The learned judge said:

> A person is carried by reason of a contract of employment if, for instance, he is directed by his employer to travel in the vehicle, and the employer is able to give that direction because of the relationship of employer and employee; and that person is carried 'in pursuance of' a contract of employment if it is a term of the contract that he should be carried.

To avert any further uncertainty and confusion, the writer reiterates that the Malaysian legislature should follow the footsteps of other legislatures. An insured's liability to his passenger, regardless of the reason why he is carried in the vehicle, should be included as an item in a compulsory motor policy in Malaysia.

5.2.2 Damages for "death or bodily injury"

An injured third party can claim from the insurer the judgment sum awarded to him for his "death or bodily injury" which was caused by or which arose out of the insured's use of a motor vehicle on a road. His cause of action against the insured must be founded on a tort. He cannot claim from the insurer the insured's contractual liability to him. This is

[36] *Supra*, note 24.
[37] *Supra*, note 34, at 600.
[38] *Supra*, note 18, at 327.

provided for in proviso (cc) to s.91(1)(b).[39] Further, unlike the position in the UK,[40] he cannot enforce against the insurer the judgment for compensation for his damaged property.[41] A man whose house is damaged by a 'runaway' vehicle does not have a right against the vehicle's insurer. In this Part, the writer will study the scope of the terms "death" and "bodily injury".

5.2.2.1 "Death"

A person may die or suffer injury as a result of the negligent act of a user of a vehicle. His death may be immediate or occur after a lapse of time. At common law, a person's death terminates any cause of action which he had against the tortfeasor. In 1934, the Law Reform (Miscellaneous Provisions) Act 1934 (UK) was enacted to modify the common law position. Subject to certain exceptions, all causes of action vested in a person will not lapse on his death. They survive for the benefit of his estate. In Malaysia, s.8(1) of the Civil Law Act 1956 is based on the Law Reform (Miscellaneous Provisions) Act 1934 (UK).[42]

The common law also does not recognise that anyone who is adversely affected by a person's death has a cause of action against the tortfeasor. To overcome this, the English Fatal Accidents Act 1846 was enacted to give a statutory right to the deceased's immediate family members to claim for loss or damage caused to them by his death. The 1846 Act has since been repealed. Currently, the aforesaid statutory right is conferred by

[39] A similar exception is found in s.145(4)(f) of the RTA 1988 (UK).
[40] Section 145(3)(a) of the RTA 1988 (UK). A compulsory motor insurance in Singapore also does not include damage to a third party's property.
[41] *New Zealand Insurance Company Ltd* v. *Sinnadorai* , *supra*, note 6.
[42] Salleh Abas FJ in *Sambu Pernas Construction and Anor* v. *Pitchakkaran* [1982] 1 MLJ 269, at 270.

the Fatal Accidents Act 1976 (UK).[43] In Malaysia, the genesis of s.7 of the Civil Law Act 1956 is the Fatal Accidents Act 1846 (UK).

Thus, where the injured third party succumbs to his injuries, his immediate family members and his estate have causes of action against the tortfeasor pursuant to s.7 and s.8(1) of the Civil Law Act 1956. They may avail themselves of the rights conferred by Part IV of the RTA 1987 on an injured third party against the tortfeasor's insurer.

5.2.2.2 "Bodily injury"

As a result of a person's negligence, another person may suffer an injury. The injury can be physical or mental.[44] The issue is whether the phrase "bodily injury" in s.91(1) of the RTA 1987 comprises both physical and mental injury. The writer could not find any case law on this point of law in the UK and Malaysia and thus, she had to look beyond motor insurance cases.

The House of Lords in the conjoined cases of *Morris* v. *KLM Royal Dutch Airlines* and *King* v. *Bristow Helicopters Ltd*,[45] discussed the phrase "bodily injury" which appears in Art. 17 of the Warsaw Convention. The principal question of law before the House was whether "a person who suffers no physical injury but who does suffer mental injury or illness (such as clinical depression) as a result of an accident on board an aircraft has a claim against the carrier under Art. 17 of the (Warsaw) Convention".[46] Article 17

[43] It is noted that the English Law Commission has proposed reformations to the Fatal Accidents Act 1976 (UK) in its Report No. 263, *Claims For Wrongful Deaths*, (1999) published on 2 November 1999. According to the 39th Annual Report of the Law Commission (Annual Report 2004/2005), at 16, the Government's response to the recommendations is awaited.

[44] *Page* v. *Smith* [1996] AC 155. In Malaysia, as early as 1955, the High Court in *Zainab bt Ismail* v. *Marimuthu and Anor* (1955) 21 MLJ 22 awarded the plaintiff who saw her daughter killed in a road accident, damages for nervous shock.

[45] [2002] 1 All ER (Comm) 385.

[46] *Ibid.*, at 390.

provides, *inter alia*, that a carrier is liable to compensate a passenger for bodily injury sustained by him.[47] The House held that the phrase "bodily injury" means injury to the passenger's body, that is, his skin, bones or other tissues of the body. A person who suffers mental injury *per se*, that is, mental injury which is not caused by a physical injury or which does not in turn cause adverse physical symptoms, cannot claim compensation from the carrier under Art. 17 of the Convention.

It must be noted that the House of Lords in *Morris* and *King* had determined the meaning of the phrase "bodily injury" in accordance with the Warsaw Convention[48] and decisions from other jurisdictions that adopted the Convention.[49] The House might not have adopted such strict meaning if the House was required to interpret the same phrase in a local statute, such as s.145(3) of the RTA 1988 (UK). As per Lord Hope in *Morris* and *King*:[50]

> I think there is little doubt that, if same words as those in Art 17 were used in a United Kingdom statute to describe the kinds of personal injury caused by an accident that would entitle the victim to recover damages, they would now be held to extend to those kinds of mental injury that could be shown to amount to a recognisable psychiatric illness or injury by expert evidence.

In this connection, reference should be made to the judgment of Hobhouse LJ (as he then was) in the Court of Appeal's decision in *R* v. *Chan-Fook*.[51] The learned judge said:[52]

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[47] Article 17 of the Warsaw Convention, as cited in the conjoined cases of *Morris* and *King*, *ibid.*, at 391, reads:

> "The carrier is liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking".

[48] As per Lord Steyn, *ibid.*, at 392-393, "the Warsaw Convention is an exclusive code of limited liability of carriers to passengers". See also Lord Hope, *ibid.*, at 411.

[49] See Lord Nicholls and Lord Mackay, *ibid.*, at 389.

[50] *Ibid.*, at 406.

[51] [1994] 2 All ER 552. The appellant was charged with assault resulting in actual bodily harm. It is an offence under s.47 of the Offences against the Person Act 1861 (UK).

[52] *Ibid.*, at 558-559.

> The body of the victim includes all parts of his body, including his organs, his nervous system and his brains. Bodily injury therefore may include injury to any of those parts of his body responsible for his mental and other faculties.

In conclusion, from the above cases in the UK, it is clear that an injured third party has to produce expert medical evidence to prove that the "mental injury" is a form of "bodily injury".[53] One drawback is that such expert evidence is not conclusive. Rival experts may be called to dispute it. This will escalate the costs of legal proceedings. In addition, the 'floodgates argument'[54] comes to mind. The costs and additional claims will in the end be passed down to the policy owners in the form of increased premiums. All these may result in the court making a policy-based decision to restrict the coverage of a compulsory motor policy in Malaysia to physical injury.[55] Until then, it is difficult to predict whether the phrase "bodily injury" in s.91(1) of the RTA 1987 includes mental injury *per se*.

5.2.3 "Caused by or arising out of"

A compulsory motor policy in Malaysia must cover the insured's liability which is "caused by or which arises out of" the use of the vehicle on a road. The phrase "caused by or arising out of" is also found in s.145(3)(a) of the RTA 1988 (UK) which is *in pari*

[53] Mullany, Nicholas J., "Airborne Injury to Body and Mind" [2002] 118 *LQR* 523.
[54] A fear of unlimited number of claims arising from a single event.
[55] However, in the UK, all these drawbacks may be irrelevant in view of Art. 1(1) of the European Community Second Council Directive 84/5 of 30 December 1983. The Article prescribes that a compulsory motor insurance shall cover liability for 'personal injuries'. Thus, notwithstanding the 'floodgates argument' and the prospect of escalating premiums, the English court may hold that 'mental injury' is indeed a form of "bodily injury". This is because as per Lord Cooke in *White* v. *White and Anor* [2001] 2 All ER 43, at 51 "when applying provisions of national law the national court must interpret them as far as possible in the light of the wording and purpose of any relevant (EC) directive".
It is to be noted that in *Keeley* v. *Parshen and Anor* [2005] 1 WLR 1226, at 1230, the insured and his insurer did not dispute that psychiatric illness constituted "bodily injury" within the meaning of s.145(3) of the RTA 1988 (UK). In this case, the appellant claimed against the insured for damages for psychiatric injury, diagnosed as 'traumatic grief' arising out of her husband's death in a motor accident which was caused by the insured.

materia with s.91(1) of the Malaysian RTA 1987. In the UK, the phrase was considered by the Court of Appeal in *Dunthorne* v. *Bentley and Ors.*[56]

In *Dunthorne*, the vehicle ran out of petrol and was parked at the side of the road. The accident happened when the insured ran across the road to seek help in order to continue her journey in her vehicle. The court held that although the accident was not caused by the insured's use of the vehicle, it arose out of its use. Thus, her liability was covered by the compulsory motor policy. Rose LJ held that the phrase "'arising out of' contemplated more remote consequences than those envisaged by the words 'caused by'".[57] The phrase 'caused by' "connotes a direct or proximate relationship of cause and effect",[58] such as when the insured's negligent driving causes the accident. On the other hand, the phrase 'arising out of' connotes "less immediate ... consequences"[59] compared to the phrase 'caused by'. It includes the negligent act of engaging the wrong gear and putting the car into forward motion instead of reversing it out onto the road.[60] Thus, in conclusion, the phrase "caused by or arising out of" covers a wide scope of activities pertaining to the use of the vehicle.

5.2.4 "Use"

The expression "use" in s.35(1) of the RTA 1930 (UK) which is *in pari materia* with s.91(1) of the Malaysian RTA 1987, had been interpreted to mean not only the actual driving of the vehicle, but also having "the use of (the vehicle) on the road ... (In other

[56] [1999] Lloyd's Rep IR 560.
[57] *Ibid.*, at 562.
[58] As per Windeyer J in *Government Insurance Office of New South Wales* v. *R.J. Green & Lloyd Pty Ltd* (1965) 114 CLR 437, at 447.
[59] Pill LJ in *Dunthorne* v. *Bentley and Ors*, *supra*, note 56, at 562.
[60] *Tahan Insurance Malaysia Bhd* v. *Ong Choo Tian and Anor* [2004] 7 CLJ 270, at 274-275.

words, having) the advantage of a vehicle as a means of transport, including any period or time between journeys".[61] It includes even parking the vehicle at the side of a road.[62]

With regard to the related term, "user" of the vehicle, the courts have held that it includes not only the driver of the vehicle, but also any person who has some element of controlling, managing or operating the vehicle. He can be the driver's employer[63] or a passenger of the vehicle.[64] Thus, where a vehicle is being driven, s.91(1) requires the user and the driver of the vehicle to be covered by a compulsory motor policy in Malaysia.

It must be noted that in the UK, s.151(2)(b) of the RTA 1988 (UK) requires an insurer to satisfy the judgment sum awarded to an injured third party against a tortfeasor who is using the vehicle covered by a compulsory motor policy issued by the insurer. It is immaterial that the tortfeasor is not an insured or licensed driver.[65] Thus, from an injured third party's perspective, it is immaterial as to who was driving the vehicle when the accident happened. This is a new protection conferred by the UK's legislature on an injured third party.[66] It is not found in the (Malaysian) RTA 1987.[67] Thus, in Malaysia,

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[61] As per Lord Parker CJ in *Elliott* v. *Grey* [1960] 1 QB 367, at 372.

[62] In *Elliot* v. *Grey*, *ibid.*, the court held that a car parked on a public road required compulsory motor insurance coverage even though it could not be driven.

[63] *Lees* v. *Motor Insurers' Bureau* [1952] 2 All ER 511, at 513.

[64] Some examples given by Merkin, Robert, *Colinvaux and Merkin's Insurance Contract Law*, (Loose-leaf) (Releases 5 & 6, March-June 2003), Sweet & Maxwell, London, at para. D-0337 are where the passenger was also the owner of the car and allowed the driver to drive it (*Cobb* v. *Williams* [1973] RTR 113); where the passenger was assisting a drunken driver to drive the vehicle (*Stinton* v. *Stinton* [1955] RTR 157); where the passenger was knowingly being driven in a vehicle which he had helped to misappropriate (*Leathley* v. *Tatton* [1980] RTR 358); and where the passenger had encouraged the driver to drive the vehicle for a purpose which was mutually beneficial to them (*O'Mahoney* v. *Jolliffe* [1999] Lloyd's Rep IR 321).
It is insufficient if the person has some control over a part of the vehicle as in the case of *Brown* v. *Roberts and Anor* [1965] 1 QB 1. In this case, the passenger injured a pedestrian when he opened the door of the vehicle. The court held that though he had control over the vehicle's door, he was not a user of the vehicle.

[65] Section 151(3) of the RTA 1988 (UK). An insurer upon paying the judgment sum can claim reimbursement from the tortfeasor and the insured who causes or permits the uninsured use of the vehicle which gives rise to the liability. See s.151(7) and (8) of the RTA 1988 (UK).

[66] This was not found in the predecessors of the RTA 1988 (UK).

[67] The position in Singapore is similar to the Malaysian position. The insurer will satisfy the judgment obtained against an insured only.

unlike in the UK, an insurer is not obliged to satisfy the judgment obtained against a tortfeasor whose liability is not covered by a compulsory motor policy issued by the insurer. Fortunately, most, if not all motor policies in Malaysia extend their coverage to any person who uses the vehicle with the policy owner's permission.[68] Further, as will be discussed in Part 5.4,[69] a person who is injured in a road accident caused by an uninsured tortfeasor may claim *ex gratia* compensation from the MIB (Malaysia).

5.2.5 "Motor vehicle or land implement"

The user of a motor vehicle or land implement on a road must be covered by a compulsory motor policy. Thus, it is important to examine first, the scope of the phrases "motor vehicle" and "land implement"; and secondly, whether every user of any motor vehicle or land implement must be insured.

The phrase "motor vehicle" is defined in s.2 of the RTA 1987 as a vehicle that is propelled by a mechanism contained in the vehicle. It is constructed or adapted so as to be capable of being used on roads. It includes a trailer[70] drawn by a motor vehicle. The inclusion of a trailer in the definition of "motor vehicle" clarifies its scope. The phrase "land implement" is also defined in s.2. It "means any implement or machinery used with a land tractor in connection with the purposes for which a land tractor may be used under the Act".

[68] See Poh, *supra*, note 16, at 523.
[69] *Infra*, at 258-279.
[70] A trailer is defined in s.5(1)(k) as a vehicle other than a land implement drawn by a motor vehicle, whether or not part thereof is superimposed on the drawing vehicle.

Unlike the position under the UK Act, the user of an invalid carriage[71] in Malaysia must be covered by a compulsory motor policy.[72] However, the user of any of the following vehicles need not be covered by a compulsory motor policy in Malaysia. The first is a vehicle, other than a public service vehicle, which is owned by the Government of Malaysia, the Republic of Singapore, a local authority or a public authority whilst it is being used for the purpose of its owner.[73] However, when the vehicle is being driven for another purpose, its user must be covered by a compulsory motor policy. The second is a vehicle which is being driven for police purposes by or under the direction of a police officer,[74] or being driven for salvage purposes pursuant to Part X of the Merchant Shipping Ordinance 1952,[75] or being driven by or under the direction of a road transport officer for the purpose of testing the vehicle.[76]

The third is a vehicle which is being driven by a person under the direction of a road transport officer in connection with the former's application for a driving licence.[77] This exception needs some comment. The writer is of the view that s.90(5)(c) of the RTA 1987 should not exclude the coverage of this usage from a compulsory motor policy for a reason obvious to all. Not every learner driver who is being tested on the road is a competent driver. An accident may happen even though the car is being driven under the direction of a tester. The exclusion could be due to the possibility that the road transport officer is deemed to be a user of the vehicle, for the car is being driven under his

[71] Section 185(1) of the RTA 1988 (UK) defines an invalid carriage as "a mechanically propelled vehicle the weight of which unladen does not exceed 254 kilograms and which is specially designed and constructed, and not merely adapted, for the use of a person suffering from some physical defect or disability and is used solely by such a person".

[72] An invalid carriage is also excluded from the requirement of compulsory motor insurance in Singapore. See s.3(8) of the Motor Vehicles (Third Party Risks and Compensation) Act (Chapter 189). The Act did not provide any definition for the phrase "invalid carriage".

[73] Section 90(5)(a) of the RTA 1987.

[74] Section 90(5)(b) of the RTA 1987.

[75] Section 90(5)(b) of the RTA 1987.

[76] Section 90(5)(c) of the RTA 1987. This exclusion is not found in the RTA 1988 (UK) or the Motor Vehicles (Third Party Risks and Compensation) Act (Chapter 189) (Singapore).

[77] Section 90(5)(c) of the RTA 1987.

direction. If the officer is liable to an injured third party, the Government of Malaysia being his employer, is also vicariously liable. The writer is of the opinion that s.90(5)(c) should be either repealed or amended to clarify that the tester is a user of the vehicle. Until then, the injured third party is at risk. He may not be compensated.[78]

In addition, s.90(5)(c) also appears to be inconsistent with s.95(j). The provision in s.95(j) was added into the RTO 1958 in 1967 as s.79(j). According to s.95(j), an insurer is liable even if the insured does not hold a licence to drive or a licence to drive the particular vehicle at the time of the accident. When the legislature amended s.79 of the RTO 1958 in 1967, it should have reviewed the exclusion in s.74(5)(c) of the RTO 1958, which was the predecessor of s.90(5)(c) of the RTA 1987.

The fourth is a vehicle which is being driven by its owner who has deposited with the Accountant-General the sum of RM125,000, or being driven by his servant in the course of his employment, or being driven under his control.[79] It is to be noted that notwithstanding the depreciation in the value of money, the deposit amount has remained unchanged since 1937.[80] Today, such amount may prove insufficient to satisfy the judgment sum awarded against the tortfeasor. It is time that the legislature reviews the amount of deposit.

The fifth is a vehicle which is covered by an insurer's undertaking to discharge a user's liability arising from a third party risk prescribed in s.91(1). The minimum amount of the insurer's undertaking is RM225,000 for a public service vehicle and RM45,000 for any

[78] Note that the injured third party will not be able to claim for any compensation from the MIB (Malaysia), for this is not a compulsory third party risk. See the discussion in Pt. 5.4.3, *infra*, at 268.
[79] Section 90(5)(d) of the RTA 1987. In the UK, the amount of deposit has been increased gradually and currently, it is £500,000. See s.144(1) of the RTA 1988 (UK).
[80] Section 51(4)(b) of the Road Traffic Enactment 1937.

other type of vehicle.[81] It is submitted that the minimum amount which has not been revised since 1937,[82] may be insufficient to satisfy the judgment sum awarded to an injured third party. If the tortfeassor is insolvent, the injured third party will not recover the difference between the judgment sum and the security amount. Thus, to protect a third party, the legislature should increase the minimum amount of security.

The sixth is a foreign motor vehicle in Malaysia which has been issued with a foreign certificate of insurance that complies with the requirements of Part IV of the RTA 1987.[83] According to s.91(1)(a), the foreign certificate of insurance must be issued by an authorised insurer. An authorised insurer is defined as "a person lawfully carrying on motor vehicle insurance business in Malaysia who is a member of the Motor Insurers' Bureau".[84] Only a public company which is incorporated under the Companies Act 1965 (Act 125, Rev. 1973) can lawfully carry on insurance business in Malaysia.[85] Thus, only a certificate of insurance which is issued by a local insurer is acceptable. This requirement is necessary to protect a third party because the rights conferred by Part IV of the RTA 1987 on him are not applicable to and enforceable against a foreign insurer. In addition, even where the foreign insurer is subject to a similar local law in its country,

[81] Section 93(1) of the RTA 1987. In the UK, the amount of undertaking for public service vehicle is £25,000 and £5,000 for other vehicles. See s.146(4) of the RTA 1988 (UK).
[82] Section 53(1)(a) of the Road Traffic Enactment 1937.
[83] Rule 10 of the Motor Vehicles (International Circulation) Rules 1967 (PU 69/1967) provides that a permit to use a foreign vehicle on a road in Malaysia will be issued only if there is a certificate of insurance, security or foreign insurance that complies with the requirement of Part IV of the RTA 1987. Such certificate must be valid for the period of the said permit. If there is none, then the Registration Authority may issue a permit only after it has issued a certificate of insurance or security which complies with the requirement of Part IV for the duration of the period of the said permit. The 1967 Rules continue to be applicable and is deemed made pursuant to s.25 of the RTA 1987 by virtue of s.128(1) of the RTA 1987.
[84] Section 89 of the RTA 1987.
[85] Sections 2 and 14 of the Insurance Act 1996 (Act 553).

the injured third party may not be able to recover the awarded judgment sum from the insurer due to jurisdictional issues.[86]

It is also noted that in practice, there is no requirement for a Singapore registered car to be issued a permit for entry into West Malaysia although a certificate of insurance issued by a Singaporean insurer does not comply with the requirements of Part IV of the RTA 1987. To comply with Part IV, it must be issued by a Malaysian insurer. Thus, it is submitted that, strictly speaking, the user of a Singapore registered vehicle which has no certificate of insurance issued by a Malaysian insurer, commits an offence under s.90(1) of the RTA 1987. It is probable that Singapore registered vehicles are allowed to enter West Malaysia without a permit because of the reasons stated below.

First, s.3(1) of the Motor Vehicles (Third Party Risks and Compensation) Act (Chapter 189) (Singapore) ("the Singapore Motor Vehicles Act") provides that a third party who is injured in an accident in West Malaysia, which is caused by the user of a Singapore registered vehicle, may avail himself of the benefits conferred by the Act. Thus, an injured third party will enjoy the benefits conferred by the Singapore Motor Vehicles Act if the tortfeasor is insured and the injured third party has obtained judgment against the tortfeasor either in Singapore, or in Malaysia and registered it in Singapore pursuant to the Reciprocal Enforcement of Commonwealth Judgments Act (Chapter 264) (Singapore).

[86] It is beyond the scope of this thesis to discuss the jurisdictional issues, such as whether the injured third party should commence proceedings against the foreign insurer in Malaysia or in the country where the policy was issued. Other related issues are service of the process out of jurisdiction and the enforcement of the judgment against the insurer. For a general discussion, see, for example, Chapter 3 of Marasinghe, Lakshman, *Principles of International Trade Law*, (1998), Butterworths Asia, Singapore.

Secondly, if the tortfeasor is not insured, the injured third party can claim compensation from the Motor Insurers' Bureau of Singapore ("the MIB (Singapore)"). Under the Agreement between the Singapore Minister for Finance and the MIB (Singapore) on 22 February 1975 ("the MIB (Singapore) Agreement"), the MIB (Singapore) agrees to, *inter alia*, pay any unsatisfied judgment sum in respect of any liability which is required to be covered by a compulsory motor insurance obtained against any person in any court in Singapore. The Agreement should also cover a judgment which is awarded by a Malaysian court against an uninsured tortfeasor and registered with the court in Singapore pursuant to the Singaporean Reciprocal Enforcement of Commonwealth Judgments Act. This is because s.3(3)(a) of the Act provides that as from the date of its registration at the Singapore court, the judgment shall "be of the same force and effect, and proceedings may be taken thereon, as if it had been a judgment originally obtained or entered ... (in) the registering court".

Moreover, the MIB (Malaysia) in its agreements with the Minister of Transport in 1968 and 1992 has agreed to compensate a third party who is injured in an accident caused by the user of a Singapore registered vehicle in West Malaysia. However, as will be discussed in Part 5.4.1,[87] the 1968 Agreement has since been terminated, and the injured third party's position under the 1992 Agreement is much weaker.

In conclusion, it is recommended that the legislature reviews the list of vehicles excepted from the ambit of s.91(1). This is to ensure that a person who is injured in an accident caused by the use of such vehicle can exercise the rights conferred by Part IV of the RTA 1987.

[87] *Infra*, at 262.

5.2.6 "Road"

The next issue is whether there is any restriction on the area coverage of the compulsory motor policy. The writer will examine the respective positions in the UK and Singapore, before analysing the position in Malaysia.

Prior to the year 2000, the compulsory motor policy in the UK covered only the vehicle's usage on a road. However, s.143(1) of the RTA 1988 (UK) was amended to extend the area coverage to include a public place in the UK. The amendment was made two years after the House of Lords' decision in the conjoined appeals of *Cutter* v. *Eagle Star Insurance Co Ltd* and *Clarke* v. *Kato and Ors*.[88] Though the phrase "public place" in s.143(1) is not defined in the Act, there are numerous decisions on other parts of the Act where the phrase was considered. It is a public place if members of the public are expressly or tacitly permitted to use it.[89] However, as pointed out by Bird and Hird, "difficult questions as to what is a 'public place' might still, though, arise".[90]

In Singapore, the use of a vehicle on "any public road and any other road to which the public has access, including bridges over which a road passes"[91] in Singapore and West Malaysia[92] must be covered by a compulsory motor policy.

[88] [1998] 4 All ER 417.
[89] Merkin, *supra*, note 64, at para. D-0336.
[90] Birds, John and Norma J. Hird, *Birds' Modern Insurance Law*, (6th ed., 2004), at 373 note 29.
[91] See the definition for "road" in s.2 of the Singapore Motor Vehicles Act.
[92] See also the discussion in Pt. 5.2.5, *supra*, at 233-234.

In Malaysia, the word "road" is defined in s.2 of the RTA 1987.[93] It does not include a road outside Malaysia. Thus, a third party who suffers injury as a result of an accident which is caused by the user of a Malaysian registered vehicle outside the territory of Malaysia is not entitled to the benefits of Part IV of the RTA 1987.[94]

In another aspect, it must be stressed that it is immaterial that the accident happens on private property so long as it is caused by or arises out of the use of the vehicle on a road. It is also not necessary for the whole vehicle to be on a road when the accident happens. These were held by the High Court in *Tahan Insurance Malaysia Bhd* v. *Ong Choo Tian and Anor*.[95] In this case, the vehicle was on a five-foot path in front of a residential house. Instead of reversing the vehicle, the insured engaged the wrong gear and caused the vehicle to move forward into the compound of the house and hit the plaintiff. When the negligent act occurred, that is when the insured hit the plaintiff on a private property, part of the vehicle was on the five-foot path. The court found for the plaintiff since the insurer had conceded that the five-foot path was within the definition "road".

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[93] The definition given for 'road' in the RTA 1987's interpretation section is as follows:

"'road' means –

(a) any public road and any other road to which the public has access and includes bridges, tunnels, lay-bys, ferry facilities, interchanges, round-abouts, traffic islands, road dividers, all traffic lanes, acceleration lanes, deceleration lanes, side-tables, median strips, over passes, underpasses, approaches, entrance and exit ramps, toll plazas, service areas, and other structures and fixtures to fully effect its use; and

(b) for the purposes of sections 70 and 85, also includes a road under construction

but shall not include any private road, bridge, tunnel or anything connected to that road which is maintained and kept by private persons or bodies".

[94] *Cf* Dass, S. Santhana, "Extraterritoriality and the Motor Insurers' Statutory Liability" [1998] 4 MLJ cxiii. The author expresses the opinion that an insurer could extend the coverage to Singapore and Brunei. It is submitted that though the insurer is contractually liable to the policy owner, the injured third party cannot enforce against the insurer the judgment awarded against the insured for death or bodily injuries caused by or arising out of the use of a vehicle in a place other than "a road" in Malaysia. Section 96 of the RTA 1987 does not apply. See the Federal Court's decision in *New Zealand Insurance Company Ltd* v. *Sinnadorai*, *supra*, note 6.

[95] *Supra*, note 60.

The writer will proceed to examine the word "road". Compared to the definition found in the RTO 1958,[96] the word "road" as defined in s.2 of the RTA 1987 is more detailed. It clearly includes areas that form part of a "line of communication",[97] such as bridges and tunnels. It also includes service areas and other structures and fixtures to fully effect the use of a road. It is submitted that the definition is not free from difficulties. This is because "road" is defined as "any public road and any other road to which the public has access ... but shall not include any private road, bridge, tunnel or anything connected to that road which is maintained and kept by private persons or private bodies". It appears that a road which is maintained and kept by private persons or bodies is not a "road" within the definition. It appears to be immaterial that the 'road' is accessible to the public.[98] This interpretation finds support in the fact that the word "road" is used not only in Part IV of the Act, but throughout the Act. Since there is a presumption that a word or phrase has the same meaning within the same statute,[99] it is important to study the context in which the word "road" appears in the Act.

Part III of the RTA 1987 is devoted to "Roads". As per the Explanatory Statement to the Road Transport Bill, Part III "deals with roads and provides for the control of all classes of vehicular traffic".[100] It also "empowers the Minister charged with the responsibility for works to make rules prohibiting any person from using a road in such a manner as to be

[96] The word "road" is defined in s.2 of the RTO 1958 as:

"(a) any public road and any other road to which the public has access;

(b) for the purposes of s.14 to 24 and Part V of this Ordinance 'road' in relation to use means any such road maintained at the public expense"

Sections 14 to 24 and Part V of the Ordinance were not connected to the rights of a third party. For the purpose of third party rights, the definition in paragraph (a) applies.

[97] As per Streatfeild J in *Griffin* v. *Squires* [1958] 1 WLR 1106, at 1109.

[98] The position is contrasted with that in the UK prior to the amendment of s.143(1) of the RTA 1988 (UK), where the term "road" covered any highway or road to which the public has access. A private road which is accessible to the general public comes within the definition if the access is at least by the tolerance of the owner of the road. See Jess, Digby C., *The Insurance of Commercial Risks: Law and Practice*, (3rd ed., 2001), Sweet and Maxwell. London, at para. 10-04; and Merkin, *supra*, note 64, at para. D-0335.

[99] Bennion, Francis A.R., *Statutory Interpretation: A Code*, (3rd ed., 1997), Butterworths, London, at 900 and 942-943. See also *Craig Williamson Pty Ltd* v. *Barrowcliff* [1915] VLR 450, at 452.

[100] Paragraph 15 in the Explanatory Statement.

likely to affect its cleanliness".[101] It is unlikely that the legislature intended to empower the Minister to make rules pertaining to the control of traffic and cleanliness of roads which are maintained and kept by private persons or bodies even though they are accessible to the public. Since the word "road" appearing in Part IV of the Act should have the same meaning as the same word in Part III, the writer submits that the spirit of compulsory motor insurance, which is to protect the public against the risks arising from the use of vehicles, is severely compromised. It appears that the compulsory motor insurance is not required to cover the usage of a vehicle on a private road, even though the 'road' is accessible to the public.

Another issue to consider is whether a road within a car park, is deemed to be a "road". The House of Lords (UK), in the conjoined appeals of *Cutter* v. *Eagle Star Insurance Co Ltd* and *Clarke* v. *Kato and Ors*,[102] held that whether a place can be considered a road is a question of fact. Guidelines can be:[103]

> found by considering its physical character and the function which it exists to serve ... (I)ts physical limits are defined or at least definable .... Its location should be identifiable as a route or way ... to reach a destination.

The House of Lords held that a road within a car park is not a road within the context of s.143(1) of the RTA 1988 (UK). Nevertheless in Singapore, the court in *Teo Siong Khoon* v. *PP*[104] held that the driveway of a Housing and Development Board car park constitutes a road.

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[101] Paragraph 23 in the Explanatory Statement.
[102] *Supra*, note 88.
[103] *Ibid.*, at 422-423.
[104] [1995] 2 SLR 107. See also Lee, Kiat Seng, "When is a Car Park a Road?" [1999] *SJLS* 113.

The writer is of the view that if a similar issue is raised in the Malaysian court,[105] the court may hold that a road within a car park, which is accessible to the general public and maintained and kept by the authority, is a road for the purpose of the RTA 1987. This is because the definition of "road" in s.2 includes "service areas"[106] and other structures and fixtures to fully effect its use. So long as the structure or fixture gives effect to the use of a road and is accessible to the public, and it is maintained and kept by an authority, it is a road within the definition of "road". However, a road within a car park that is kept and maintained by a private person or body, though accessible to the public, may not be deemed a road for the purpose of the RTA 1987. This is because it does not fulfil one of the two conditions, namely, it is not maintained and kept by an authority.

In conclusion, the definition of the term "road" in the RTA 1987 may have adversely affected the rights of third parties in motor insurance in Malaysia. If the accident is caused by or arises out of the use of the vehicle on a road which is kept and maintained by a private person or body, an affected third party cannot avail himself of the rights conferred by Part IV of the RTA 1987. It is submitted that the term "road" should be amended to include a road which is accessible to the public. It should be immaterial who keeps and maintains the road.[107] Further, the legislature in Malaysia should follow the

[105] The decisions in *Cutter* v. *Eagle Star Insurance Co Ltd* and *Clarke* v. *Kato and Ors*, *supra*, note 88; and *Teo Siong Khoon* v. *PP*, *ibid.*, are not binding on the courts in Malaysia.

[106] The New Penguin English Dictionary (2000) defines a service area as "an area at the side of a motorway or other road where there are various facilities, e.g. toilets, restaurants, and a filling station, for travelers".

[107] *Nippon Fire and Marine Insurance Co Ltd* v. *Sim Jin Hwee* [1998] 2 SLR 806, at 809-811; *Harrison* v. *Hill* 1932 JC 13 which was cited in *Cutter* v. *Eagle Star Insurance Co Ltd* [1997] 1 WLR 1082, at 1087; and *Cutter* v. *Eagle Star Insurance Co Ltd*, *ibid.* As per Lord Sands in *Harrison* v. *Hill* 1932 JC 13, at 17, "it is the public who are to be protected, and the provisions of the Act are made to apply to all roads to which the motorists may encounter members of the public".

lead of the legislature in the UK and require the user of a vehicle in a place which is accessible to the public to be covered by a compulsory motor policy.[108]

5.3 Rights of an Injured Third Party Against the Insurer

At common law, an injured third party has no direct cause of action against the insurer who has insured the tortfeasor's liability. As Whitley J said in *King Lee Tee* v. *Norwich Union Fire Insurance Society Ltd*,[109] "it is clear that the person injured is not a party or privy to the contract of insurance and that neither at common law nor in equity has he any rights against the insurers". The insurance policy is a contract between the policy owner and insurer.[110]

Part 5.3 analyses the rights conferred by the RTA 1987 on an injured third party against the insurer where he has obtained a judgment against the insured in respect of first, compulsory third party risks; and secondly, non-compulsory third party risks.

5.3.1 Compulsory third party risks

Where an injured third party has obtained a judgment against an insured for a liability which is within the scope of the compulsory motor insurance scheme ("the awarded

[108] It is to be noted the phrase "public place" is defined in s.166 of the Interpretation Acts 1948 and 1967 (Act 388, Consolidated and Rev. 1989) to include "any public highway, street, road, bridge, square, court, alley, lane, bridleway, footway, parade, whaft, jetty, quay, public garden or open space, and every theatre, place of public entertainment of any kind, or other place of general resort, admission to which is obtained by payment or to which the public has access". For the purpose of Part IV of the RTA 1987, the meaning for the phrase has to be modified to suit its purpose.

[109] (1933) 2 MLJ 187, at 188. See also *QBE Insurance Ltd* v. *Dr K Thuraisingam* [1982] 2 MLJ 62, at 63.

[110] *Cf Digby* v. *General Accident Fire and Life Assurance Corporation Limited*, *supra*, note 2, at 146. In this case, Lord Porter held that a motor policy which covered several persons consists of separate contracts between the insurer and each of the insured. The writer is of the view that this is *per incuriam*, for the insurance contract is made between the policy owner and the insurer where the insurer agrees to indemnify the insured under the terms of the policy. In addition, only one person, namely the policy owner, provides consideration for the contract. The other insureds do not give any consideration and thus, in the UK, there is no contractual nexus between them and the insurer.

judgment sum"), he is vested with certain rights. This Part examines his rights against the insurer when the insured is solvent and when the insured is insolvent.

5.3.1.1 Right to sue when the insured is solvent

In the UK, the Contracts (Rights of Third Parties) Act 1999 (UK) ("the CRTP Act 1999 (UK)") permits a third party to enforce benefits conferred on him under a contract. Since a compulsory motor policy contains a statutory prescribed term that the insurer is to pay direct to the injured third party his awarded judgment sum, the 1999 Act governs such policy. Nevertheless, the injured third party should proceed against the insurer under the RTA 1988 (UK), and not under the CRTP Act 1999 (UK) because he is conferred additional enforceable benefits under the RTA 1988 (UK). Further, the benefits, including the right to recover the judgment sum from the insurer, cannot be contractually excluded. It is also immaterial that the tortfeasor is not an insured person.[111]

In Malaysia, s.96(1) of the RTA 1987 confers on an injured third party the right to sue the insurer for the judgment sum awarded to him.[112] The injured third party can also recover from the insurer his taxed costs on a solicitor and client basis[113] and interest on the judgment sum calculated from the date of the pronouncement of the quantified

[111] Section 151 of the RTA 1988 (UK) provides, *inter alia*, that an insurer must satisfy the judgment sum, so long as the judgment pertains to "a liability, other than an excluded liability" that is covered by the compulsory motor policy issued by it. The excluded liabilities are prescribed in s.151(4) of the RTA 1988 (UK). They are where the injured third party knew or had reason to believe that the vehicle was stolen or unlawfully taken before the commencement of the journey. If he knew or had reason to believe it only after the commencement of the journey, he could have alighted from the vehicle.
Section 151(7) stipulates that where the insurer is not liable if not for the provision in s.151, it can recover from the tortfeasor the sum which it has paid out. Where the tortfeasor is not an insured, the insurer can recover the moneys from the permitter and the tortfeasor under s.151(8). It is noted that this is a statutory reformation of the doctrine of privity. There are two limbs in the doctrine, namely, a third party cannot enforce the benefits conferred on him by a contract and the parties to a contract cannot impose enforceable obligations on him. In other words, a third party cannot sue or be sued on a contract. However, under s.151(7) and (8), the tortfeasor can be sued by the insurer even where he is not a party to the contract. They are the statutory reformations to the second limb. Such reformation is not found even in the CRTP Act 1999 (UK).

[112] It is to be stressed that unlike s.151 of the RTA 1988 (UK), s.96(1) of the RTA 1987 does not require the insurer to satisfy the awarded judgment sum against a user of the vehicle who is not an insured.

[113] *Tan Chik bin Ibrahim* v. *Safety Life and General Insurance Sdn Bhd* [1987] 1 MLJ 217, at 220.

judgment.[114] Order 42 r.12 of the Rules of the High Court 1980 (PU(A) 50/1980) and O.29 r.12 of the Subordinate Court Rules 1980 (PU(A) 328/1980) fix the maximum interest rate at 8% per annum unless the parties have agreed on a higher rate.

For ease of reference, s.96(1) of the RTA 1987 is reproduced below:

> If, after a certificate of insurance has been delivered under subsection (4) of section 91 to the person by whom a policy has been effected, judgment in respect of any such liability as is required to be covered by a policy under paragraph (b) of subsection (1) of section 91 (being a liability covered by the terms of the policy) is given 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 persons entitled to the benefit of the judgment any sum payable thereunder in respect of the liability, including any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any written law relating to interest on judgments.

Since s.96 imposes a statutory liability on the insurer, it must be construed strictly.[115] It follows that the conditions precedent for the insurer's liability should also be construed strictly. The conditions are first, the insurer must have delivered the certificate of insurance to the policy owner; secondly, the insurer must have been notified of the injured third party's proceedings against the insured; thirdly, the injured third party must have obtained judgment against the insured; and fourthly, the insurer has not avoided liability under the Act. Due to the importance of the conditions precedent, each of them will be subject to a thorough examination below.

(a) Certificate of insurance

Section 91(4) of the RTA 1987 provides that a motor policy is effective for the purpose of Part IV only upon the delivery of the policy's certificate of insurance by the insurer to

[114] *Parsons* v. *Mather & Platt Ltd* [1977] 2 All ER 715. As per Lord Denning MR in *K* v. *K* [1977] 1 All ER 576, at 580-581, "when the sum is unascertained, the debtor cannot be expected to pay it until it is quantified. He cannot make a tender until he knows how much it is. He cannot be said to be 'wrongfully withholding' the money until it is fixed".

[115] *Lee Chau* v. *Public Insurance Co Ltd* [1969] 2 MLJ 167, at 168.

the policy owner.[116] This means that a third party cannot rely on the statutory protection given by s.96 unless the insurer has delivered the policy's certificate of insurance to the policy owner. Even a letter from the Registrar and Inspector of Motor Vehicles that the insurer has issued a policy to the owner of the motor vehicle is insufficient.[117]

However, the Privy Council in *Motor and General Insurance Co Ltd* v. *Dorothy Cox and Anor*[118] mitigated the harshness of this requirement to some extent by holding that the requirement of s.9(1) of the Motor Vehicles Insurance Act (c.292) (Barbados) (which is *in pari materia* with s.96 of the RTA 1987) was fulfilled even though the "certificate was issued subsequent to the accident (provided that it was) expressed to be retrospective to a time before the accident, and a cover note ... had been issued before the accident".[119] Without quoting the Privy Council case, the Court of Appeal in Malaysia in *Capital Insurance Bhd* v. *Kasim bin Mohd Ali*[120] and the High Court of Malaya in *The People's Insurance Co (M) Sdn Bhd* v. *Narayani a/p Raman*[121] held that an injured third party has recourse against the insurer for the unsatisfied judgment sum awarded to him against the insured if the insurer has delivered the certificate of insurance to the policy owner before the injured third party obtains the judgment.

Writers[122] have opined that the requirement for the certificate of insurance should be removed. The certificate has no value and serves no purpose apart from that given by Part IV of the RTA 1987. The contract between the insurer and the policy owner covering the

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[116] See also s.147 of the RTA 1988 (UK).
[117] *Capital Insurance Bhd* v. *Kasim bin Mohd Ali* [1996] 2 MLJ 425.
[118] [1990] 1 WLR 1443.
[119] Birds and Hird, *supra*, note 90, at 376-377.
[120] *Supra*, note 117.
[121] [2003] 1 AMR 712.
[122] P. Balan, "Perlindungan Pihak Ketiga Dalam Undang-undang Insurans Motor" in Fakulti Undang-undang, *Makalah Undang-undang Menghormati Ahmad Ibrahim*, (1988), Dewan Bahasa dan Pustaka, Kuala Lumpur, at 91-92; and Badayuh bt Obeng, Insurans Motor: Perlindungan Kepada Pengambil Insurans dan Pihak Ketiga, LLM Dissertation, Faculty of Law, UM 1994/5, at 207.

compulsory motor policy is evidenced by the policy of insurance, and not the certificate.[123] Since the insurer's risks under the insurance contract and Part IV commence upon the issuance of the cover note,[124] there is no reason why the delivery of the certificate of insurance to the policy owner is made a condition precedent for the injured third party's cause of action against the insurer.

Further, one would expect that due to the importance of the certificate in the application of Part IV of the RTA 1987, an insurer is obliged to deliver the certificate either together with the policy of insurance or within a stipulated time. However, such a rule is not prescribed in the Act. Thus, there is a remote possibility that an unscrupulous insurer may hold back the delivery of the certificate to avoid liability under Part IV. Due to the doctrine of privity, only the policy owner can obtain specific performance against his insurer to issue and deliver the certificate to him. Unfortunately, a policy owner may refuse[125] or may not be in the position[126] to seek specific performance.

In conclusion, the requirement for the certificate weakens the protection given to an injured third party by Part IV. An insurer's duty and obligations under Part IV should commence upon its issuance of the cover note or policy, rather than upon its delivery of the certificate of insurance to the policy owner. The Act must be amended to make this clear.

[123] *Biddle* v. *Johnston* [1965] 2 Lloyd's Rep 121.
[124] Section 89 of the RTA 1987 stipulates that a policy of insurance includes a cover note. In *Gimstern Corp (M) Sdn Bhd and Anor* v. *Global Insurance Co Sdn Bhd* [1987] 1 MLJ 302, the Supreme Court held the view that the insurer was at risk upon the issuance of the cover note. It is immaterial that the policy owner has not paid the premium.
[125] For example, where the policy owner is insolvent and does not want to incur any unnecessary costs.
[126] For example, where the policy owner has died, migrated or cannot be located after the accident.

(b) Notice of proceedings

Following s.96(2)(a) of the RTA 1987, the injured third party must ensure that the insurer is notified of his proceedings against the insured either before or within seven days after its commencement. If the insurer is not notified, the injured third party cannot recover from the insurer the judgment sum which he has obtained against the insured.[127]

(c) Judgment against the insured

According to s.96(1), an injured third party who has been awarded judgment against the insured for a liability which is required to be covered by a compulsory motor policy may enforce the judgment against the insurer. In addition, the injured third party may claim from the insurer only if his awarded judgment sum has not been satisfied and the execution of the judgment has not been stayed pending an appeal.[128]

However, the injured third party's rights against the insurer are not so strong where the judgment is a judgment in default against the insured, for then the insurer can intervene and apply to the court to set it aside. The insurer is allowed to do so because its rights are adversely affected since it has to satisfy the judgment.[129] The ideal would be to amend the RTA 1987 to provide that where a judgment in default is entered against the insured after adequate notice of the proceedings has been given to the insurer,[130] the insurer may not intervene and apply to set aside the judgment except in exceptional cases.

[127] For a detailed discussion, see Merkin, Robert, *Colinvaux and Merkin's Insurance Contract Law* (Loose-leaf) (Releases 8&9, March 2004), Sweet & Maxwell, London, at paras. D-0372/16 to D-0372/19.
[128] Section 96(2)(b) of the RTA 1987.
[129] *Windsor* v. *Chalcraft* [1939] 1 KB 279.
[130] See the comments in Pt. 5.3.1.1(b), *supra*, at 245.

(d) Insurer has not avoided liability

Even though s.96(1) confers on an injured third party the right to sue the insurer for the awarded judgment sum, there are provisions in the RTA 1987 which allow the insurer to avoid its liability to him. First, the insurer may have terminated the policy either before or after the motor accident. Secondly, the insurer may defend the action brought against it by the injured third party. Only certain defences are excluded by the RTA 1987.

(i) Policy is not terminated

Section 96(2)(c) of the RTA 1987 provides that a compulsory motor policy may be terminated by mutual consent between the insurer and the policy owner or by virtue of any provision in the policy before the occurrence of the accident. However, such termination is ineffective against the injured third party unless first, the policy owner has surrendered the certificate of insurance or made a statutory declaration that the certificate is lost or destroyed, either before the accident or within fourteen days of the policy's cancellation; or secondly, the insurer has commenced proceedings against the policy owner within 14 days of the policy's cancellation for the latter's failure to surrender the certificate. If the procedure is not complied with, the injured third party can avail himself of the rights in s.96(1).

Even if the accident which gives rise to the injured third party's action against the insurer has occurred, the insurer may still avoid the compulsory motor policy by complying with

the procedure laid down in s.96(3).[131] The prescribed procedure is as follows. If the injured third party has commenced his action against the insured, the insurer must give notice of its proceedings to the injured third party before or within seven days after the commencement of the proceedings. The injured third party is entitled to be made a party to the declaration proceedings. Further, the court declaration that the insurance is void or unenforceable must be obtained before the liability is incurred. It is submitted that the prescribed procedure is against the injured third party's interest. The reasons are set out below.

First, the insurer may apply to terminate the policy even after the injured third party has commenced legal action against the insured. The writer submits that since an injured third party has a direct cause of action against the insurer only when the insured[132] fails to pay the awarded judgment sum,[133] an insurer who wishes to avoid an impending liability may commence and fast track its declaration proceedings and obtain the declaration prior to the quantification of the judgment. This is different from its predecessor, s.80(3) of the repealed RTO 1958, which required an insurer to commence the declaration proceedings not later than three months after the commencement of the injured third party's action.[134] The current position prejudices the injured third party.

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[131] Section 96(3) of the RTA 1987 reads as follows:

> "No sum shall be payable by an insurer under subsection (1) if before the date of the liability was incurred, the insurer had obtained a declaration from a court that the insurance was void or unenforceable.
>
> Provided that an insurer who has obtained such a declaration as aforesaid in an action shall not thereby become entitled to the benefit of this subsection as respects any judgment obtained in proceedings commenced before the commencement of the action unless, before or within seven days after the commencement of that action, he has given notice thereof to the person who is the plaintiff in the said proceedings specifying the grounds on which he proposes to rely, and any person to whom notice of such an action is so given shall be entitled if he thinks fit to be made a party thereto".

[132] *QBE Insurance Ltd* v. *Hashim b Abdul and Anor* [1981] 2 MLJ 275, at 277.

[133] As per Lord Denning MR in *K* v. *K*, *supra*, note 114, at 580-581, "when the sum is unascertained, the debtor cannot be expected to pay it until it is quantified. He cannot make a tender until he knows how much it is. He cannot be said to be 'wrongfully withholding' the money until it is fixed".

[134] This remains the position in the UK and Singapore. See s.152(2) of the RTA 1988 (UK) and s.9(4) of the Singapore Motor Vehicles Act.

Secondly, the insurer is not required to notify the injured third party if it has obtained a declaration from the court that the insurance is void or unenforceable, or if it commences its declaration proceedings before the injured third party commences his action against the insured. The writer is of the view that since an injured third party is required to notify the insurer of his action against the insured, the insurer, if it is aware of the injured third party's identity, should notify him of its declaration or its on-going declaration proceedings to avoid the policy. This is to enable the injured third party to make an informed decision whether to proceed with his action against the insured. There may be situations where an injured third party, unaware of the declaration or the declaration proceedings, commences action against an insolvent insured with the ultimate aim of recovering the awarded judgment sum from the insurer. If he is aware of the declaration or the proceedings therefor, he may not commence the action against the tortfeasor. Instead, he may wish to proceed against the MIB (Malaysia).[135] This is because under the 1992 MIB (Malaysia) Agreement, an injured third party is permitted to claim compensation from the MIB (Malaysia) even before he commences legal action against the tortfeasor.[136]

Thirdly, the insured, even if he is aware of the insurer's declaration proceedings, is not required to notify the injured third party of it. He is required to notify the injured third party only if the insurer has avoided or cancelled the policy and the third party enquires about it.[137]

Fourthly, the writer notes that under the predecessor of s.96(3), namely s.80(3) of the RTO 1958, the grounds available to an insurer to terminate a compulsory motor policy

[135] An injured third party's rights against the MIB (Malaysia) are discussed in Pt. 5.4, *infra*, at 258-279.
[136] See the implication of Clause 2 when read together with Clauses 5, 7 and 8.
[137] Section 98(1) of the RTA 1987.

were limited to the policy owner's non-disclosure or misrepresentation of a material fact. This has remained the position in the UK and in Singapore.[138] Unfortunately, s.96(3) does not prescribe or limit the grounds available to the insurer to obtain a declaration to nullify the policy. This clearly weakens the protection conferred by the RTA 1987 on an injured third party. It defeats the purpose of the compulsory motor policy scheme, that is, to ensure that an injured third party receives compensation for his injury.[139] The writer submits that the legislature should revert to the position under s.80 of the RTO 1956. There should be restriction on the grounds on which, and the time frame within which, an insurer could avoid the compulsory insurance policy.

(ii) Defences which are not available to the insurer

In an action by the injured third party, the insurer can avail itself of any defence other than those listed in s.96(1), s.94 and s.97(3) of the RTA 1987. They are stated below.

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[138] Section 152(2) of the RTA 1988 (UK) and s.9(4) of the Singapore Motor Vehicles Act.

[139] In this connection, reference may be made to the judgment of Scott LJ in *Merchants' and Manufacturers' Insurance Co Ltd* v. *Hunt and Ors* [1941] 1 All ER 123, at 125-126:

> "This proviso (s.10(1) of the RTA 1934 which was the genesis of s.96(1) of the RTA 1987, s.151 of the RTA 1988 (UK) and s.9(1) of the Singapore Act) thus gives to plaintiffs who obtain judgment in an action for damages caused by the negligent driving or management of a motor car a direct right of action against the insurance company who issued the policy required by the 1930 Act, although the plaintiffs in the negligence action are no party to the policy, and although the policy is voidable at the insurer's instance. From the extreme hardship which might otherwise result from ss.(1), ss.(3) (s.10(3) is the genesis of s.152(2) of the RTA 1988 (UK) and s.9(4) of the Singapore Act) gives the insurer a conditional means of escape. If he discovers that he was induced to make the contract of insurance by some material non-disclosure or misrepresentation which, by ordinary insurance law, and not merely by reason of some special stipulation which he has put in his form of policy, entitles him to avoid the contract, he may obtain a declaration to that effect from the court, and he will then be free from the statutory liability to the injured third party. This legislation was obviously intended to effect, *inter alia*, a fair compromise between the two desirable but conflicting objects – namely, on the one hand that of protecting the public from the danger of impecunious tortfeasors on the roads, and, on the other hand, that of avoiding the injustice of putting on a wholly innocent and misled insurer the whole pecuniary burden of a policy which, neither in law nor in equity, is his policy. However, it would have been unfair to confer this relief unconditionally. There was an obvious danger of the injured party being deprived of the pecuniary safeguard which was the subject of ss.(1) through the possibility of the policy being avoided in proceedings under the first part of ss.(3) without his knowledge, and even by collusion between the insurer and the insured. It was essential that he should have notice of any such action by the insurer, and also that he should be given the right to appear in it and there defend his rights. Both the requisites are met by the proviso to ss.(3) which in effect creates two conditions precedent to the existence of the insurer's right to get his declaration under the first part of ss.(3). The third party gets full notice of the ground of the insurer's claim, and is given an unqualified right to become a party in the insurer's action, and it is particularly to be noted that he is given all the rights of a party to an action without any qualification upon them".

The first defence which is not available to the insurer is stated in s.96(1). Any limit imposed on the insurer's liability in the compulsory motor policy is ineffective against the injured third party, for s.96(1) requires the insurer to pay the injured third party the full judgment sum awarded to him The issue is whether the insurer is liable for the whole judgment sum awarded to the injured third party where there are several tortfeasors and the court had apportioned their respective liabilities.

In 1987, the Supreme Court in *Tan Chik bin Ibrahim* v. *Safety Life and General Insurance Sdn Bhd*[140] held that under s.80(1) of the RTO 1958 (now s.96(1) of the RTA 1987), the insurer was under a duty to pay only the amount which the court had ordered the insured to pay the third party. Thus, where there were several tortfeasors whose liabilities had been apportioned by the court, the injured third party could recover from an insurer only the amount of liability incurred by its own insured. The decision in *Tan Chik* was subject to much criticism.[141] Its interpretation of s.80(1) of the RTO 1956 defeated the spirit of the provision to give full and effective protection to an injured third party. Further, at common law, the apportionment of liability between tortfeasors was not important to the claimant. The claimant could claim the total judgment sum from any tortfeasor, for each tortfeasor was liable to him for the whole judgment. The tortfeasor who had paid the full judgment sum could claim contribution from the other tortfeasors.

Fortunately, in 1997, the Federal Court in *Malaysia National Insurance Sdn Bhd* v. *Lim Tiok*[142] unanimously overruled the controversial decision in *Tan Chik*. The current position is that where there are several independent tortfeasors, the injured third party can

[140] *Supra*, note 113.
[141] See Balan, *supra*, note 122, at 96-97; Zainur bin Zakaria, "Liability of Insurers to Satisfy Judgments Against Persons Insured" [1987] 2 MLJ ccxlvi; and the decision of Edgar Joseph Jr FCJ in *Malaysia National Insurance Sdn Bhd* v. *Lim Tiok* [1997] 2 MLJ 165.
[142] *Ibid.*, at 186.

recover the full amount from any of the tortfeasors' insurer. However, where the injured third party has contributed to his own death or injury, s.12(1) of Civil Law Act 1956 prescribes that the damages recoverable by him will be reduced to such extent as the court thinks just and equitable having regard to his share in the responsibility for the damage.[143] It thus follows that an injured third party cannot recover from the insurer the portion of damages attributed to his own negligence.

Another issue is whether the injured third party can claim from the insurer the judgment sum awarded to him against the insured in the following situation. The insurer has defended the insured in the suit by the third party for damages against him and the insurer has put on record that its defence was not to be construed as waiving its rights to repudiate a subsequent recovery claim pursuant to s.96(1) of the RTA 1987. According to the High Court in *Tahan Insurance Malaysia Bhd* v. *Ong Choo Tian and Anor*,[144] the insurer "cannot place any condition against any third party from making a recovery claim against (the insurer) for bodily injuries pursuant to (its) statutory liability".[145] Any reservation of the insurer's rights to repudiate the injured third party's claim is ineffective against the former.

The second defence which is not available to the insurer is listed in s.94. It provides that any breach or failure to comply with a condition in the policy after the accident is ineffective against an injured third party.[146] The injured third party may recover from the

[143] See P. Balan, "Contributory Negligence in Fatal Accident Claims" [1999] 26 *JMCL* 179.
[144] *Supra*, note 60.
[145] *Ibid.*, at 278.
[146] The corresponding section in the RTA 1988 (UK) is s.148(5). Merkin, *supra*, note 64, at para. D-0372/5 gives some examples. They are the policy owner's late submission of claims, the policy owner's failure to provide the necessary proofs and assistance to the insurer, and the policy owner's admission of liability to the injured third party in contravention of the policy.

insurer the judgment sum awarded to him even though the policy entitles the insurer to avoid liability.

The third defence which is not available to the insurer is stated in s.95 of the RTA 1987.[147] It lists the warranties which are ineffective against the injured third party. Thus, the injured third party may recover from the insurer the awarded judgment sum even though there is a breach of one of the following warranties:[148]

(a) the insured's age, physical or mental condition;

(b) the vehicle's condition, for example, its roadworthiness;

(c) the maximum number of persons carried in the vehicle;[149]

(d) the weight or physical characteristics of the goods carried on the vehicle;

(e) the time or place[150] the vehicle is used;

(f) the vehicle's horsepower or value;

(g) the vehicle's apparatus;

(h) the vehicle's means of identification, other than those required by the Vehicle Excise and Registration Act 1994;

(i) the insured being under the influence of intoxicating liquor or of a drug at the time of the accident;[151]

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[147] In the UK, the corresponding provision is found in s.148(2) of the RTA 1988 (UK).

[148] For a detailed discussion, see Merkin, *supra*, note 64, at para. D-372/4. See also the discussion in Balan, *supra*, note 122, at 103-106.

[149] However, the policy may impose a weight limit, instead of limiting the number of passengers. A breach of warranty on the weight limit is effective against the injured third party. See *Houghton* v. *Trafalgar Insurance Co Ltd* [1954] 1 QB 247.

[150] However, it must be noted that the insurer is liable to the injured third party only if the accident is caused by or arises out of the use of the vehicle on a "road". See the discussion in Pt. 5.2.6, *supra*, at 236-240.

[151] This is not found in the RTA 1988 (UK). It should also be covered by item (a) listed above.

(j) the insured not holding a licence to drive or to drive the particular vehicle;[152]

(k) the vehicle being used for a purpose other than the purpose stated in the policy.[153]

A warranty on a matter that is not listed in s.95 is effective against the insured and the injured third party.[154] The injured third party may not be able to recover from the insurer the judgment sum if it is breached.[155] Although the list of exclusion clauses in s.95 of the RTA 1987 that are non-operational against the injured third party is wider than that of the UK's RTA 1988, it is submitted that an injured third party in the UK is better protected due to the EC's Directives. He who suffers losses due to the effectiveness of the exclusion clauses, may claim damages from the UK Government under the principle in *Francovich* v. *Italian Republic*[156] for its failure to implement the EC's Directives.

The fourth defence which is not available to the insurer is that the insured has committed an act of insolvency.[157] Section 97(3) provides that the injured third party may enforce his judgment against the insurer even though the insurer has reserved a right to avoid the policy on this ground. In fact, the injured third party is conferred additional rights under the circumstances. They will be discussed in Part 5.3.1.2 below.

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[152] This is also found in s.151(3) of the RTA 1988 (UK).
[153] Under the RTA 1988 (UK), s.150 modifies, and does not exclude totally, the effectiveness of this restriction. See the implication in *Keeley* v. *Parshen and Anor*, *supra*, note 55.
[154] *Bright* v. *Ashfold* [1932] 2 KB 153.
[155] Birds and Hird, *supra*, note 90, at 390. However, as opined by Brooke LJ in *Keeley* v. *Parshen and Anor*, *supra*, note 55, at 1232, the courts should not be astute to interpret any limitations imposed on a compulsory motor policy benevolently in the insurer's favour. This is because the policy is pursuant to a statutory scheme which is intended to enable innocent third parties to recover direct from the tortfeasor's insurer.
[156] [1991] ECR1-5337, cited in Merkin, Robert, *Colinvaux and Merkin's Insurance Contract Law*, (Loose-leaf) (Release 1, March 2002), Sweet & Maxwell, London, at para. D-0375. See also *Evans* v. *Secretary of State for the Environment, Transport and the Regions* [2004] Lloyd's Rep IR 391, at 402-403.
[157] What amounts to an act of insolvency is prescribed in s.97(1). *Infra*, note 162.

5.3.1.2 Additional rights when the insured becomes insolvent

The next pertinent issue is whether upon the insolvency of the insured, the injured third party will continue to enjoy the rights conferred by the RTA 1987. Unfortunately, s.100 specifically preserves only the rights conferred by s.97 to s.99.[158] Despite that, the writer is of the opinion that the injured third party should also continue to enjoy the benefits that were discussed in Part 5.3.1.1. This is because an injured third party requires even more protection when the insured is or becomes insolvent. Thus, it is unlikely that the legislature intended to withdraw the said benefits. This interpretation is further supported by the provision in s.100 itself. Section 100 provides that the insurer's liabilities under a compulsory motor policy will not be affected once the certificate of insurance is delivered to the policy owner. It should thus follow that the benefits conferred on an injured third party by Part IV of the RTA 1987 will not be affected by the insured's insolvency.

Further, the marginal note to s.100 reads that "Bankruptcy etc not to affect third party claims". The Malaysian courts do accept and use the marginal note as an aid to interpret a statutory provision. In *Lim Phin Khian* v. *Kho Su Ming*,[159] the Court of Appeal referred to the marginal note to the section which was in dispute and rejected the literal interpretation of the provision. The marginal note was used to discover the purpose of the provision. Therefore, it is submitted that the court may give effect to the marginal note to s.100 and hold that all the rights conferred on an injured third party by Part IV of the RTA 1987 are not withdrawn when the insured is or becomes insolvent. However, since

[158] These provisions will be discussed below, *infra*, at 256-257.

[159] [1996] 1 MLJ 1. See also *Badan Peguam Malaysia* v. *Louis Edward van Buerle* [2005] 4 CLJ 469, where the Court of Appeal held that s.17A of the Interpretation Acts 1948 and 1967 called for the adoption of the purpose approach in the interpretation of statutes if there were two contending constructions. The marginal note and the general heading could then be used in the interpretation of a statute.

this remains uncertain, the writer submits that the legislature should take steps to amend s.100 to expressly provide so.

The writer will now proceed to examine the additional rights conferred by s.97 to s.99[160] when the insured[161] is or becomes insolvent.[162] It is immaterial that the insured is the

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[160] In Pt. 3.5.1.2(a), *supra*, at 119-121, the writer discussed that the legislature has enacted provisions to protect the third party claimant of a liability policy when the insured becomes insolvent. The general legislation is the Third Parties (Rights against Insurers) Act 1930 (UK). This Act, though enacted in England, applies in Malaysia by virtue of s.5 of the Civil Law Act 1956. It is noteworthy that the rights conferred by the TP(RI) Act 1930 (UK) are also incorporated into s.97 to s.99 of the RTA 1987.

[161] Compared to the RTA 1987, the RTA 1988 (UK) protects an injured third party when the policy owner, not the insured, commits an act of insolvency. This is because s.153(1) and (2) of the RTA 1988 (UK) refer to "the person *by* whom the policy was effected" instead of "*for* whom". The phrase in s.153 refers to the policy owner whereas the latter phrase refers to the person insured. This gives rise to two possibilities.
First, where the insolvent insured is not the policy owner, the injured third party may sue the insurer only under the rights conferred on him by the TP(RI) Act 1930 (UK) upon the happening of one of the acts of insolvency prescribed in the TP(RI) Act 1930 (UK). The injured third party will not enjoy the benefits conferred on him by Part VI of the Act. His rights against the insurer are governed solely by the TP(RI) Act 1930 (UK) and the contract of insurance effected between the insurer and the policy owner. Further, as discussed above, where the insolvent tortfeasor is not a person insured by the policy, s.151(2) of the RTA 1988 (UK) requires the insurer of the 'insured' vehicle to satisfy the awarded judgment sum against the tortfeasor who used the 'insured' vehicle. However, the third party who is injured in a motor accident caused by an insolvent tortfeasor who is not the insured cannot rely on TP(RI) Act 1930 (UK) or Part VI of the RTA 1988 (UK) to recover the awarded judgment sum from the insurer.
Secondly, the financial status of the tortfeasor has no bearing on the insurer's liability under Part VI of the RTA 1988 (UK). The insurer is liable to satisfy the awarded judgment sum. It is immaterial that the tortfeasor is solvent or insolvent. It is also immaterial that the tortfeasor is the policy owner or an authorised driver or a person who is not insured by the policy. The insurer's liability to the third party under Part VI remains.
The second interpretation is preferred because it is in line with the purpose of compulsory motor insurance. A third party who is injured in a motor accident caused by an insolvent tortfeasor requires more protection. It is unlikely the UK legislature would undermine whatever protection given to the third party under Part VI of the RTA 1988 (UK) when the tortfeasor becomes insolvent.
It is to be noted that s.10 of the Singapore Motor Vehicles Act refers to the insolvency of the insured, and not the policy owner.

[162] The acts of insolvency which are stipulated in s.97 of the RTA 1987 are as follows:

(a) where the insured is an individual:
  (i) the insured becomes bankrupt;
  (ii) the insured makes a composition with his creditors;
  (iii) an order is made under any written law relating to the bankruptcy for the administration in bankruptcy of the insured's estate.
(b) where the insured is a company:
  (i) a winding-up order is made against the company;
  (ii) a resolution to voluntary wind-up the company (other than for the purpose of reconstruction or amalgamation with another company);
  (iii) a Receiver or Manager of the company's business or undertaking is appointed;
  (iv) its debenture holder has possessed its property comprised in or subject to a floating charge.

authorised driver, and not the policy owner. It is also immaterial whether the insured commits the act of insolvency before or after the accident.[163]

(a) Transfer of rights

Section 97 of the RTA 1987 stipulates that when the insured is or becomes insolvent, his rights against the insurer under the motor policy in respect of his liability to an injured third party are transferred to the third party. To protect the injured third party, s.97 provides that the policy cannot abrogate or modify this right. Unfortunately, this right will be transferred only when the injured third party has established the insolvent insured's liability.[164] This affects the protection conferred on the third party.[165]

(b) Right to information

Section 98(2) stipulates that the injured third party has the right to obtain the necessary information from the insolvent insured to enable him to ascertain whether any rights have been transferred to and vested in him under the RTA 1987. He has similar rights against the insurer pursuant to ss.(3). Unfortunately, as in the position under s.97,[166] the injured third party's rights against the insolvent insured and insurer do not arise until he has established the insolvent insured's liability.

(c) Settlement between the insurer and the insured is ineffective

Section 101 of the RTA 1987 protects an injured third party by stipulating that any settlement by an insurer of a prospective claim in respect of a compulsory third party risk

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[163] Section 97(1) of the RTA 1987.

[164] *Woolwich Building Society* v. *Taylor* [1995] 1 BCLC 132, which was discussed in paras. 4.16 to 4.18 in the English Law Commission Consultation Paper No. 152, *Third Parties (Rights Against Insurers) Act 1930*, (1998)".

[165] For a good discussion, see English Law Commission Consultation Paper No. 152, *ibid.*, particularly Pt. 4 thereof.

[166] This was discussed in Pt. 5.3.1.2(a), *supra*, at 256.

is void unless the third party is a party to the settlement. Section 99 reinforces the protection by providing that the injured third party is not bound by any settlement or agreement between the insured and insurer if the settlement or agreement defeats or affects the rights transferred to him under the RTA 1987 and is made after the occurrence of two events. The events are first, liability has been incurred to the injured third party;[167] and secondly, the insured's bankruptcy[168] or winding-up[169] has commenced. The writer submits that s.99 and s.101 protect the injured third party against any settlement or agreement between the insured and insurer which prejudices him.

5.3.2 Non-compulsory third party risks

It is clear from s.96 of the RTA 1987 and *New Zealand Insurance Company Ltd* v. *Sinnadorai*[170] that an injured third party who has obtained judgment for a liability outside the ambit of the compulsory motor insurance scheme has no direct recourse against the insurer when the insured is solvent. However, the position of the injured third party in relation to the insurer changes when the insured is or becomes insolvent. He can avail himself of the rights under s.97 to s.99 even where the insolvent insured's liability to the injured third party is not one of the risks stipulated in s.91(1) of the RTA 1987, so long as the liability is covered under a policy which includes the compulsory risks. The reasons for this are stated below.

First, s.97 and s.99 refer to "a policy issued for the purposes of this Part", namely, Part IV of the RTA 1987. Following the principle in *Digby* v. *General Accident Fire and Life*

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[167] *Ibid.*
[168] See s.47 of the Bankruptcy Act 1967 (Act 360, Rev. 1988) on when the bankruptcy of a person is deemed to commence.
[169] See s.219 and s.255(6) of the Companies Act 1965 (Act 125, Rev. 1973) on when the winding-up of a company is deemed to commence.
[170] *Supra*, note 6.

Assurance Corporation Limited,[171] a motor policy which includes the compulsory third party risks is a policy issued for the purpose of Part IV. It is immaterial that the policy includes other risks so long as the policy satisfies s.91(1).

Section 98 confers on an injured third party the right to obtain information from the insolvent insured and insurer for the purpose of ascertaining whether any rights of the insured have been transferred to and vested in him under the Act. The rights include those found in s.97 and s.99. Thus, where the insured is insolvent, the injured third party enjoys the right to obtain information with respect to the insured's liability which is covered by a policy issued for the purpose of Part IV. It is immaterial that the policy includes non-compulsory third party risks.

Secondly, s.100 of the RTA 1987 provides, *inter alia*, that once the certificate of insurance has been delivered to the policy owner pursuant to s.91(4),[172] the injured third party's rights that are conferred on him by s.97 to s.99 of the RTA 1987 will not be affected by the insured's insolvency.

5.4 Rights of an Injured Third Party Against the Motor Insurers' Bureau of West Malaysia

The main purpose of the compulsory motor insurance scheme is "to make provision for .. protection of third parties against risks arising out of the use of motor vehicles".[173] However, it still leaves an injured third party uncompensated where the tortfeasor is not

[171] *Supra*, note 2. See the discussion on this case in Pt. 5.6.1, *infra*, at 287.
[172] See Pt. 5.3.1.1(a), *supra*, at 242-243.
[173] Preamble to the RTA 1930 (UK).

insured[174] or where the insurer validly avoids the policy.[175] To overcome this, the Cassel Committee of the UK in 1937, "recommended that a central fund should be set up from which victims of motor accidents caused by uninsured motorists could obtain compensation".[176] On 31 December 1945,[177] the Minister of Transport (UK) entered into an agreement with the companies and Lloyd's syndicates which dealt with motor insurance, to set up the central fund.[178] On 14 June 1946, the Motor Insurer's Bureau (UK) ("the MIB (UK)"), a company limited by guarantee, was incorporated under the Companies Act 1929 (UK)[179] to hold and administer the central fund, which was and still is, funded by the motor insurers themselves. Currently, all motor insurers in the UK are members of the MIB (UK).

The first agreement between the MIB (UK) and the Minister of Transport (UK) was made on 17 June 1946 ("the First MIB (UK) Agreement"). Under this Agreement, the MIB (UK) agreed to compensate an injured third party who was deprived of compensation because the tortfeasor was uninsured. In 1969, an agreement was reached between the MIB (UK) and the Minister of Transport (UK) to compensate victims of hit-and-run

[174] Both tortfeasor and permitter could be insolvent. The injured third party's rights against the permitter will be discussed in Pt. 5.5, *infra*, at 280-286.
However, it is to be noted that the current position in the UK is different. The insurer is required to satisfy an awarded judgment sum against the user of the vehicle covered by a compulsory motor insurance issued by it. It is immaterial that the tortfeasor is not an insured. See s.151 of the RTA 1988 (UK) and, *supra*, note 111.
[175] This was dealt with in Pt. 5.3.1.1(d), *supra*, at 246-253. See Williams, Donald B., *Guide to Motor Insurers' Bureau Claims*, (8th ed., 2000), Blackstones Press, London, at 1-2; and *Gardner* v. *Moore and Anor* [1984] AC 548, at 561-562.
[176] Taylor, Paul J. (*et al.*), *Bingham and Berryman's Motor Claims Cases*, (11th ed., 2000), Butterworths, London, at para. 3.1. See also Williams, *ibid.*, at 2.
[177] Taylor, *ibid.*, at para. 3.1. The time lag could be due to World War Two.
[178] Preamble to the First MIB (UK) Agreement.
[179] Section 145(5) of the RTA 1988 (UK).

accidents.[180] Since then, there has been a series of agreements made between the two parties.[181] They can be classified as follows:

(1) the Uninsured Drivers Agreement (UK), where the MIB (UK) agrees to compensate an injured third party for the unsatisfied judgment awarded to him against a known tortfeasor. It is immaterial that the tortfeasor cannot be traced or contacted after the accident; and

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[180] This Agreement is more popularly known as the Compensation of Victims of Untraced Drivers Agreement 1969. Merkin, *supra*, note 156, at para. D-0387 credited the birth of this Agreement to Sachs J's *obiter dictum* in *Adams* v. *Andrews* [1964] 2 Lloyd's Rep 347, at 351-352:

> "Under their current agreement with the Minister of Transport they could, if they so chose, decline to accept any legal liability on the grounds that they are not responsible for damages suffered by those who have just claims against a hit-and-run driver of a motor vehicle – provided, of course, that that hit-and-run driver succeeds in finally escaping identification... (T)he Bureau, in law, would be entitled to sit back and pay nothing....
>
> The above situation is illogical as it is unjust. For in cases where the liability of a driver is under the Road Traffic Acts 'required to be covered by a policy of insurance', either the driver of the hit-and-run car is insured as by law required – in which case one of the member companies of the Bureau would normally have to pay any damages awarded by the Court, or else he is not insured, in which case the Bureau would likewise have to pay if he had been found and judgment entered against him. That the injured person cannot recover as of right merely because he or she cannot secure a judgment as the driver has successfully evaded identification is lamentable and should not obtain *(sic)*; it merely provides for insurance companies as a whole a potential avenue of escape from liabilities which in principle they have accepted.
>
> He who has to go cap-in-hand for an *ex gratia* payment is always at a disadvantage – wholly unwarranted in this class of case ...
>
> (T)here seems to be an immediate need so to revise the agreement with the Motor Insurers' Bureau that it cannot in law decline liabilities which should, in justice, be met by it in hit-and-run cases, and so that it is precluded from having available the powerful 'ex gratia' argument which can be used to pare down sums justly due to some grievously injured person. In particular, whatever be the Bureau's practice – and I am certainly not prepared to criticize it adversely without knowing more about it, for it may, indeed, be a good practice – it is important that it ought not to be in a position wholly to decline liability simply because some other motorist or some other person who is under no duty to insure against the particular risks is also partly to blame. Moreover, if there are cases which are to be left to the discretion of the Bureau, it is worthy of consideration whether it is right for claims important to the individual claimant to be turned down by unnamed and unappealable administrators in this type of case".

[181] The MIB (UK) Agreements that are currently applicable are as follows:

(1) the Compensation of Victims of Uninsured Drivers Agreement dated 21 December 1988 ("the Uninsured Drivers Agreement 1988 (UK)"). This Agreement remains in force for claims arising out of accidents which occurred before 1 October 1999. See Clause 23(1) of the Uninsured Drivers Agreement 1999 (UK);

(2) the Compensation of Victims of Uninsured Drivers Agreement dated 13 August 1999 which came into force on 1 October 1999 ("the Uninsured Drivers Agreement 1999 (UK)");

(3) the Compensation of Victims of Untraced Drivers Agreement dated 14 June 1996 ("the Untraced Drivers Agreement 1996 (UK)"). This Agreement continues to be operative in relation to any claim arising out of an event occurring before 14 February 2003 when the Untraced Drivers Agreement 2003 (UK) came into effect. See Clauses 3(1) and 33 of the 2003 Agreement; and

(4) the Compensation of Victims of Untraced Drivers Agreement dated 7 February 2003 which came into force on 14 February 2003 ("the Untraced Drivers Agreement 2003 (UK)").

(2) the Untraced Drivers Agreement (UK), where the MIB (UK) agrees to compensate the victim of a hit-and-run accident, *i.e.*, where the tortfeasor is unidentifiable.

The Uninsured Drivers Agreement (UK) and the Untraced Drivers Agreement (UK) are collectively referred to in this thesis as "the MIB (UK) Agreements".

In this Part, the writer will deal with the establishment of the Motor Insurers' Bureau of West Malaysia ("MIB (Malaysia)") and its agreements to compensate an injured third party who is deprived of compensation.

5.4.1 Motor Insurers' Bureau of West Malaysia ("MIB (Malaysia)")

In Malaysia, the MIB (Malaysia) was incorporated on 24 October 1967 to hold and administer the central fund established to compensate a third party who is injured in a motor accident caused by an uninsured driver. The MIB (Malaysia) is a company limited by guarantee and its members are the insurers of motor policies. Writers[182] have credited the incorporation of the MIB (Malaysia) to Thomson LP's *obiter dictum* in the case of *New India Assurance Co Ltd* v. *Simirah*.[183] Thomson LP was of the view that some form

[182] Nik Ramlah, Mahmood, *Insurance Law in Malaysia* (1992), Butterworths, Kuala Lumpur, at 242; the Editorial, 'Motor Insurers' Bureau' [1968] 1 MLJ xix; and Poh, *supra*, note 16, at 567-568.

[183] [1966] 2 MLJ 1. In this case, the Federal Court upheld the insurer's contention that it was not liable to compensate the injured third party because the policy had lapsed when the policy owner sold the car. Consequently, the injured third party's estate could not obtain any compensation from the insurer.

of social insurance should be established to compensate an injured third party who could not enforce his judgment against the insurer due to legal technicalities.[184]

On 15 January 1968, the MIB (Malaysia) entered into an agreement with the Minister of Transport ("the 1968 MIB (Malaysia) Agreement"). Under the 1968 MIB (Malaysia) Agreement, the MIB (Malaysia) agreed to compensate a third party who was injured in an accident in West Malaysia that was caused by an identified tortfeasor. At the signing of the Agreement, the Minister of Transport, Tan Sri Haji Sardon bin Haji Jubir said:[185]

> As required by the Road Traffic Ordinance, every road user must take out compulsory third party insurance policy. This is to make sure that there is money to meet any damages awarded by the courts as compensation to people killed or injured on public roads in motor vehicle accidents. Unfortunately from time to time a road user has no valid insurance policy, or the insurance is inoperative as in the case of a stolen car which may be involved in road accidents. This has caused much concern to the Government especially, and to the general public as a whole, as justice is not being done to the poor road victim who should, by right, receive costs for damages suffered by the victim. It is with the intention to secure damages for the victim who is denied compensation for the absence of effective insurance that the Motor Insurers' Bureau is formed.

On 9 January 1992, the Minister and MIB (Malaysia) entered into another agreement to substitute the 1968 MIB (Malaysia) Agreement with retrospective effect from 1 January 1992 ("the 1992 MIB (Malaysia) Agreement").[186] It applies throughout Malaysia. The 1968 MIB (Malaysia) Agreement and the 1992 MIB (Malaysia) Agreement are collectively referred to as the MIB (Malaysia) Agreements.

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[184] *Ibid.*, at 4:

> "Things like this should not happen in a civilized society. It may be legal justice, it is not social justice. Hitherto, in this country as elsewhere, the State has recognised to some extent the unfortunate position of victims of road accidents by the requirement of compulsory third party insurance. Experience, however, has shown that that is not enough and that there are cases like the present where by reason of legal technicalities an innocent victim fails to obtain any compensation. I express the prophecy that sooner or later we shall have to accept the position that compensation for injuries resulting from road accidents should become the subject of some form of social insurance and should not be left to depend on the vagaries of application of the general law relating to negligence".

[185] Extracted from Lock, Lai Kam, Development of Insurance Law in Malaysia, LLB Dissertation, Faculty of Law, UM, 1980, at 98-99.

[186] Clause 3 of the 1992 MIB (Malaysia) Agreement reads, "This Agreement shall apply to all claims preferred against the Bureau excluding any court awards which remain unsatisfied as at the 1st day of January 1992". The recent Court of Appeal's decision in *Ramli bin Shahdan and Anor* v. *Motor Insurers' Bureau of West Malaysia and Anor* [2006] 1 CLJ 224, at 246, held that the 1992 MIB (Malaysia) Agreement rescinded the 1968 MIB (Malaysia) Agreement.

In the following Parts, the writer will analyse the 1992 MIB (Malaysia) Agreement in the following aspects, first, its validity and role as an administrative device; secondly, its scope; thirdly, the conditions precedent for the MIB (Malaysia)'s liability; and fourthly, the injured third party's rights to sue and appeal under the Agreement.

5.4.2 Status of the 1992 MIB (Malaysia) Agreement

This Part analyses the validity of the 1992 MIB (Malaysia) Agreement in the light of s.89 of the RTA 1987, and its role as an administrative device.

5.4.2.1 Validity is in question

The 1992 MIB (Malaysia) Agreement appears to conflict with the provision found in s.89 of the RTA 1987. Section 89 defines the MIB (Malaysia) as the body "which has executed an agreement with the Minister of Transport to secure compensation to third party victims of road accidents in cases where such victims are denied compensation by the absence of insurance or effective insurance". The agreement referred to is the 1968 MIB (Malaysia) Agreement.

Pursuant to the 1968 MIB (Malaysia) Agreement, the MIB (Malaysia) agreed to pay or cause to be paid to an injured third party his unsatisfied awarded judgment sum including taxed costs provided first, the road accident happened on or after 15 January 1968;[187] secondly, at least 28 days had lapsed since the judgment became enforceable;[188] and thirdly, the awarded judgment sum was not satisfied due to a reason other than the insurer's inability to make payment.[189] The MIB (Malaysia) also had the discretion to

[187] Clauses 1 and 4 of the 1968 MIB (Malaysia) Agreement.
[188] Clause 2 of the 1968 MIB (Malaysia) Agreement.
[189] Clause 2 of the1968 MIB (Malaysia) Agreement.

offer to the injured third party such sum as it considered sufficient in respect of any claim before the hearing of his claim against the tortfeasor.

Unfortunately, the MIB (Malaysia)'s *undertaking to indemnify* an injured third party for his unsatisfied judgment was revoked by the 1992 MIB (Malaysia) Agreement. Under the 1992 Agreement, the MIB (Malaysia) agrees that it "may ... consider (making) at its absolute discretion, compassionate payments or allowances to persons injured and to the dependants of persons killed" in road accidents where the tortfeasor is not covered by a compulsory motor policy or where the policy is ineffective for any reason.[190] Any payment to an injured third party is *ex gratia*. It is not assessed in accordance with the law in a like manner as a court.[191] Even where he has obtained judgment against the uninsured tortfeasor, the MIB (Malaysia) is not obliged to pay him his unsatisfied awarded judgment sum. Effectively, its obligation to compensate an injured third party was obliterated.

In *Ramli bin Shahdan and Anor* v. *Motor Insurers' Bureau of West Malaysia and Anor*,[192] the appellants suffered grave injuries as a result of a motor accident in 1985 caused by an uninsured tortfeasor. Notice of intention to commence proceedings against the tortfeasor was given to the MIB (Malaysia). Whilst negotiation was going on between the appellants' solicitors and the MIB (Malaysia), the Bureau entered into the 1992 MIB (Malaysia) Agreement with the Minister of Transport. The appellants obtained judgment against the uninsured tortfeasor on 3 September 1993. If the 1968 MIB (Malaysia)

[190] Clause 2 of the 1992 MIB (Malaysia) Agreement.
[191] Even the Untraced Drivers Agreement (UK) and the MIB (Singapore) Agreement (see Clause 10) provide that the compensation payable to a victim of a hit-and-run accident shall be assessed in a like manner as a court.
[192] *Supra*, note 186.

Agreement applied, the Bureau would be obliged to settle the judgment sum.[193] However, the Court of Appeal held that the 1968 Agreement was rescinded by the 1992 MIB (Malaysia) Agreement on 1 January 1992. The Court of Appeal also referred to Clause 3 of the 1992 Agreement which reads, "This Agreement shall apply to all claims preferred against the Bureau excluding any court awards which remain unsatisfied as at the 1st day of January 1992" and held that the MIB (Malaysia) was not bound to satisfy the judgment awarded to the appellants in 1993. *Ramli bin Shahdan* shows the lack of protection afforded to an injured victim of an uninsured tortfeasor. It is a blow to injured third parties, much so to the appellants who were in the midst of negotiation with the Bureau when the 1968 Agreement was rescinded.

In the writer's view, the MIB (Malaysia) has reneged on its purpose of incorporation, which is, "to secure damages for the (injured third party) who is denied compensation for the absence of effective insurance".[194] It is submitted that the Minister did not have the power to enter into a contract with the MIB (Malaysia) which effectively revoked its statutory obligations.[195] The writer submits that the Minister acted *ultra vires* s.89 of the RTA 1987 when he signed the 1992 MIB (Malaysia) Agreement, for it reduced the position of an injured third party from a person who could recover his unsatisfied awarded judgment sum from the MIB (Malaysia)[196] to a person who "has to go cap-in-hand"[197] to the MIB (Malaysia). The validity of the 1992 Agreement is in question.

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[193] The Court of Appeal did not indicate the judgment sums awarded by the court to the injured third parties against the uninsured tortfeasor. The MIB (Malaysia) offered to award the injured third parties a compensation payment of RM8,200 and RM4,450 each.

[194] As per the Minister of Transport, Tan Sri Haji Sardon bin Haji Jubir at the signing of 1968 MIB (Malaysia) Agreement. See Lock, *supra*, note 185, at 99. See also the definition of "Motor Insurers' Bureau" in s.89 of the RTA 1987.

[195] For a good discussion on the effect of the rescission of the 1968 MIB (Malaysia) Agreement, see *Ramli bin Shahdan and Anor* v. *Motor Insurers' Bureau of West Malaysia and Anor*, *supra*, note 186, at 246-247.

[196] Clause 2 of the 1968 MIB (Malaysia) Agreement.

[197] As per Sachs J in *Adams* v. *Andrews*, *supra*, note 180, at 352.

Following the above, the next issue which arises is whether a court action to nullify the 1992 Agreement is time barred. This is because s.2(a) of the Public Authorities Protection Act 1948 (Act 198, Rev. 1978) fixes the limitation period for an action against a person for an act done in pursuance of a public duty or a statute at 36 months from the act or from the cessation of injury or damage which is caused by the act, whichever is relevant. If the time had started to run from the time the act was committed, i.e. when the Minister of Transport signed the 1992 MIB (Malaysia) Agreement on 9 January 1992, the limitation period for any action against the Minister expired on 9 January 1995.[198] However, it may be argued that since the 1992 Agreement affects the rights of all injured third parties where the tortfeasors are uninsured, the injuries or damage caused to them are continuing.[199] Thus, the writer is of the view that proceedings can still be taken to declare the 1992 MIB (Malaysia) Agreement void.

Notwithstanding the writer's views on the status of the 1992 MIB (Malaysia) Agreement, the writer shall proceed to discuss the said Agreement on the basis that it is valid. Where relevant, the writer will also refer to the 1968 MIB (Malaysia) Agreement.

5.4.2.2 An administrative device

Although the MIB (UK) Agreements are "as important as any statute",[200] they do not have statutory force. This can be drawn from the House of Lords' case of *White* v. *White and Anor*.[201] In this case, the majority of the Law Lords agreed with Lord Nicholls' views that the obligations of the MIB (UK) are not statutory, but contractual pursuant to its various agreements with the Minister of Transport (UK). The agreements are contracts

[198] Section 54(1) of the Interpretation Acts 1948 and 1967 on the computation of time for the purposes of any written law, which includes the Public Authorities Protection Act 1948.
[199] *Whitehouse* v. *Fellowes* 142 ER 654.
[200] As per Lord Denning MR in *Hardy* v. *Motor Insurers' Bureau* [1964] 2 QB 745, at 757; and approved by Lord Cooke in *White* v. *White and Anor*, *supra*, note 55, at 52.
[201] *Ibid.*

"made between citizens" even though "one of the parties was an emanation of government".[202]

However, Lord Cooke in the same case held the view that the said agreement was not in the category of a contract between private parties:[203]

> (R)ather it is what is called in Wade and Forsyth *Administrative Law*[204] 'an administrative device in order to enforce some policy'. That work lists the MIB agreement among the specific examples given. Lord Denning MR said that the MIB agreement was 'as important as any statute'[205]. The increasing employment by government at all levels of contractual techniques to achieve regulatory aims is a development well recognised in the courts and by legal writers: see too, for instance, De Smith, Woolf and Jowell, *Judicial Review of Administrative Action*.[206]

The writer prefers Lord Cooke's views. This is because the MIB (UK) is given recognition by s.145(5) of the RTA 1988 (UK).[207] Further, even though the MIB (UK) Agreements did not provide the same "level of compensation required by the Community law under the (EC Motor Insurance) Directive",[208] the MIB (UK) was "chosen by the UK Government to secure compliance with the UK's obligations under the ... Directive(s), namely, to ensure that compensation (would be) paid to the victims of untraced and uninsured drivers".[209] In fact, the UK's Department of Transport took steps to streamline the MIB (UK) Agreements with the EC requirements.[210]

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[202] *Ibid.*, at 50.
[203] *Ibid.*, at 52.
[204] (8th ed, 2000), Oxford University Press, Oxford, at 777.
[205] *Hardy* v. *Motor Insurers' Bureau*, *supra*, note 200, at 757.
[206] (5th ed., 1995), Sweet & Maxwell, London, at para. 6-036.
[207] Section 145(5) provides, *inter alia*, that a motor insurer must be a member of the MIB (UK).
[208] Davey, James and Claudina Richards, "Direct but Ineffective? The Second Motor Insurance Directive" [1999] *JBL* 157, at 157-158. However, it is noteworthy that the MIB (UK) Agreements have been revised to comply with the EC Directives.
[209] Merkin, *supra*, note 156, at para. D-0375.
[210] See webpage *http://www.roads.dft.gov.uk/consult/untraced* on 29 September 2002. For example, the EC Directive requires interest to be awarded to a victim of a hit-and-run accident. Since such obligation was not stated in the Untraced Drivers Agreement 1996 (UK), the Untraced Drivers Agreement 2003 (UK) was made to ratify the omission. Clause 9(1) of the 2003 Agreement requires the MIB (UK) to award interest, in an appropriate case, on the compensation payable.

Similarly, in Malaysia, the 1992 MIB (Malaysia) Agreement does not have statutory force. The MIB (Malaysia)'s obligations are contractual. The issue is whether the 1992 Agreement can also be construed as an administrative device. As discussed in Part 5.4.2.1,[211] the MIB (Malaysia) is given statutory recognition by s.89 of the RTA 1987. However, unlike the UK which comes under the EC, there is no compelling legal requirement to establish such a body. Notwithstanding that, it is submitted that the 1992 MIB (Malaysia) Agreement is also an administrative device to enforce a regulatory policy. This is because the MIB (Malaysia) was incorporated at the desire of the government for the purpose of securing damages for an injured third party where the tortfeasor is uninsured. In addition, all motor insurers are statutorily required to be members of the MIB (Malaysia). The importance of the 1992 Agreement as an administrative device will be seen in Part 5.4.6.[212]

5.4.3 Scope of the MIB (Malaysia)'s liability

This Part examines the scope of the 1992 MIB (Malaysia) Agreement. It will be shown that the Agreement which purported to ensure compensation to an injured third party does not meet with its objective. The writer would like to highlight its weaknesses.

First, an injured third party who wishes to claim compensation from the MIB (Malaysia) must prove that the damage is caused by a tortfeasor whose liabilities should be covered by a compulsory motor policy. It is not required to process any claim for a damage caused by a non-compulsory third party risk.

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[211] *Supra*, at 263.
[212] *Infra*, at 278-279.

Secondly, under the 1968 MIB (Malaysia) Agreement, the MIB (Malaysia) was obliged to pay or caused to be paid to an injured third party his unsatisfied awarded judgment sum against an uninsured tortfeasor. However, Clause 2 of the 1992 MIB (Malaysia) Agreement provides that it may consider making "payments or allowances to persons injured and to the dependants of persons killed" through the use of a vehicle that is not covered by a compulsory motor policy. As was shown in the recent Court of Appeal case, *Ramli bin Shahdan and Anor v. Motor Insurers' Bureau of West Malaysia and Anor*,[213] the amount that may be paid is not the judgment sum, but an amount at the MIB (Malaysia)'s discretion.

Thirdly, the injured third party may not claim from the MIB (Malaysia) under the 1992 MIB (Malaysia) Agreement if the tortfeasor's insurer is unable to make payment.[214] Most probably, this refers to the insurer's financial inability. However, it must be noted that the injured third party may claim compensation from the insurance guarantee scheme fund only when the insurer is wound-up on the ground of insolvency.[215] If the insurer is insolvent but not wound-up, the injured third party may be left uncompensated until the insurer is wound-up. In contrast, the MIB (UK)[216] and the MIB (Singapore)[217] have agreed to pay an injured third party his unsatisfied awarded judgment sum irrespective of the reason for the insurer's failure to satisfy it.

[213] *Supra*, note 186 and at 264-265.
[214] Clause 2 of both Agreements.
[215] The rights of the injured third party against the Insurance Guarantee Scheme Fund will be dealt with in Pt. 5.8, *infra*, at 291-295.
[216] Clause 2(1) of the Uninsured Drivers Agreement 1988 (UK); and Clause 5 of the Uninsured Drivers Agreement 1999 (UK).
[217] Clause 3 of the MIB (Singapore) Agreement.

Fourthly, a victim of a hit-and-run accident is not eligible to claim against the MIB (Malaysia) under the 1992 MIB (Malaysia) Agreement.[218] The Agreement requires the tortfeasor who causes the injury to the third party to be identified. In contrast, the MIB (UK)[219] and the MIB (Singapore)[220] have agreed to pay an amount which shall be assessed in a similar manner as a court upon receipt of an application for compensation by a victim of a hit-and-run accident.

Fifthly, a third party who is injured in a road accident caused by a tortfeasor whose liability is covered by a security in lieu of a compulsory motor policy, is also not qualified to claim against the MIB (Malaysia).[221] This is because he should proceed to claim the judgment sum awarded against the tortfeasor from the issuer of the security. However, as discussed in Part 5.2.5,[222] the minimum amount of the security in lieu of a compulsory motor policy has remained at RM225,000 for a public service vehicle and RM45,000 for any other type of vehicle since 1937. An injured third party may not be sufficiently compensated if the tortfeasor is insolvent and his liability is covered by security. If there is any shortfall, he cannot claim the difference from the MIB (Malaysia).

Sixthly, an injured third party cannot claim compensation from the MIB (Malaysia) if the vehicle used by the tortfeasor entered Malaysia from Thailand, Indonesia and Negara Brunei Darussalam, unless the vehicle is registered in accordance with s.7 of the RTA 1987 or s.6 of the Road Traffic Act (Chapter 2) (Singapore) or similar provisions of the

[218] However, prior to September 1997, the MIB (Malaysia) did give *ex gratia* payments to victims of hit-and-run accidents. The practice was stopped due to insufficient funds. The writer was informed of this by the manager of the MIB (Malaysia) on 7 May 2003.
[219] Clause 3 of the Untraced Drivers Agreement 1996 (UK) and Clause 8 of the Untraced Drivers Agreement 2003 (UK).
[220] Clause 10 of the MIB (Singapore) Agreement.
[221] Clause 10(a) of the 1992 MIB (Malaysia) Agreement.
[222] *Supra*, at 231-232.

relevant Acts of Indonesia and Negara Brunei Darussalam.[223] However, the MIB (Malaysia) may make compassionate payments to a third party who is injured in an accident caused by an uninsured user of a vehicle which entered West Malaysia[224] from Singapore.[225] The MIB (Malaysia)'s generosity towards such injured third party could be due to the possibility that the injured third party would most probably proceed against the MIB (Singapore) if the accident was caused by an uninsured user of a Singapore registered vehicle in West Malaysia. This is because the injured third party who has obtained judgment against the tortfeasor in Malaysia can register his judgment in Singapore pursuant to the Reciprocal Enforcement of Commonwealth Judgments Act (Singapore). Upon registration, the third party can enforce his judgment against the tortfeasor in Singapore. Since s.3(1) of the Singapore Motor Vehicles Act requires the user of a Singapore registered vehicle in West Malaysia to be covered by a compulsory motor policy,[226] the injured third party can recover the awarded judgment sum from the MIB (Singapore) if the tortfeasor is uninsured.[227] Thus, the injured third party has an option to claim compensation from either the MIB (Malaysia) or the MIB (Singapore). As the latter would satisfy the unpaid judgment, it is to the injured third party's best interest to proceed against it.

5.4.4 Conditions precedent for the MIB (Malaysia)'s liability

The preceding Part revealed that although the 1992 MIB (Malaysia) Agreement applies throughout Malaysia, its scope is not extensive. Not all injured third parties are eligible to

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[223] Clause 10(b) of the 1992 Agreement. It is to be noted that vehicles which entered Malaysia from Indonesia and Negara Brunei Darussalam were not covered under the 1968 Agreement because the said Agreement applied to West Malaysia only. West Malaysia does not share common frontiers with the two countries.

[224] East Malaysia and Singapore do not share common frontiers.

[225] However, it is noted that Clause 7(c) of the MIB (Singapore) Agreement dated 22 February 1975 excludes any Malaysian vehicle unless the vehicle is registered in accordance with s.6 of the RTO 1958 (Malaysia) or s.6 of the Road Traffic Act (Chapter 2) (Singapore).

[226] See Pt. 5.2.5, *supra*, at 233-234; and Pt. 5.2.6, *supra*, at 235.

[227] Clause 3 of the MIB (Singapore) Agreement.

claim compensation from the MIB (Malaysia). It will be shown in this Part that an injured third party who is eligible to claim must also comply with the conditions precedent laid down in the Agreement. For the purpose of comparison, the writer will first, examine the conditions precedent for the MIB (Malaysia)'s liability under its 1968 Agreement.

Clause 6 of the 1968 MIB (Malaysia) Agreement required the injured third party who wished to claim against the MIB (Malaysia) to notify the insurer by registered post before he commenced an action against the tortfeasor. If the insurer's identity was unknown, notice of the action was to be given to the MIB (Malaysia). Upon commencement of the action, a copy of the summons or statement of claim was required to be given to the insurer or the MIB (Malaysia). In addition, he was under a duty to comply with all reasonable requirements imposed by the MIB (Malaysia) on any matter which might give rise to a claim against it.[228] This included taking all reasonable steps to obtain judgment against any person whom he had a cause of action in respect of the injury,[229] such as the permitter of the uninsured use of the vehicle.[230] The injured third party was prohibited from obtaining judgment in respect of his claim within 30 days of supplying the summons or statement of claim to the insurer or the MIB (Malaysia).[231]

In contrast, an injured third party who wishes to claim against the MIB (Malaysia) under its 1992 Agreement must comply with the following conditions. First, Clause 5 provides that if he has commenced legal proceedings against any person, he must notify the MIB (Malaysia) in writing within 30 days of the issuance of the summons. At the same time,

[228] Clause 6(d) of the 1968 MIB (Malaysia) Agreement.
[229] Clause 6(c) of the 1968 MIB (Malaysia) Agreement.
[230] The injured third party's rights against the permitter will be discussed in Pt. 5.5, *infra*, at 280-286.
[231] Clause 6(b) of the 1968 MIB (Malaysia) Agreement.

he must supply to it certified copies of the summons, statement of claim, police reports, medical reports and all other relevant supporting documents.

Secondly, Clause 8 requires the injured third party to comply with the requirements of the MIB (Malaysia) in relation to any matter that may give rise to a claim against it,[232] including the requirement to sue any person against whom he may have a cause of action.[233]

Thirdly, Clause 6 provides that all claims against the MIB (Malaysia) must be made within three years from the date of the accident or such further period as it may grant. Although the 1992 MIB (Malaysia) Agreement is not an agreement with the injured third party to compensate him, the writer is of the view that an injured third party has recourse against the MIB (Malaysia) if it acts arbitrarily. This will be discussed in Part 5.4.6 below.[234] In connection with this, the effect of Clause 6 is important.

It is to be noted that s.6(1)(a) of the Limitation Act 1953 (Act 254, Rev. 1981) provides that the limitation period for an action founded on a contract or a tort in West Malaysia is six years. In Sabah and Sarawak, the Limitation Ordinance of Sabah (Cap 72, Reprint 1966)[235] and Limitation Ordinance of Sarawak (Cap 49, Reprint 1965)[236] respectively prescribe that the limitation period for an action for specific performance of a contract or for compensation for injury to a person is three years. It is probable that the MIB (Malaysia), when limiting the claim period to three years from the date of the accident,

[232] Unlike the 1968 Agreement, the 1992 Agreement does not expressly state that the MIB (Malaysia)'s requirements must be reasonable.
[233] See Clause 7. The prospective defendants are the tortfeasor and the permitter. The injured third party's rights against the permitter will be discussed in Pt. 5.5, *infra*, at 280-286.
[234] *Infra*, at 278-279.
[235] Items 92 and 94A of the Schedule.
[236] Items 90 and 92 of the Schedule.

took the shortest limitation period applicable for an action founded on a contract throughout Malaysia. As a result of Clause 6, it appears that an injured third party has to file his claim against the MIB (Malaysia) within three years from the date of the accident.

However, it is the writer's opinion that Clause 6 of the 1992 MIB (Malaysia) Agreement which reduces the time within which an action against the MIB (Malaysia) for compensation should be brought in West Malaysia is void[237] by virtue of s.29 of the Contracts Act 1950 (Act 136, Rev. 1974). Section 29 provides, *inter alia*, that any agreement that shortens the limitation period is void to that extent.[238] If the writer's interpretation is correct, then an injured third party in West Malaysia may claim against the MIB (Malaysia) within six years, and not three years, from the date of the accident.

5.4.5 Injured third party's right to sue

The 1992 MIB (Malaysia) Agreement was made for the benefit of an injured third party. However, due to the strict application of the doctrine of privity, he cannot enforce the Agreement.[239] It is immaterial that he has fulfilled the conditions precedent prescribed for the MIB (Malaysia)'s liability towards him. The parties to the Agreement are the MIB (Malaysia) and the Minister of Transport. Similarly in the UK, an injured third party is also a stranger to the MIB (UK) Agreements. However, it is the MIB (UK)'s policy not to

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[237] In fact, the validity of the 1992 MIB (Malaysia) Agreement is in question. See Pt. 5.4.2.1, *supra*, at 263-266.

[238] In *New Zealand Insurance Company Ltd* v. *Ong Choon Lin (t/a Syarikat Federal Motor Trading)* [1992] 1 MLJ 185, at 195, the Supreme Court held that a contractual term which limited the time within which a party could enforce his rights under s.6(1)(a) of the Limitation Act 1953 was void.

[239] As per Lord Denning MR in *Gurtner* v. *Circuit and Anor* [1968] 1 Lloyd's Rep 171, at 176:

> "It is true that the injured person was not a party to that agreement (the First MIB Agreement) between the bureau and the Minister of Transport and he cannot sue in his own name for the benefit of it. But the Minister of Transport can sue for specific performance of it. He can compel the bureau to honour its agreement by paying the injured person, see *Beswick* v. *Beswick* [1968] AC 58. If the Minister of Transport obtains an order for specific performance the injured person can enforce it for his own benefit, see by Lord Pearce in *Beswick* v. *Beswick* [1968] AC 58, at 61. If the Minister of Transport should hesitate to sue, I think it may be open to the plaintiff to make him a defendant and thus compel performance".

rely on the doctrine of privity as a defence.[240] And the courts in turn, have to-date "turned a blind eye to this".[241]

However, unlike the position in the UK, it is unfortunate indeed that the MIB (Malaysia) raised the defence of privity in *Mohd Salleh Kasim* v. *Taisho Marine and Fire Insurance Co Ltd and Motor Insurers' Bureau of West Malaysia*[242] and *Ramli bin Shahdan and Anor* v. *Motor Insurers' Bureau of West Malaysia and Anor*.[243] In *Mohd Salleh*, the MIB (Malaysia) contended that since the plaintiff was not a party to the 1968 Agreement, he had no *locus standi* to sue. Abdul Malik Ishak J could have dismissed this defence because it was not pleaded.[244] Instead, the learned judge held that the 1968 MIB (Malaysia) Agreement was an exception to the doctrine of privity because the purpose of the Agreement and the MIB (Malaysia)'s incorporation was to benefit an injured third party where the tortfeasor was uninsured. The learned judge also held that the Minister of Transport entered into the Agreement as "an agent of the people". Thus, the plaintiff,

[240] As per Lord Scott of Foscote in *White* v. *White and Anor*, *supra*, note 55, at 53. See also *Persson* v. *London Country Buses and Anor* [1974] 1 WLR 569, at 572, where the MIB (UK) 'inadvertently' defended the action on the ground that the injured third party was not a party to the MIB (UK) Agreement. Fortunately, this line of defence was abandoned when the case came before the Court of Appeal. It is to be noted, too, that the MIB (UK) Agreements, apart from the Untraced Drivers Agreement 2003 (UK), were made before the enactment of the CRTP Act 1999 (UK). Thus, the 1999 Act does not apply to give any enforceable rights to an injured third party, except for the rights conferred on him by the Untraced Drivers Agreement 2003 (UK).

[241] Diplock LJ in *Gurtner* v. *Circuit and Anor*, *supra*, note 239, at 178.

[242] [1999] 5 CLJ 302.

[243] *Supra*, note 186.

[244] It is a cardinal rule that the parties are bound by their pleadings and are not allowed to adduce facts which they have not pleaded. See O.18 r.8 of the Rules of the High Court 1980; and Hamid Sultan bin Abu Backer, *Janab's Key to Civil Procedure in Malaysia and Singapore*, (3rd ed, 2001), Janab, Kuala Lumpur, at 279.

being one of the principals, was entitled to enforce the Agreement against the MIB (Malaysia).[245]

The analysis of the learned judge on the status of the 1968 MIB (Malaysia) Agreement is commendable but, unfortunately, *per incuriam*. First, the purpose of the 1968 Agreement and the MIB (Malaysia)'s incorporation does not make the Agreement an exception to the doctrine of privity. The doctrine strictly prohibits a third party from enforcing a contract, even where the contract is made specifically for his benefit.[246]

Secondly, the concept of the Minister signing the Agreement as the people's agent is, with respect, inaccurate. It amounts to holding that the injured third parties are the undisclosed principals. Since some of them did not have the capacity to contract or were not even born at the time of the Agreement, the Agreement cannot be ratified.[247] The same argument was attempted by the injured third party in *Gurtner* v. *Circuit and Anor*,[248] and it was rejected by Diplock LJ.

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[245] *Supra*, note 242, at 324-325:

"In Malaysia by virtue of (the now s.96 of the RTA 1987) an exception is made to the doctrine of privity of contract which enables a third party to a contract to sue on it even though he is not a party to it. Another exception would be the memorandum of agreement in this particular case and the reasons for this would be as follows:

(a) When the Minister of Transport entered into the memorandum of agreement with the Bureau (it must not be forgotten that the Bureau is a company formed specifically to take care of the claims of third parties against uninsured vehicles) it was done solely for and on behalf of all the third parties who obtained judgment against any person in respect of liability which is required to be covered by the (now RTA).

(b) Pure and simple the Minister of Transport is the agent or servant of the people, in the context of the present case the third parties, and consequently any contract entered into by the Minister, as an agent or servant of the people, would bind the principals – namely, the third parties and the Bureau.

(c) It is clear as daylight that upon reading the memorandum of agreement its primary object is simply to give a third party who comes within the purview of the memorandum of agreement a direct cause of action".

[246] *Beswick* v. *Beswick*, *supra*, note 239.

[247] Section 179 of the Contracts Act 1950. See also *Kelner* v. *Baxter and Ors* (1866) LR 2 CP 174.

[248] *Supra*, note 239, at 177.

Although the learned judge's opinion in *Mohd Salleh Kasim* was *per incuriam*, it is heartening indeed that a member of the judiciary upheld social justice to protect the unfortunate injured third party. The learned judge also took the MIB (Malaysia) to task and reminded it of its role as:[249]

> a 'godfather' who must step in by virtue of the memorandum of agreement to pay the victim of a road accident whenever the victim (could not) recover from the insurance company ....(T)he Bureau is obliged to pay those victims in respect of any liability for injury or death, arising out of the event which gave rise to the claim against the Bureau. Seen in this context, the Bureau is a charitable organization whose sole existence is to help road accident victims where the culprits are men of straws. That would be social justice in the form of social insurance that would ensure compensation to an innocent victim.

In *Ramli bin Shahdan*, the injured third parties took out an originating summon against the MIB (Malaysia) because they were unsatisfied with the amount of compensation offered by the Bureau. The MIB (Malaysia) contended that the appellants did not have *locus standi* to sue. PS Gill JCA, who delivered the judgment of the Court of Appeal, referred to Lord Denning's opinion in *Gurtner* v. *Circuit and Anor*[250] and held that:[251]

> (W)hen a contract as in our present instance is made between the first respondent and second respondent for the benefit of the appellants, then the second respondent can sue on the contract for the benefit of the appellants, and recover all that the appellants could have recovered as if the contract had been made by the appellant himself. Implicit in this proposition of ours, is the fact that if the second respondent fails in his duty, the appellants as beneficiaries under the implied trust, may successfully maintain an action against the first respondent and second respondent as joint defendants

The writer submits that the MIB (Malaysia) should make it its policy not to rely on the absence of privity of contract in its defence against an action by the injured third party,[252] for such defence is against the purpose of the Bureau and the interests of justice.

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[249] *Supra*, note 242, at 326-327.
[250] *Supra*, note 239, at 176.
[251] *Supra*, note 186, at 238.
[252] In the UK, it is the MIB (UK)'s publicly declared policy that it does not rely on the absence of privity of contract. See *Persson* v. *London Country Buses and Anor*, *supra*, note 240.

5.4.6 Injured third party's right to appeal

Under the 1992 MIB (Malaysia) Agreement, an injured third party who claims against the MIB (Malaysia) is required to comply with its requirements on any matter which may give rise to a claim against it. However, unlike the MIB (UK) Agreements, the 1992 MIB (Malaysia) Agreement does not provide the injured third party with an avenue for appeal. In addition, the amount of compassionate payment or allowance awarded by the MIB (Malaysia) to the injured third party is at its absolute discretion and is purely *ex gratia*. Notwithstanding the aforesaid, the writer is of the opinion that the injured third party has recourse in a court of law if the MIB (Malaysia) acts arbitrarily. Her reasons are explained below.

First, if the MIB (Malaysia)'s decision is not made in accordance with the law or principles of natural justice, the injured third party may file an action in court. This is because in matters of law, "the court is the sole arbiter".[253] The principles of natural justice apply not only to decision-making powers conferred by statute, but also by contract. The principles are not applicable only if the contract clearly shows a plain and manifest intention to exclude them.[254] In the writer's views, such intention is not expressed in the 1992 MIB (Malaysia) Agreement.

Secondly, the MIB (Malaysia) is given recognition by s.89 of the RTA 1987 as the body that has entered into:

> an agreement with the Minister of Transport to secure compensation to third party victims of road accidents in cases where such victims are denied compensation by the absence of insurance or of effective insurance.

[253] As per Ajaib Singh J in *Florence Bailes* v. *Dr Ng Jit Leong* [1985] 1 MLJ 374, at 377.
[254] *Florence Bailes* v. *Dr Ng Jit Leong*, *ibid.*, at 377.

Thus, it is submitted that it is the government's policy that a third party who is injured in an accident caused by an uninsured tortfeasor, should be compensated. The MIB (Malaysia) was chosen by the government to carry out the task. Its function is public and consequently, its decisions are subject to judicial review pursuant to s.25(2) of the Courts of Judicature Act 1964 (Act 91, Rev. 1972). Section 25(2) provides that the High Court has additional powers set out in the Schedule. Paragraph 1 of the Schedule provides that the Court has the "power to issue to any person or authority directions, orders, or writs, including writs of the nature of ... *certiorari*, or any others, ... or for any purpose". In Malaysia to-date, *certiorari* has been issued to various bodies and authorities, such as the prison superintendent, Minister of Finance, and the Panel on Takeovers and Mergers, to quash their quasi-judicial and administrative decisions.[255] It has also been issued to the committee of the Kuala Lumpur Stock Exchange, a company limited by guarantee and incorporated under the Companies Act 1965,[256] and a company which was then subjected to the controls under the Securities Industry Act 1973 (Act 112) (Repealed). Even though the MIB (Malaysia) is also a company limited by guarantee and incorporated under the Companies Act 1965, unfortunately it is not subject to any statutory control. It is only given recognition by s.89 of the RTA 1987. However, since the MIB (Malaysia)'s function affects the rights of an injured third party where the tortfeasor is uninsured, the writer submits that the MIB (Malaysia) is a body which is also subject to judicial review under paragraph 1 of the Schedule to the Courts of Judicature Act 1964.

In conclusion, it is submitted that an injured third party has recourse in a court of law if the MIB (Malaysia) acts arbitrarily. This is notwithstanding the fact that he is a stranger to the 1992 MIB (Malaysia) Agreement.

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[255] Jain, M.P., *Administrative Law of Malaysia and Singapore*, (3rd ed., 1997), Malayan Law Journal, Singapore, at 677-683.
[256] *OSK & Partners Sdn* v. *Tengku Noone Aziz and Anor* [1983] 1 MLJ 179.

5.5 Rights of an Injured Third Party Against a Permitter for Breach of Statutory Duty

Section 90(1) of the RTA 1987 requires the user of a vehicle on a public road to be insured against the risks prescribed in s.91(1)(b). The failure to comply is a criminal offence committed by both uninsured user and person who causes or permits ("the permitter") the uninsured to use the vehicle. They are subject to criminal sanctions.[257]

In this Part, the permitter's civil liability for breaching his statutory duty will be studied. The writer will first discuss the principle in *Monk* v. *Warbey and Ors*[258]; secondly, examine the application of the principle in Malaysia; and lastly, analyse whether its application is affected by the 1992 MIB (Malaysia) Agreement.

5.5.1 Principle in *Monk* v. *Warbey*

A person who suffers injury from the non-performance of a statutory duty can bring an action against the person who breaches his statutory duty. Since it is a tort, the plaintiff has to prove first, the defendant owes a statutory duty to a class of persons which includes the plaintiff; secondly, the defendant breaches his statutory duty; and thirdly, as a result of the breach, the plaintiff suffers a loss which is of the type that the legislation intends to prevent.[259]

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[257] The punishment for the offence under s.90(1) of the RTA 1987 is a fine not exceeding RM1,000 or imprisonment for a term not exceeding 3 months or both. The offender is also disqualified from holding or obtaining a driving licence for a period of 12 months from the date of conviction. See s.90(2) of the RTA 1987.
The punishment for the offence under s.143 of the RTA 1988 (UK) is found in the Road Traffic Offenders Act 1988 (UK). See *Halsbury's Statutes of England and Wales*, Vol. 38, (4th ed., 2001 Reissue), Butterworths, London, at 954.

[258] [1935] 1 KB 75.

[259] Dugdale, Anthony M., (*et al.*) (Ed.), *Clerk and Lindsell on Torts*, (18th ed., 2000), Sweet & Maxwell, London, at para. 11-04.

Traditionally, road users were generally not treated as a particular class of persons.[260] However, the Court of Appeal in *Monk* v. *Warbey and Ors*[261] held that an injured third party could sue the permitter for damages if he could prove the following elements. First, the injured third party was a road-user and thus, a member of the class which was protected by the statute.[262] Secondly, the permitter allowed the uninsured tortfeasor to use the vehicle on the road. The permitter's liability is strict.[263] Thirdly, the injured third party was unable to recover the awarded judgment sum from the tortfeasor because he was:[264]

> in such a financial position that nothing (was) obtainable from him, and that nothing (could) be effected by bankruptcy proceedings against him, as, being an uninsured person, there (could) be no recourse against an insurance company.

As succinctly put by Humpreys J in *Daniels* v. *Vaux*:[265]

> Damages to the plaintiff obviously arose from two things: first, from the negligence of the driver of the motor car, and secondly, from the failure to insure, which prevented the plaintiff from recovering the damages which he ought to have done.

Where an uninsured tortfeasor pays the awarded judgment sum to the injured third party promptly,[266] the latter does not suffer any damage from the permitter's breach of statutory duty. Consequently, no damages can be recovered from the permitter even though he is

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[260] According to Williams, Glanville in his article "The Effect of Penal Legislation in the Law of Tort" [1960] 23 *MLR* 233, at 246-247, prior to *Monk* v. *Warbey and Ors*, almost all cases in which the courts held that the injured third parties could maintain civil actions for breach of statutory duty, were related to industrial accidents. *Monk* v. *Warbey* was on a traffic offence. In the other traffic offences cases, such as allowing cattle and sheep to stray on highways, the courts had held that the offences did not give rise to any civil action by the injured third parties against the respective offenders.See also Rogers, W.V.H., *Winfield and Jolowicz on Torts*, (16th ed., 2002), Sweet & Maxwell, London, at 266. .

[261] *Supra*, note 258, at 82.

[262] As per Lord Wright in *McLeod* v. *Buchanan* [1940] 2 All ER 179, at 186.

[263] As per Lord Wright in the House of Lords' case of *McLeod* v. *Buchanan*, *ibid.*, at 186, the "intention to commit a breach of (the now s.143 of the RTA 1988 (UK)) need not be shown".

[264] As per Greer LJ in *Monk* v. *Warbey and Ors*, *supra*, note 258, at 83.

[265] [1938] 2 KB 203, at 208.

[266] In *Martin* v. *Dean and Anor* [1971] 2 QB 208, the court held that the injured third party was entitled to judgments against both driver and permitter because the permitter's breach of statutory duty had caused him to lose his rights to prompt payment of the judgment sum.

convicted of the related criminal offence. Thus, it is not in all circumstances that an injured third party has a cause of action against the permitter.[267]

The principle in *Monk* v. *Warbey*, which was unprecedented, was approved by the House of Lords in *McLeod* v. *Buchanan*.[268] The issue is whether the principle applies in Malaysia. This will be discussed below.

5.5.2 Application of the principle in *Monk* v. *Warbey* in Malaysia

Section 3 of the Civil Law Act 1956 provides, *inter alia*, that the courts in West Malaysia, Sabah and Sarawak shall apply the common law of England and rules of equity as administered in England on 7 April 1956, 1 December 1951 and 12 December 1949 respectively "subject to such qualifications as local circumstances render necessary". The subsequent march by the courts in England since then is not binding on the courts in Malaysia.[269] The case of *Monk* v. *Warbey* was decided in 1935, and therefore its principle "subject to such qualifications as local circumstances render necessary" should apply in Malaysia.

The first Malaysian case to refer to the principle in *Monk* v. *Warbey* is *Tan Kwee Low* v. *Lee Chong and Anor*.[270] In this case, the injured third party sued both the tortfeasor and the owner of the vehicle. The High Court held that the tortfeasor's inability to meet the judgment was a necessary condition for liability under the principle in *Monk* v. *Warbey*. The tortfeasor's inability could not be inferred. There must be evidence to the effect. This

[267] As per Humphreys J in *Daniels* v. *Vaux* [1938] 2 KB 203, at 208, "It would be wrong ... to hold that the plaintiff here can recover damages from the defendant for the admitted breach of her statutory duty irrespective of the question whether he has suffered damage as a result of the breach".
[268] *Supra*, note 262.
[269] As per Lord Russell of Killowen in the Privy Council case of *Lee Kee Choong* v. *Empat Nombor Ekor (NS) Sdn and Ors* [1976] 2 MLJ 93, at 95. See also Lord Scarman in the Privy Council's case of *Jamil bin Harun* v. *Yang Kamsiah and Anor*, *supra*, note 21, at 219.
[270] (1960) 26 MLJ 212.

observation was *obiter*, for the court had earlier held that the vehicle's owner was liable to the injured third party as he was the tortfeasor's principal. Since the insurance policy covered the owner's agent, he did not breach the statutory duty imposed by Regulation 3(1) of the Motor Vehicles Third Party Risks Regulations 1946 (GN 705/1946) (which is a predecessor of s.90(1) of the RTA 1987).

However, following an appeal, the Court of Appeal[271] held that the vehicle's owner had parted with his car unconditionally to a third party who lent it to the tortfeasor. The vehicle's owner "retained neither control nor the right to exercise any control over it".[272] Thus, he was not responsible in law for the tortfeasor's act of negligent driving. It is unfortunate that the injured third party did not sue the person who lent the car to the tortfeasor under the principle in *Monk* v. *Warbey*.

In 1972, the principle in *Monk* v. *Warbey* was mentioned by the Chief Justice of Malaya in the case of *Letchumi and Anor* v. *The Asia Insurance Co Ltd.*[273] In this case, the Federal Court held that the insurer was not liable under s.80(1) of the RTO 1958 (now s.96 of the RTA 1987) to satisfy the judgment obtained against the tortfeasor because the tortfeasor was not an authorised driver. Ong CJ (Malaya) 'advised' the injured third party's estate to claim "against (the permitter) on the principle enunciated in *Monk* v. *Warbey*".[274] *Letchumi* is important because the Federal Court recognised the application of the principle in *Monk* v. *Warbey* in Malaysia.

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[271] *Lee Chong* v. *Tan Kwee Low and Anor* (1961) 27 MLJ 98.
[272] *Ibid.*, at 99.
[273] [1972] 2 MLJ 105, at 107.
[274] *Ibid.* It is doubted that the injured third party's legal representatives took up the advice given since it was noted in the judgment that the permitter was "possibly a man of straw".

5.5.3 Effect of the 1992 MIB (Malaysia) Agreement

The accident in *Letchumi and Anor* v. *The Asia Insurance Co Ltd* referred to in Part 5.5.2,[275] happened on 26 February 1962. The injured third party's estate could not proceed to recover the judgment sum from the MIB (Malaysia) pursuant to the 1968 MIB (Malaysia) Agreement because the Agreement did not apply to a claim which arose from an accident that occurred before 15 January 1968.[276]

The issue is whether the principle in *Monk* v. *Warbey* is applicable in Malaysia in view of the incorporation of the MIB (Malaysia) and the 1992 MIB (Malaysia) Agreement. There is no reported Malaysian case on this issue and therefore, reference has to be made to the English cases. In *Corfield* v. *Groves and Anor*,[277] the court held that the First MIB (UK) Agreement did not affect the application of the principle in *Monk* v. *Warbey*. The injured third party had the option to recover the judgment sum from the MIB (UK) or the permitter. In *Norman* v. *Ali*,[278] although it was not resolved whether the tortfeasor was insured to drive the permitter's car, the Court of Appeal made declarations pertaining to the limitation period for the injured third party's action against the permitter and the liability of the MIB (UK).

Applying the principle in *Corfield*, the writer submits that the incorporation of the MIB (Malaysia) and the 1992 MIB (Malaysia) Agreement do not affect the rights of an injured third party against the permitter. This is supported by Clause 7 of the 1992 MIB (Malaysia) Agreement which provides that the MIB (Malaysia) may require its claimant

[275] *Supra*, at 283.
[276] Clauses 1 and 4 of the 1968 MIB (Malaysia) Agreement.
[277] [1950] 1 All ER 488.
[278] [2000] Lloyd's IR 395.

to sue the permitter. Only if the permitter fails to pay the said sum, will the MIB (Malaysia) make compassionate payments to him.

The next issue is when an injured third party's cause of action against the permitter arises. As a result of Clause 7 of the 1992 Agreement too, there are a few possibilities. An injured third party's cause of action against the permitter may accrue on the date of the accident, or the date he is unable to recover the full judgment sum from the tortfeasor, or the date the MIB (Malaysia) requires him to proceed against the permitter.

In *Norman* v. *Ali*, the Court of Appeal held that the injured third party's cause of action against the permitter of the uninsured use of the vehicle accrued on the date of the accident. This could be due to the nature of the injured third party's claim which fell within the ambit of s.11(1) of the Limitation Act 1980 (UK).[279] There is no equivalent of the said provision in Malaysia. Thus, reference is made to *Corfield* v. *Groves and Anor*[280] which happened before the enactment of the genesis of s.11, *i.e.*, s.2A of the Limitation Act 1975 (UK). In *Corfield*, the court also held that the injured third party's cause of action against the permitter accrued on the date of the accident. This could be because the uninsured tortfeasor "was in such a financial position that nothing was obtainable from him, even by bankruptcy proceedings".[281] It is still important to prove the financial inability of the uninsured user to satisfy the awarded judgment sum.

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[279] Section 11(1) of the Limitation Act 1980 (UK) reads, "This section applies to any action for damages for negligence, nuisance or breach of duty (whether the duty exists by virtue of a contract or of provision made by or under a statute or independently of any contract or any such provision) where the damages claimed by the plaintiff for the negligence, nuisance or breach of duty consist of or include damages in respect of personal injuries to the plaintiff or any other person". The genesis of s.11 was s.2A of the Limitation Act 1975 which came into effect on 1 September 1975. See *Halsbury's Statutes of England*, Vol. 45, (3rd ed., 1976), Butterworths, London, at 847-848.

[280] *Supra*, note 277.

[281] *Ibid.*, at 490.

Therefore, it appears that if an uninsured user is insolvent at the date of the accident, the injured third party has to proceed against both user and permitter within six years from the date of the accident to stop the limitation period from running. It is still uncertain when an injured third party's cause of action against the permitter accrues if the uninsured user becomes insolvent after the accident. It is submitted that this uncertainty is detrimental to the injured third party. His rights may be affected as in the case of *Norman* v. *Ali.* In *Norman*, the injured third party could not recover the damages from the permitter because his claim was time barred.[282] The injured third party could not recover the damages from the MIB (UK) too, because he did not fulfil MIB (UK)'s requirement to recover the same from the permitter. It was unfortunate that the injured third party in this case was required by the MIB (UK) to take steps to sue the permitter "a little over a month before the expiration of the (limitation) period".[283] The injured third party failed to fulfil the MIB (UK)'s requirement within the short period, possibly due to his solicitor's lack of experience.[284] The loser was the injured third party.

5.6 Rights of the Authorised Driver in Relation to the Insurer

In Malaysia, most, if not all, motor policies cover the liabilities of the policy owner and any person who uses the vehicle with the policy owner's permission ("an authorised driver") towards a third party who is injured in an accident arising from the use of the vehicle on a road. Although the authorised driver is a third party to the motor policy, Part VI of the RTA 1987 confers on him the right to sue the insurer and imposes on him the obligation to indemnify the insurer under certain circumstances.

[282] According to the court, his cause of action against the permitter accrued when the accident occurred.
[283] *Supra*, note 278, at 402.
[284] *Ibid.*, at 402.

5.6.1 Right to indemnity

Section 91(3) of the RTA 1987[285] provides that the insurer is liable to indemnify an authorised driver "in respect of any liability which the policy purports to cover". It is immaterial that the authorised driver's liability does not arise from a compulsory third party risk so long as the policy satisfies s.91(1). This was decided by the House of Lords in *Digby* v. *General Accident Fire and Life Assurance Corporation Limited.*[286] In this case, the policy owner was a passenger in the vehicle driven by her authorised driver at the time of the accident. She obtained judgment against her driver. The House of Lords held that the insurer must indemnify the driver pursuant to the policy as required by s.36(4) of the RTA 1930 (UK) (now s.148(7) of the RTA 1988 (UK) which is *in pari materia* with s.91(3) of the RTA 1987). This is notwithstanding that the liability arose from a non-compulsory third party risk.[287] In conclusion, s.91(3) confers on an authorised driver the right to sue the insurer even though he does not enjoy contractual nexus with the insurer. It is a statutory exception to the doctrine of privity.[288]

However, unlike an injured third party, an authorised driver has no better rights against the insurer than the policy owner himself.[289] The rights of an authorised driver against the insurer are governed by the terms of the contract between the insurer and the policy owner. His rights are affected if the policy owner breaches a warranty.

[285] The corresponding section in the RTA 1988 (UK) is s.148(7).
[286] *Supra*, note 2.
[287] At that point in time, an insured's liability to his passengers was not a compulsory third party risk in England. It was included only in 1972. See the discussion in Pt. 5.2.1.2, *supra*, at 217.
[288] In contrast, Birds and Hird, *supra*, note 90, at 379 are of the view that the authorised driver is "by statute a party to the contract". It is submitted that both lead to the same result. The authorised driver has direct recourse against the insurer.
[289] *Austin* v. *Zurich General Accident and Liability Insurance Co Ltd* [1945] KB 250.

5.6.2 Obligation to reimburse

Where the insurer has paid the judgment sum to the injured third party pursuant to s.95 or s.96(1) of the RTA 1987 despite a contractual limitation or condition, the insured is liable to reimburse the insurer.[290] It is immaterial whether the insured is the policy owner or his authorised driver, for the contractual limitations or conditions are effective against both policy owner and his authorised driver. Sections 95 and s.96(1) are, in fact, statutory exceptions to the doctrine of privity.[291]

Section 94 also provides that if an insurer has to satisfy the judgment because of the provision, it can claim reimbursement[292] from the insured in accordance with the terms in the policy.[293] However, it is uncertain whether s.94 is an exception to the doctrine of privity because it merely confirms the validity of a term in the policy that requires the insured to reimburse the insurer. It is uncertain whether the term in the policy is effective against the authorised driver. If the legislature intended the proviso to s.94 to have a similar effect as the provisos to s.95 and s.96(1), it would have worded the former in a similar language as the latter. Thus, it appears that the insurer may claim reimbursement from the policy owner, but not the authorised driver if the policy gives it a right to do so.

It must also be stressed that following the Federal Court's decision in *Lee Chau* v. *Public Insurance Co Ltd*,[294] the authorised driver is not liable to reimburse the insurer if the

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[290] Provisos to s.95 and s.96(4). See the discussions in Pt. 5.3.1.1(d), *supra*, at 246-253. See also Viscount Dilhorne in the Privy Council's decision in *New India Assurance Co Ltd* v. *Yeo Beng Chow* [1972] 1 MLJ 231, at 232.

[291] There are two limbs in the doctrine of privity. First, a third party cannot sue even though he is conferred benefits under the contract. Secondly, he cannot be sued even though obligations are imposed on him. In other words, the benefits and obligations are not enforceable by or against him. Sections 95 and 96(6) are statutory exceptions to the second limb of the doctrine.

[292] However, the insurer will not be reimbursed for its costs. See *New India Assurance Co Ltd* v. *Yeo Beng Chow*, *supra*, note 290, at 232.

[293] Proviso to s.94. The insurer cannot claim from the insured if the policy does not give it the right to do so. See *Gan Chwee Leong* v. *New India Assurance Co Ltd* [1968] 1 MLJ 196.

[294] *Supra*, note 115.

injured third party is paid before any judgment is awarded by the court. Such payment is deemed a voluntary payment and not pursuant to a legal liability. To overcome the principle in *Lee Chau*, the insurer may resort to any of the following practices. First, the policy may provide that the insurer is empowered to make a compromise or out-of-court settlement with an injured third party and claim reimbursement from the policy owner.[295] Secondly, the insurer may require the injured third party and the insured to enter into a consent judgment before paying the agreed damages to the injured third party.[296] Thirdly, the insurer may obtain an express undertaking from the insured to reimburse it before it pays the injured third party.[297] The effectiveness of the third method is uncertain where the insured is an authorised driver. He may refuse to co-operate with the insurer since he has to reimburse the insurer pursuant to s.96(4). Moreover, he is not contractually obliged to co-operate with the insurer.

5.7 Rights of the Hospital that Treated the Injured Third Party Against the Insurer

Section 91(2)(a) of the RTA 1987 provides that a hospital which gives emergency medical treatment to an injured third party can recover the unpaid expenses incurred by it from the tortfeasor's insurer.[298] Even where the motor policy does not cover the injured third party's treatment costs, the hospital has direct legal recourse against the insurer. However, s.91(2)(a) places three conditions on the rights of the hospital.

[295] Balan, *supra*, note 122, at 109. However, due to the doctrine of privity, an insurer cannot claim reimbursement from the authorised driver who is not the policy owner.
[296] *Chong Kok Hwa* v. *Taisho Marine & Fire Insurance Co Ltd* [1977] 1 MLJ 244.
[297] *Gan Chwee Leong* v. *New India Assurance Co Ltd*, *supra*, note 293, at 198.
[298] The corresponding section in the UK is s.157 of the RTA 1988 (UK).

First, the motor policy must fulfil s.91(1).[299] Secondly, the insurer is liable to the hospital only if the insurer knew of the treatment given to the injured third party before it paid the injured third party pursuant to a motor policy. Thirdly, the maximum amount of the insurer's statutory liability is RM400 if the injured third party received in-patient treatment and RM40 if he received out-patient treatment. As a result, even where the policy expressly covers an injured third party's treatment costs in a hospital, the hospital has no recourse against the insurer for payment beyond the prescribed limit.[300]

The application of s.36(2) of the RTA 1930 (UK) which was the genesis of s.91(2)(a), was discussed in *Barnet Group Hospital Management Committee* v. *Eagle Star Insurance Co Ltd.*[301] In this case, the owner-driver of a vehicle held a motor policy which encompassed the compulsory motor risks as well as his liability to passengers.[302] A passenger was injured in an accident and sought emergency treatment from the plaintiff hospital. The insurer paid damages to the passenger for his injuries pursuant to the motor policy. Relying on s.36(2) of the RTA 1930 (UK), the plaintiff hospital sued the insurer for the unpaid expenses incurred by it. The court held that the policy was issued under Part II of the RTA 1930 (UK) (now Part VI of the RTA 1988 (UK), which is the UK's corresponding Part IV of the RTA 1987) even though it included non-compulsory third party risks. Therefore, payments made to a passenger were payments made under the policy issued under Part II of the Act. However, the hospital could not recover from the insurer the expenses incurred because the insurer had paid the passenger before the insurer was informed of the treatment given to the passenger.

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[299] *Barnet Group Hospital Management Committee* v. *Eagle Star Insurance Co Ltd* [1960] 1 QB 107.

[300] In the UK, the hospital may recover the contractual amount from the insurer if the motor policy is subject to the CRTP Act 1999 (UK). The hospital's rights against the insurer for the payment in excess of the prescribed limit are then governed by the terms of the contract between the insurer and the policy owner.

[301] *Supra*, note 299.

[302] The compulsory motor scheme was then governed by the RTA 1930 (UK). Liability to passengers was not included in the scheme.

It is submitted that the provision in s.91(2)(a) of the Malaysian statute is archaic for the following reasons. First, the maximum liability of the insurer has not been revised since 1958. It may be insufficient where the injured third party suffers severe injuries. It is also not cost effective for the hospital to enforce its statutory rights against the insurer. Secondly, the word "hospital" is defined in s.91(2)(b) as "an institution (not being an institution carried on for profit) which provides medical or surgical treatment for in-patients". This means that the rights conferred by s.91(2)(a) on a hospital are not extended to a private hospital or clinic that gives emergency treatment to an injured third party. Today, many injured persons seek treatments at private hospitals and the writer would urge the authorities to reconsider and amend s.91(2)(a) and the definition of "hospital".

5.8 Rights of the Third Parties Against the Insurance Guarantee Scheme Fund

In Part 2.4.2.3,[303] the writer dealt with Part XIV of the Insurance Act 1996 (Act 553) which provides for the establishment of an Insurance Guarantee Scheme Fund ("the IGSF"). The funds, which are contributed by the insurers and managed by Bank Negara Malaysia ("BNM"), may be utilised to meet the liabilities of an insurer that is wound-up on the ground of insolvency, to a person described in s.178(1)(c) of the Insurance Act 1996. The predecessor of the IGSF was the insurance guarantee scheme fund which was established pursuant to s.12A of the repealed Insurance Act 1963 (Act 89, Rev. 1972)

[303] *Supra*, at 58-67.

("the original IGSF").[304] Its original purpose was to protect an injured third party and a workman.[305]

The writer's discussion in Part 2.4.2.3[306] on the rights of a third party when the insurer is wound-up on the ground of insolvency is also relevant and applicable where the policy is a motor policy. Owing to the purpose of the compulsory motor insurance scheme, special mention should be made to the maximum amount recoverable by a third party from the IGSF and the policy's automatic termination when the insurer is wound-up. These were discussed in Parts 2.4.2.3(a)[307] and (d)[308] respectively and will not be repeated here. This Part analyses the issue whether the third parties to a motor policy are qualified to claim compensation from the IGSF.

The insurer in a motor policy is, invariably, required to indemnify the insured for his liability towards an injured third party. The issue is whether the injured third party is a qualified claimant against the IGSF. Under the IGSF scheme, only the owner of a policy issued by an insurer which is wound-up on the ground of insolvency, and persons entitled through him can claim compensation from the IGSF.[309]

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[304] Section 12A of the Insurance Act 1963 came into effect on 15 July 1977. When the Insurance Act 1996 came into force on 1 January 1997, the original IGSF ceased to exist. Its credit balance was transferred into the IGSF pursuant to s.223 of the Insurance Act 1996.

[305] This could be seen from the first regulations pertaining to the original IGSF which supplemented s.12A of the Insurance Act 1963, namely, the Insurance Guarantee Scheme (General Insurance) Fund Regulations 1978 (PU(A) 305/1978). Regulation 3 provided that the moneys from the fund could be withdrawn to meet the liabilities of an insolvent insurer arising out of a compulsory motor policy or workmen's compensation insurance policy.
However, it was subsequently extended to cover "any other proper claimants" as defined in s.44(5). They are persons who claim "to be entitled to the sum in question as executor of the deceased, or who claims to be entitled to that sum (whether for his own benefit or not) and is the widower, widow, parent, child, brother, sister, nephew or niece of the deceased".

[306] *Supra*, at 58-67.

[307] *Supra*, at 63-65.

[308] *Supra*, at 67.

[309] Section 178(1)(c) of the Insurance Act 1996.

The phrase "the policy owner" is defined to include the person to whom moneys are due and payable under a policy. Thus, it does not cover the injured third party. If an injured third party is not deemed to be a policy owner by s.2 of the Insurance Act 1996, the next issue is whether he is a person entitled through the policy owner to enjoy direct recourse against the IGSF. As discussed in Part 2.4.2.3(a),[310] there are two possible interpretations to the phrase "person entitled through him (the policy owner)". It could mean that the IGSF is liable to compensate the claimant only if the wound-up insurer is contractually liable to him. Alternatively, it could mean that the IGSF is liable if the wound-up insurer is either contractually or statutorily liable to the claimant.

If the first possible interpretation applies, there would be no difference between the phrases "the policy owner" and "the person entitled through him". The latter phrase is then superfluous. Further, if the phrase "person entitled through him (the policy owner)" is a person to whom the wound-up insurer is contractually liable, it appears that the purpose of the original IGSF is defeated. The IGSF is not liable if the policy issued by the wound-up insurer is void or cancelled pursuant to the terms of the policy. It appears to be immaterial whether the insurer complies with the procedures laid down in s.96(2) and (3) of the RTA 1987[311] to avoid or cancel the policy. It also appears that the IGSF will not be liable where the policy owner has breached any warranty, even a warranty which is listed in s.95 of the RTA 1987. As discussed in Part 5.3.1.1(d),[312] a breach of such warranty should not have any effect against the injured third party.

Admittedly, the first possible interpretation is supported by r.3A of the Insurance Guarantee Scheme (General Insurance) Fund Regulations 1990 (PU(A) 8/1990) ("the

[310] *Supra*, at 60.
[311] See Pt. 5.3.1.1(d), *supra*, at 246-247.
[312] *Supra*, at 252-253.

IGSF Regulations"). Regulation 3A provides that the moneys from the IGSF may be withdrawn to meet the liabilities of a wound-up insurer arising from or relating to any *valid* policy.[313] However, the writer submits that this Regulation can be challenged. Pursuant to s.214(2)(a) of the Insurance Act 1996, r.3A is deemed to be made under s.202. Section 202 provides, *inter alia*, that BNM or the Minister of Finance may make regulations for carrying into effect any provision of the Act. As discussed, s.178(1)(c) authorises BNM to utilise the moneys in the IGSF "to meet the liabilities of an insolvent insurer to a policy owner or person entitled through him". However, r.3A is more restrictive, for it requires the policy to be valid. This is contrary to the statutory requirements found in s.94, s.95 and s.97(3) of the RTA 1987[314] that the insurer is liable to the injured third party even though the insurer has avoided or cancelled the policy pursuant to the terms of the policy. Thus, the writer submits that r.3A may be *ultra vires* s.202 of the Insurance Act 1996.[315]

As discussed in Part 2.4.2.3(a),[316] it is the writer's opinion that the second possible interpretation is the correct one. It is not superfluous, for it covers a person who is conferred statutory rights to claim the policy moneys from the insurer, even though such rights are not found in the policy. It also complies with the purpose of the compulsory motor insurance scheme and the establishment of the IGSF. A third party, particularly an injured third party, should not be deprived of the rights conferred on him by Part IV of the RTA 1987, especially when the insurer is wound-up on the ground of insolvency. The purpose of the establishment of the IGSF requires it to meet the insolvent insurer's statutory liability to an injured third party.

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[313] Regulation 3A came into effect on 13 July 1994 (PU(A) 278/1994).
[314] See the discussion in Pt. 5.3.1.1(d), *supra*, at 249-253.
[315] See *Port Swettenham Authority* v. *TW WU and Company (M) Sdn Bhd* [1978] 2 MLJ 137.
[316] *Supra*, at 60.

If the injured third party is qualified to claim compensation against the IGSF, it follows that the authorised driver and the hospital that treated the injured third party should also be entitled to do likewise.

5.9 Concluding Remarks

It is disheartening indeed that the authorities have not fully comprehended the purpose of a compulsory motor insurance scheme. Instead of marching forward to plug the loopholes in the scheme, the legislature has taken a few steps backwards and compromised on the protection conferred on a third party by revising some of the relevant provisions in the RTA 1987.

The term "road" was revised. Unlike the position under the RTO 1958, it appears that the rights conferred by Part IV of the RTA 1987 are not available to a third party who is injured in an accident caused by or arising out of the use of a vehicle on a road which is accessible to the public but maintained and kept by private persons or bodies. This, the writer submits, is not in accordance with the purpose of the compulsory motor insurance scheme which is to protect third parties against risks arising out of the use of motor vehicles.

Further, there is no restriction on the grounds available to an insurer to avoid a policy and the time frame within which the declaration proceedings can be brought. The court declaration is effective against the injured third party if the following conditions are fulfilled. First, the declaration is obtained before the insurer's liability is incurred. Secondly, if the insurer commences its declaration proceedings after the injured third

party has commenced his action against the insured, the insurer must notify the injured third party before or within seven days after the commencement of its proceedings.

In addition, the rights of an injured third party when the insurer becomes insolvent were eroded by the changes in the IGSF scheme. Currently, there is much uncertainty whether the rights conferred by Part IV of the RTA 1987 on an injured third party against an insurer are extended against the IGSF when the insurer is wound-up on the ground of insolvency.

There are also some archaic statutory provisions in the RTA 1987 pertaining to the compulsory motor insurance scheme which may affect its effectiveness. The minimum amounts of deposit and security in lieu of insurance policy, and the amount of the insurer's statutory liability to the hospital have remained unchanged since 1937 and 1958 respectively. The legislature should increase the said amounts in accordance with the current value of money.

The legislature should also enhance the compulsory motor insurance scheme to cover an insured's liability to his passengers. In addition, under the UK scheme, an insurer is required to satisfy the judgment obtained against any tortfeasor who was using the insured vehicle lawfully or unlawfully when the accident happened. An insurer is also required to satisfy a judgment in respect of damage to a third party's property. The writer submits that the Malaysian legislature should review the current compulsory motor insurance scheme applicable in Malaysia and widen its scope to include the above risks. The legislature should also consider clarifying the scheme's coverage to include damages for a third party's mental injury which is not caused by a physical injury or does not cause adverse physical symptoms.

Apart from the above, the legislature should review the importance placed on the delivery of the certificate of insurance to the policy owner. As an insurer's risk commences upon the issuance of the cover note, there is no reason for the delivery of the certificate of insurance to be made a condition precedent for the insurer's liability.

There is also uncertainty on the rights of an injured third party in two situations, namely when the insured becomes insolvent, and when the tortfeasor is uninsured. Section 100 of the RTA 1987 specifically preserves the rights of the third party conferred by s.97 to s.99 when the insured is or becomes insolvent. Unfortunately, it is silent on the other rights conferred by Part IV of the Act. The writer has proposed in Part 5.3.1.2[317] that the legislature should amend s.100. To further protect an injured third party where the insured becomes insolvent, the writer proposes that the latter's rights against the insurer should be transferred to the injured third party when the insured commits an act of insolvency, and not after he has established the insolvent insured's liability. The latter is the current position under the RTA 1987.

With regard to the position of the injured third party where the tortfeasor is uninsured, it is uncertain whether the principle in *Monk* v. *Warbey* applies in Malaysia. And even if the principle applies, there is uncertainty when the injured third party's cause of action against the person who permitted the tortfeasor to use the vehicle on the road, accrues.

Further, compared to the direction taken by the Motor Insurers' Bureaus in other countries to enhance the protection conferred on an injured third party, it is of much regret that the MIB (Malaysia) appears to have reneged on its very purpose of incorporation when it entered into the 1992 MIB (Malaysia) Agreement with the Minister

[317] *Supra*, at 254-255.

of Transport. The writer calls on the authority to review the Agreement to revise the provisions which are prejudicial to an injured third party. It should also consider extending the protection to a victim of a hit-and-run accident.

In conclusion, the writer is of the view that much could still be done to protect and improve the rights of a third party in motor insurance law. Chapter 7 of this thesis will propose further statutory reforms. The role of the MIB (Malaysia) will also be reviewed. All these, if adopted, should lead to the implementation of the aim behind the compulsory motor insurance scheme, that is, to enhance the rights conferred on a third party.

The next Chapter will analyse the rights of third parties in two other compulsory insurance schemes, namely, the solicitors' professional liability and workmen's compensation insurance schemes. The policies issued under the respective schemes are group insurance policies.

CHAPTER SIX

RIGHTS OF THIRD PARTIES IN GROUP INSURANCE

6.1 Introduction

A group insurance is a contract between the insurer and the group policy owner, whereby the insurer insures or agrees to insure a certain group of persons. The document evidencing the contract is generally known as 'the master policy' or 'the group policy'. A group policy owner may effect the contract to benefit itself or to benefit the respective insured persons.

This Chapter deals with the position of the insured person and his claimant where the master policy is effected to benefit them. In such cases, there is a problem of privity because the contracting parties are the group policy owner and the insurer. To avoid injustice, the courts have resorted to agency and trust as exceptions. These exceptions will be examined in Part 6.2. In Malaysia, the legislature has enacted statutory provisions pertaining to four types of group insurance, namely, a group life policy, a group personal accident policy, a solicitors' professional policy and a workmen's compensation policy. The provisions will be analysed in Parts 6.3, 6.4 and 6.5.

6.2 Application of the Doctrine of Privity in Relation to a Group Insurance

This Part discusses the nature of a group insurance. Generally, the insured person is a stranger to the insurance contract, and unless one of the exceptions to the doctrine of privity applies, he cannot sue the insurer at common law. Thus, a study will be

conducted on the exceptions which apply to an insurance contract in a group insurance. This Part also examines the insured person's rights against the group policy owner where the insurer has paid the policy moneys to the latter.

6.2.1 Agreement to insure or contract of insurance

A preliminary issue is whether the master policy is a contract of insurance. Much depends on its terms. The master policy is not a contract of insurance if the insurer agrees with the group policy owner that it will insure a certain group of persons as and when they apply for coverage.[1] An example is the master policy taken out in the name of the Malaysian Bar Council with regard to the insurance coverage for the professional liabilities of practicing advocates and solicitors. An advocate and solicitor who wants to be insured must apply for coverage. The characteristics of the approved solicitors' professional policy scheme will be discussed in Part 6.4.[2]

The master policy is a contract of insurance if the insurer automatically insures the persons described in the policy. It is immaterial that the premium is payable by the group policy owner at such times as may be agreed by the group policy owner and insurer, and not at the inception of the policy.[3] One example where the master policy constitutes the insurance contract is the workmen's compensation policy which is effected pursuant to the Workmen's Compensation Act 1952 (Act 273, Rev. 1982).

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[1] *Re Lawton* [1945] 4 DLR 8, at 33-38; and *Swain and Anor* v. *The Law Society* [1983] 1 AC 598, at 611-612. A person may be attracted to apply for coverage under a group insurance by its low premium. The competitive rate is due to the lower costs incurred by the insurer arising from lower administrative expenses and sales commissions. The insurer ploughs back the savings in the form of lower premium. Another attractive feature of a group insurance is that the premium is predetermined. The insurer does not fix the premium for each and every insured person individually based on his insurability. Instead, the insurer assesses the average risks of the group when fixing the premium.

[2] *Infra*, at 326-345.

[3] It is immaterial that the quantum of the premium is not known at the time of the insurance contract, so long as the mechanism to determine the premium is in place. See Merkin, Robert, *Colinvaux and Merkin's Insurance Contract Law*, (Loose-leaf) (Release 4, August 2002), Sweet & Maxwell, London, at para. A-0200.

The writer will discuss the salient terms pertaining to third party rights in the policy in Part 6.5.[4]

6.2.2 Contracting parties

Due to the doctrine of privity, it is important to identify the parties to the contract of insurance in a group insurance. The issue is perplexing where the insurer has issued a certificate of insurance or participation to each of the insured persons.

In *Re Lawton*[5] and *Re Harris*,[6] the Canadian courts held that the certificate of insurance issued to an insured person under a group policy evidenced a contract of insurance between him and the insurer. The contracting parties to the insurance contract were the insurer and the insured person. Without referring to the Canadian cases, Lord Brightman in *Swain and Anor* v. *The Law Society*[7] held the same view.

However, Claude H. Denbow[8] is of the view that there is no contractual nexus between the insurer and the insured person unless the circumstances surrounding the transaction dictate otherwise. He is of the opinion that the case of *Re Harris*:

> must be treated as one on its own facts, devoid of any general principle since under the express terms of the group policy the insurance company undertook an obligation to pay to the beneficiaries designated by the employees the amounts for which the employees were insured.

Denbow reasons that if it is a general principle that the insured person has a direct contractual link with the insurer, there is no need for the legislature to enact s.178 of

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[4] *Infra*, at 353-367.
[5] *Supra*, note 1, at 37-38.
[6] [1939] 1 DLR 495, at 498-499
[7] *Supra*, note 1, at 616. However, it must be noted that according to Lord Diplock in *Swain*, at 611-612, the source of the rights and duties imposed on the insurer and the insured solicitor "is not contract; it is statute".
[8] Denbow, Claude H., *Life Insurance Law in Commonwealth Caribbean*, (1984), Butterworths, London, at 112. See also Norwood, David and John P. Weir, *Norwood on Life Insurance Law in Canada*, (2nd ed., 1993), Carswell, Toronto, at 142-143.

the Revised Statutes of Ontario 1980 (c.218) (Canada) to confer enforceable rights on an insured person of a master policy.

It is submitted that following Denbow's reasoning, it may be argued that the general principle in Malaysia is that the insured person in a group insurance is a third party to the insurance contract. It is probable that it was for this reason that the Malaysian legislature enacted s.186(3) and (4) of the Insurance Act 1996 (Act 553) to confer enforceable rights on an insured person where the group policy owner has no insurable interest in the insured person's life. The rights of an insured person under s.186(3) and (4) will be analysed in Part 6.3.[9]

6.2.3 Exceptions to the doctrine of privity

Since the insured person in a group insurance is a third party to the insurance contract, he cannot sue the insurer unless he proves one of the exceptions to the doctrine of privity. It is immaterial that the insurance contract is effected for his benefit.[10] This Part examines the common law exceptions to the doctrine which apply to an insurance contract in a group insurance. They are first, when the group policy owner effects the insurance contract as the agent for the insured person or insurer; and secondly, when the group policy owner or insurer effects the insurance contract as the insured person's trustee. The statutory exceptions in Malaysia will be dealt with in Parts 6.3, 6.4 and 6.5 of this Chapter.

[9] *Infra*, at 312-326.
[10] However, the position in the United Kingdom had changed with the enactment of the Contracts (Rights of Third Parties) Act 1999.

6.2.3.1 Group policy owner as the insured person's agent

Where the group policy owner effects the insurance contract on behalf of the insured person, it may be argued that the insured person is the principal and the group policy owner is his agent. Thus, it may be argued that the actual parties to the contract are the insured person and the insurer. An insured person's claim that the group policy owner is his agent is stronger when his participation in the group insurance is subject to the insurer's acceptance of his application and payment of the premium. This is because no person will apply for insurance coverage or pay its premium if he is merely a stranger to the contract.

On the other hand, an insured person who did not apply to be included in the insurance coverage, contribute towards its premium, or give any consideration for the insurance will have difficulty in establishing his claim that the group policy owner effected the insurance as his agent. Nevertheless, if it is proven, he can still enforce the contract, for s.2(d) of the Contracts Act 1950 (Act 136, Rev. 1974) recognises that consideration may move from a person other than the promisee.

The position in England is different. In England, a person who did not give any consideration for a promise cannot enforce it.[11] Even if the insured person proves that the group policy owner is his agent, he cannot enforce the insurance contract unless he applied for the insurance, paid for it, gave some benefit to the insurer or suffered some detriment from the transaction. Thus, if the insured person did not give any consideration for the insurance, and the contract is subject to the Contracts (Rights of

[11] Beatson J., *Anson's Law of Contract*, (28th ed., 2002), Oxford University Press, Oxford, at 88-89. See also the definition for "consideration" that was given by Lush LJ in *Currie and Ors* v. *Misa* (1875) LR 10 Ex 153, at 162:

> "A valuable consideration in the sense of the law, may consist either in some right, interest, profit or benefit accruing to one party, or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other".

Third Parties) Act 1999 (UK), he should attempt to proceed under the Act. This is because the Act allows a third party to enforce a contractual benefit conferred on him even though he did not give any consideration for it.

6.2.3.2 Group policy owner as the insurer's agent

Another exception to the doctrine of privity is where the group policy owner is the insurer's agent. The agency contract is evidenced by the master policy between the group policy owner and the insurer, whereas the insurance contract between the insurer and the insured person is evidenced by the certificate of insurance issued by the insurer to the insured person. If there is no certificate of insurance, then the insurance contract is by conduct and its terms are found in the master policy.[12]

It is a question of fact whether this agency argument applies.[13] The writer submits that the argument is stronger where the group policy owner administers the policy and performs such tasks as enrolling the insured persons, reporting the details of the insured persons to the insurer and collecting the premiums from the insured persons. Once it is proven that the group policy owner is actually the insurer's agent, the insured person has recourse against the insurer. He is also protected from any mistake and miscommunication made by the group policy owner[14] because any knowledge acquired by the group policy owner is imputed to the insurer. Any information communicated by the insured person to the group policy owner is also deemed communicated to the insurer. Further, any mistake made by the group policy owner with regard to any matters leading to the inception of the insurance contract is deemed made by the

[12] An insurance contract may exist without writing of any kind. See Clarke, Malcolm A., *Law of Insurance Contracts*, (Loose-leaf) (Service Issue No 3, March, 2002), LLP, London, at para. 1-1A. See also the definition for "policy" in s.2 of the Insurance Act 1996.
[13] Denbow, *supra*, note 8, at 113-115.
[14] Section 151 of the Insurance Act 1996. See also Poh, Chu Chai, *Principles of Insurance Law*, (5th ed., 2000), Butterworths Asia, Singapore, at 457.

insurer. In England, the insured person will not benefit from this agency argument unless he has given consideration for his participation in the insurance contract.[15]

6.2.3.3 Group policy owner as the insured person's trustee

Where the group policy owner incepts the insurance contract for the insured person's benefit, the insured person may attempt to argue that a trust is actually created in his favour. Nevertheless, the court will uphold a trust only if the group policy owner's declaration of its intention to create a trust is clear and unequivocal. It is insufficient if the group policy owner merely incepts the policy for the benefit[16] or on behalf[17] of the insured person. In this connection, the writer will discuss two English Court of Appeal cases, *Bowskill* v. *Dawson and Anor (No. 2)*[18] and *Green* v. *Russell*,[19] and one local case, *GR Nair and Anor* v. *Eastern Mining and Metals Company Sdn Bhd*,[20] to show that it is a question of fact whether the group policy owner effects the policy as the insured person's trustee.

In *Bowskill* v. *Dawson and Anor (No. 2)*,[21] the trustees of a trust fund established by an employer for its employees, effected a master policy. The trust deed recited that the scheme was to provide benefits for an employee's dependants if the employee died whilst in the company's employment. An employee was killed. The trustee, upon receipt of the sum of £3,300 from the insurer, remitted the moneys to the deceased employee's personal representatives. The issue before the court was whether the

[15] See Pt. 6.2.3.1, *supra*, at 303-304.
[16] Compare *Bowskill* v. *Dawson and Anor (No 2)* [1955] 1 QB 13 with *Green* v. *Russell* [1959] 2 QB 226. The two cases will be discussed shortly. See also the Singapore Court of Appeal's decision in *Intergraph Systems South East Asia Pte Ltd* v. *Zhang Yiguang (suing by the committee and estate of his person, Tong Wen Li)* [2005] 1 SLR 255, at 262-265.
[17] *Swain and Anor* v. *The Law Society*, *supra*, note 1, at 615-618.
[18] *Supra*, note 16.
[19] [1959] 1 QB 28 and [1959] 2 QB 226 (Court of Appeal)
[20] [1974] 1 MLJ 176.
[21] *Supra*, note 16.

moneys were paid by the trustees under the trust deed. The Court of Appeal held that the trustees effected the insurance as the employee's trustees. On the employee's death, the trustees were under an obligation to pay the moneys received from the insurer to the deceased's personal representatives. Romer LJ held that although:[22]

> the (employer) may in certain events terminate or reduce or suspend its payments and contributions to the fund, in which case the trustees are either to dissolve the fund or modify the scheme as therein prescribed, ... however, it appears to me that for all practical purposes the members may be regarded as beneficiaries under a voluntary trust (albeit a conditional revocable one), established by (the employer) for their benefit. The frequent references in the clauses which I have cited to the "claims" and "rights" and entitlement of the members or their legal personal representatives permit, I think, of no other conclusion. Certain it is that they are the only persons having beneficial interests in the fund, for the (employer), by the trust deed, deliberately excluded itself from any participation therein, either present or future, and the legal owners of the fund (the trustees cum group owners) are bare trustees to serve the purpose of the trust and have no equitable interest in the fund.

Additionally, Romer LJ found that:[23]

> Having regard, then, to the terms of the trust deed and to the exposition of the employers' intention in their booklet, it is clear, in my opinion, that the members of the fund and their personal representatives had more than mere expectancies, dependent upon the goodwill of the employers, in relation to their life assurance benefits. In my judgement they had rights which the courts would recognise and enforce; and although those rights were conferred upon them by the scheme itself they were such as to entitle them as cestuis que trust to call upon the trustees to perform the trusts of the deed under which they benefited and to seek the intervention of the court if need arose. It follows that if the trustees had upon the (insured employee)'s death refused to claim from the insurance company the amount due under the policy and pay the sum over to the (insured employee's personal representatives) they could have applied to the court ... for an order upon the trustees to do so. Indeed, it may well be that, had the (insurer) refused to pay and the trustees declined to sue, the (insured employee's personal representatives) could have sued the company adding the trustees as defendants to the proceedings....
>
> .... (The) beneficiaries under a trust are more usually volunteers than not; but in fact it seems to me that the members of the fund did contribute indirectly to the scheme.... (A) proportion of the company's sales income is .. devoted to the scheme which otherwise might have been applied to paying higher wages.

It is also to be noted that the court found that the benefits under the scheme formed part of the employee's contract of service. Thus, if the trustees failed to remit the proceeds to the deceased employee's estate, his "legal representatives ... could presumably sue the employers for damages".[24]

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[22] *Bowskill* v. *Dawson and Anor (No. 2)*, *supra*, note 16, at 26-27.
[23] *Ibid.*, at 28-29.
[24] *Ibid.*, at 27.

It is submitted that in *Bowskill*, the creation of a trust was upheld due to its peculiar facts. The policy was effected, not by the employer, but by the trustees of a trust created by the employer. The trust deed expressly provided that the trust funds were for the benefit of an employee's dependants in the event of the employee's premature death. The scheme was not only made known to the employee but also formed part of the employee's contract of service. He "had more than mere expectancies … in relation to (his) life assurance benefits" which "the courts would recognise and enforce".[25]

In a subsequent case, *Green* v. *Russell*,[26] the court distinguished the facts in the case from those of *Bowskill* v. *Dawson and Anor (No. 2)* and held that no trust was created by the employer when he effected a master policy on the lives of his employees. This is notwithstanding that the policy recited the employer's "desire" to benefit his employees.

The facts in *Green* v. *Russell* differed from *Bowskill* v. *Dawson and Anor (No. 2)* in the following aspects. First, in *Green* v. *Russell,* the contract of service did not include any provision with regard to the policy. Secondly, there was nothing to show that the employer undertook an obligation to maintain or renew the policy. Thirdly, condition 5 of the policy in *Green* v. *Russell* provided that:[27]

> the (insurer) shall be entitled to treat the (employer) as the absolute owner of (the) policy and shall not be bound to recognise any equitable or other claim to or interest in the policy and the receipt of the (employer) alone shall be an effectual discharge.

[25] *Ibid.*, at 28.
[26] [1959] 2 QB 226.
[27] *Ibid.*, at 238.

Fourthly, the recital to the policy in *Green* v. *Russell* was part of a printed form and the language was that of the insurer rather than that of the employer.[28]

In *Green* v. *Russell*, the Court of Appeal held that the language in the policy was insufficient to justify the claim that the employer was a trustee of the sums payable under the policy. Romer LJ, who also sat in the Court of Appeal for this case, quoted the definition of trust from page 3 of the 10th edition of *Underhill's Law of Trusts and Trustees*,[29] and held that a trusteeship did not arise just because a person intended to provide benefits for another person and paid for them. He could at any time surrender the policy and receive back a proportionate part of the premium which he had paid. Further, he was not under any obligation to renew the policy each year.[30]

In the local case of *GR Nair and Anor* v. *Eastern Mining and Metals Company Sdn Bhd*,[31] the group policy owner effected a group personal accident policy on the lives and disabilities of its employees. It paid the premium. The court held that there was no express trust created by the group policy owner in favour of the insured person because the master policy did not mention the creation of a trust or that the insurance was for the benefit of the insured person.[32] The court also held that there was no constructive trust even though seven other disabled employees were paid from the insurance

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[28] [1959] 1 QB 28, at 43.

[29] The definition of a trust as cited by Romer LJ, *supra*, note 26, at 241 was given as:

> "an equitable obligation, binding a person (who is called a trustee) to deal with property over which he has control (which is called the trust property) for the benefit of persons (who are called the beneficiaries or *cestui que trust*), of whom he may himself be one, and any one of whom may enforce the obligation. Any act or neglect on the part of a trustee which is not authorised or excused by the terms of the trust instrument or by law, is called a breach of trust".

[30] *Ibid.*, at 241-242.

[31] *Supra*, note 20.

[32] *Ibid.*, at 176-177. The court also referred to *Cleaver and Ors* v. *Mutual Reserve Fund Life Association* [1892] 1 QB 147 and held that even if the policy expressly stated that it was effected for the benefit of another, this by itself would not establish a trust. See also *Intergraph Systems South East Asia Pte Ltd* v. *Zhang Yiguang (suing by the committee and estate of his person, Tong Wen Li)*, *supra*, note 16, at 265, where the court held that the employer's intention to benefit the insured person was not to be equated with the creation of a trust.

moneys. This could be because the payments were made to the disabled employees on an *ex gratia* basis. Further, where the employee was deceased, the moneys were given to his dependant, rather than to his estate. This fact was incompatible with the group policy owner being a trustee.

According to Malcolm Clarke,[33] the courts were reluctant to impute an intention to create a trust on the part of the group policy owner in a scheme such as that in *Bowskill* because they would have to overcome skepticisms on two points. The points are first, there was no reason for the donor to bind himself irrevocably to make a gift of the insurance moneys at some uncertain date in the future; and secondly, there was also no reason for the donor to bind himself to the third party donee to pay premiums to the insurer for an indefinite period.

Two issues arise from Clarke's reasoning. The first issue is whether the court will find a constructive trust where the group policy owner does not have any insurable interest in the insured person. A constructive trust "is imposed by equity in order to satisfy the demands of justice and good conscience".[34] According to Gopal Sri Ram JCA in *Bank Bumiputra Malaysia Bhd* v. *Mohamed Salleh*,[35] the group policy owner would be a constructive trustee if it did not enjoy any insurable interest in the insured person. This would be the result if the policy did not cover any harm or injury which would be

[33] Clarke, Malcolm A., *Law of Insurance Contracts*, (Loose-leaf) (Service Issue No 1, 30 April 2000), LLP, London, at para. 5-2A.
[34] This definition found in the 26th edition of *Snell's Equity* was cited with approval by Edmund Davies LJ in *Carl Zeiss Stiftung* v. *Herbert Smith & Co and Anor (No 2)* [1969] 2 Ch 276, at 301. The definition is also found in the 31st edition. See McGhee, John, *Snell's Equity* (31st ed., 2005), Sweet & Maxwell, London, at para. 24.02.
[35] [2000] 2 CLJ 13.

suffered by the group policy owner. The facts of this case will be discussed in Part 6.2.4.[36]

The next issue is whether the court will find a constructive trust where the group policy owner has insurable interest in the insured person's life, but the premium is paid by the insured person. It is submitted that where the insured person pays the premium for the insurance contract, he has "more than mere expectancies"[37] that he is legally entitled to the benefits of the contract, particularly where the contract is effected for his benefit. It is doubted that the insured person will pay the premium if the ultimate beneficiary of the insurance contract is the group policy owner. Justice and good conscience demand that the group policy owner remits the moneys which it receives from the insurer to the insured person.

It is further submitted that if the insured person pays the premium, a resulting trust arises in his favour.[38] The insured person pays the premium with the hope of deriving some benefits from the insurance contract. He has no intention to make a gift to the group policy owner.[39] Thus, upon receipt of the policy moneys, the group policy owner should remit them to the insured person.

In conclusion, the writer submits that the position of an insured person who contributes towards the premium for the insurance contract is stronger. Even if the court rejects his claim that he is a contracting party, he can attempt to claim the policy moneys as the beneficiary of a constructive or resulting trust.

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[36] *Infra*, at 312.
[37] *Bowskill* v. *Dawson and Anor (No 2)*, *supra*, note 16, at 28.
[38] *Vaswani Lalchand Challaram and Anor* v. *Vaswani Roshni Anilkumar and Anor* [2005] 3 SLR 625, at 630.
[39] Hudson, Alastair, *Equity and Trusts*, (2nd ed., 2001), Cavendish Publishing, London, at 295-296. See also *Westdeutsche Landesbank* v. *Islington LBC* [1996] 2 All ER 961.

6.2.3.4 Insurer as the insured person's trustee

Another exception to the doctrine of privity is where the insurer effects the insurance contract as a trustee for the insured person. According to *Malaysian Australian Finance Co Ltd* v. *The Law Union and Rock Insurance Co Ltd*,[40] the insurer is the trustee for the insured person where the insurer has endorsed on the policy, first, that the insurance policy is effected for the insured person's benefit; and secondly, that the insurer shall pay the insured sum to the insured person. Thus, if the insurer fails to remit the policy moneys to the insured person, the insured person has direct recourse to recover them from the insurer. The writer submits that the decision in *Malaysian Australian Finance Co Ltd*, a motor insurance case, is not of general application. Much depends on the wording of the endorsement. The insurer's intention to create a trust in the insured person's favour must be clear and unequivocal.

6.2.4 Rights of the insured person against the group policy owner

Since the insurer deals with the group policy owner, it is most probable that the insurer will release the policy moneys to the owner when the insured event happens. The insured person has recourse against the group policy owner to recover the said moneys under the following circumstances. First, the group policy owner received the policy moneys as the insured person's trustee.[41] Secondly, the group policy owner acted as the insured person's agent when it incepted the insurance contract or when it received the moneys.[42] Thirdly, there were indications that the insured person looked to the group

[40] [1972] 2 MLJ 10, at 12.
[41] See the discussion in Pt. 6.2.3.3, *supra*, at 305-310.
[42] Beale, H.G. (*et. al.*) (Ed.), *Chitty on Contracts*, (29th ed., 2004), Sweet & Maxwell, London, at para. 31.128.

policy owner alone for payment[43] and the insurer had remitted the moneys to the group policy owner for transmission to the insured person.

The insured person also has recourse against the policy owner where the group policy owner has agreed to pay the proceeds to the insured person. In this respect, reference may be made to *Bank Bumiputra Malaysia Bhd* v. *Mohamed Salleh*,[44] where the respondent was the appellant's employee. One of the terms of the contract of service was that the appellant employer would effect a group insurance to cover an employee's death or total disablement due to an accident. When the respondent met with an accident in 1983, the insurer paid the amount insured to the appellant employer. The court ordered the appellant employer to remit to the respondent the amount stated in his contract of service.

6.3 Group Life And Personal Accident Policies

The preceding Part discussed that a person who is insured under a group insurance is generally a third party to the insurance contract and he has no right to sue the insurer unless one of the exceptions to the doctrine of privity applies. One of the exceptions is the conferment of rights on the third party by a statute. In Malaysia, s.186(3) and (4) of the Insurance Act 1996 confer rights on certain insured persons in a group insurance.

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[43] If such indications do not exist, the insured person cannot sue the group policy owner, for s.183 of the Contracts Act 1950 (Act 136, Rev. 1974) provides that an agent cannot be sued unless there is a contract to the contrary. Section 183 reads:

> "In the absence of any contract to that effect, an agent cannot personally enforce contracts entered into by him on behalf of his principal, nor is he personally bound by them".

See also Phang, Andrew Boon Leong, *Cheshire, Fifoot and Furmston's Law of Contract Second Singapore and Malaysian Edition*, (1998), Butterworths Asia, Singapore, at 827-828. See also Shanmukham, K., *Singhal and Subrahmanyan's Indian Contract Act*, (4th ed., 1999), Law Book Company, Allahabad, at 2211-2216, where the authors commented on s.230 of the Indian Contract Act 1872. The said s.230 is *in pari materia* with s.183 of the Malaysian Contracts Act 1950.

[44] *Supra*, note 35.

This Part analyses first, the application of s.186(3) and (4); and secondly, the rights of an insured person of a group policy under s.186(3) or (4) against the insurer, the group policy owner and the insurance guarantee scheme fund respectively.

6.3.1 Application of sections 186(3) and (4) of the Insurance Act 1996

Sections 186(3) and (4) of the Insurance Act 1996 read as follows:

> (3) A licensed insurer shall be liable to the person insured under a group policy if the group policy owner has no insurable interest in the life of the person insured and if the person insured has paid the premium to the group policy owner regardless that the licensed insurer has not received the premium from the group policy owner.
>
> (4) The licensed insurer of a group policy, where the group policy owner has no insurable interest in the lives of the persons insured, shall pay the moneys due under the policy to the person insured or any person entitled through him.
>
> Penalty: One million ringgit.

In this Part, the writer will examine the difference in the application of the two provisions and the requirements of insurable interest in a group life policy and a group personal accident policy respectively.

6.3.1.1 Difference between section 186(3) and section 186(4)

Section 186(4) requires the insurer to pay the policy moneys to the insured person or a person entitled through him where the group policy owner has no insurable interest in the life of the insured person. Since the group policy owner does not have insurable interest, it cannot benefit from the insurance. The insurer is to pay the policy moneys to the insured person. The provision in s.186(4) is reinforced by ss.(3) which provides that the insurer shall be liable to the insured person if the group policy owner has no insurable interest in the insured person's life.

Section 186(3) also provides that the insurer shall be liable to the insured person if the insured person has paid the premium to the group policy owner[45] regardless of whether the group policy owner has remitted the premium to the insurer. The payment of the premium to the group policy owner is deemed payment to the insurer.[46] This gives rise to two possible interpretations. The first possible interpretation is that the legislature recognises that where the insured person pays the premium, the group policy owner is the insurer's agent for the whole insurance contract. Therefore, the true parties to the contract are the insurer and insured person. The second possible interpretation is that the legislature recognises that the group policy owner is the insurer's agent only in the collection of the premium from the insured person. The parties to the insurance contract are still the group policy owner and the insurer. It is submitted that the first interpretation should apply, for the purpose of s.186(3) is to protect the insured person. Since the insured person pays the premium, he should be the true owner of the insurance.

6.3.1.2 Requirement of insurable interest

In a life or personal accident policy, the policy owner is required to have insurable interest in the insured person's life. Sections 186(3) and (4) are exceptions to this requirement, for the insurer is liable under the policy even where the group policy owner does not have insurable interest in the insured person's life. The insurer is liable to pay the policy moneys to the insured person. The writer will discuss the requirement of insurable interest in a group life policy and a group personal accident policy respectively.

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[45] As discussed in Pt. 6.2.3.3, *supra*, at 310, a person who has contributed towards the premium can also attempt to claim the policy moneys as the beneficiary of a constructive or resulting trust. It is immaterial that the group policy owner has insurable interest in the life of the insured person. Section 186(3) applies where the insured person has paid the premium to the group policy owner.

[46] Section 171 of the Contracts Act 1950.

(a) Group life policy

The requirement of insurable interest in a life policy is prescribed in s.152(1) of the Insurance Act 1996.[47] Unless one of the exceptions applies, the policy inceptor is required to have insurable interest in the life insured on two occasions, namely when the policy is incepted and when the policy becomes a claim. In a group life policy, the insurer is liable to the insured person where the group policy owner does not enjoy insurable interest in the life insured on either or both of the aforesaid occasions.

(b) Group personal accident policy

The requirement of insurable interest in a personal accident policy is not prescribed in s.152 of the Insurance Act 1996. Section 152 specifically applies to a life policy, and the phrase "life policy" is defined in s.2. It specifically excludes a personal accident policy.

The issue is what the requirement of insurable interest in a personal accident policy is. In England, the requirement is governed by the Life Assurance Act 1774.[48] The policy owner is required to have and shall recover the value of his insurable interest in the life

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[47] Section 152(1) and (2) of the Insurance Act 1996 read:

> "(1) A life policy insuring the life of anyone other than the person effecting the insurance, or the life of a person mentioned in subsection (2), shall be void unless the person effecting the insurance has an insurable interest in that life at the time the insurance is effected and the policy moneys payable, or where the policy moneys are payable in instalments, the discounted value of all future instalments under the life policy, shall not exceed the amount of that insurable interest at the time the event resulting in payment of policy moneys occurs.
>
> (2) A person shall be deemed to have insurable interest in relation to another person if that other person is-
>
> (a) his spouse, child or ward being under the age of majority at the time the insurance is effected;
>
> (b) his employee; or
>
> (c) notwithstanding paragraph (a), a person on whom he is at the time the insurance is effected, wholly or partly, dependent".

See also Pt. 3.4.2.3(a), *supra*, at 111-113.

[48] *Shilling* v. *Accidental Death Insurance Co* 175 ER 651. However, there is some doubt as to whether the Life Assurance Act 1774 (UK) applies to indemnity insurance. See the English Law Commission and Scottish Law Commission Joint Scoping Paper, *Insurance Contract Law*, (2006), at para. 2.6 and para. B7 of Appendix B.

insured at the policy's inception.[49] Whether the English Act applies in Malaysia depends on whether the Act can be imported pursuant to s.5 of the Civil Law Act 1956 (Act 67, Rev. 1972). There are two different tests propounded by the Privy Council in *Seng Djit Hin* v. *Nagurdas Purshotumdas and Company*[50] and *Shaik Sahied bin Abdullah Bajerai* v. *Sockalingam Chettiar*.[51] Under the test in *Seng Djit Hin*, the court may apply the English statute if it is the law as will be administered in England to resolve the issue which is within the scope of s.5(1) of the Civil Law Act 1956. However, according to the test in *Sockalingam*, only a statute of general application may be imported to resolve the issue. The statute must be judged as a whole and if relevant, imported.

The writer is of the opinion that the Life Assurance Act 1774 (UK) may be imported under the tests in both *Seng Djit Hin* and *Sockalingam*. Prior to the Insurance Act 1996, there was no local statutory provision on the requirement of insurable interest in a non-life insurance policy. According to Nik Ramlah,[52] the Life Assurance Act 1774 (UK) was then applicable notwithstanding the enactment of s.40 of the Insurance Act 1963 (Act 89, Rev. 1972) (Repealed). Section 40 of the 1963 Act governed the requirement of insurable interest in a life policy and it was repealed by the Insurance Act 1996. Since the Insurance Act 1996 also does not regulate the requirement of insurable interest in a personal accident policy, it is submitted that the Life Assurance Act 1774 (UK) should continue to apply to regulate it.

[49] *Dalby* v. *The India and London Life-Assurance Company* 139 ER 465. *Supra*, at 104.
[50] [1923] AC 444.
[51] [1933] AC 342.
[52] Nik Ramlah, Mahmood, *Insurance Law in Malaysia*, (1992), Butterworths, Kuala Lumpur, at 28-29.

If the Life Assurance Act 1774 (UK) applies to a group personal accident policy in Malaysia, the owner is required to have insurable interest in the life insured only at the policy's inception. If the group policy owner does not enjoy insurable interest at that point in time, s.186(3) or (4) applies to confer rights on the insured person.

The next issue pertains to the application of s.2 of the Life Assurance Act 1774 (UK). It requires the names of the beneficiaries of the policy to be inserted in the policy. If s.2 applies, the failure to insert the name of the insured person under s.186(3) or (4) of the Insurance Act 1996 will render the insurance contract illegal and not enforceable.[53] Currently, in the UK, the application of s.2 of the Life Assurance Act 1774 (UK) to a group policy is modified by s.50 of the Insurance Companies Amendment Act 1973 (UK)[54]. Section 50 of the 1973 Act provides that an unnamed insured person is entitled to benefit under the group policy if he is within the class or description stated in the group policy and "it is possible to establish the identity of all persons who at any given time are entitled to benefit under the policy". It applies to all group policies effected before and after the 1973 Act came into force. The writer submits that the position in Malaysia is similar, for all the provisions in the Insurance Companies Amendment Act 1973 (UK), other than s.50, had been repealed. Thus, the Act can be imported under both rules in *Seng Djit Hin* and *Sockalingam*.

However, until there is judicial interpretation on the application of the Life Assurance Act 1774 (UK) and the Insurance Companies Amendment Act 1973 (UK) to govern the requirement of insurable interest in a group personal accident policy in Malaysia, the position is uncertain. Further, there is a proposal to review the application of the

[53] *Evans* v. *Bignold* (1869) LR 4 QBD 622.
[54] The preamble reads, "An Act to amend the law relating to insurance companies and the carrying on of insurance business; and to validate certain group policies.

1774 Act in the UK.[55] In view of this, the writer recommends that the legislature enacts a general statute on the requirement of insurable interest in insurance policies. Where the policy is a group policy, it should be sufficient to describe the insured persons instead of naming them.

6.3.2 Rights of the insured person against the insurer

Sections 186(3) and (4) of the Insurance Act 1996 require the insurer to pay the policy moneys to the insured person. There are consequential rights arising from this. In this Part, the writer will examine the insured person's consequential rights against the insurer, first, the right to give a good discharge; secondly, the amount recoverable; and thirdly, the other statutory rights conferred on the true owner of the policy and on a person entitled to the policy moneys.

6.3.2.1 Rights to sue and give a good discharge

If s.186(3) or (4) of the Insurance Act 1996 applies to the insurance contract, the insured person enjoys the statutory right to sue the insurer for the policy moneys. He need not prove any of the common law exceptions to the doctrine of privity, for s.186(3) provides that the "insurer shall be liable" and s.186(4) provides that the insurer shall "pay the moneys due under the policy" to the insured person. Since the insured person has the right to sue the insurer for the moneys, it follows that he also has the right to give a good discharge for them.

[55] See the English Law Commission and Scottish Law Commission Joint Scoping Paper, *Insurance Contract Law*, *supra*, note 48, at paras. 2.2-2.9.

6.3.2.2 Amount recoverable

The next issue is on the amount recoverable by the insured person from the insurer. In this connection, it is noted that s.186(3) and (4) are exceptions to the requirement that the policy owner must enjoy insurable interest in the life of the insured person. Thus, it should also follow that the insured person should be entitled to recover from the insurer the sum prescribed in the policy.

6.3.2.3 Miscellaneous rights

Apart from the rights to sue and give a good discharge for the sum insured, the insured person of an insurance contract under s.186(3) or (4) enjoys other statutory rights conferred by the Insurance Act 1996. He is entitled to receive the sum insured from the insurer within 60 days of the insurer's receipt of his legitimate claim. If the insurer fails to remit the payment within the said period, it has to pay a minimum compound interest of 4% per annum on the unpaid amount from the expiry of the said period until the date of payment.[56]

Further, if the insurance contract pursuant to s.186(3) or (4) is a life insurance, the insured person is entitled to the protection conferred by s.154 and s.155. He will receive the moneys payable under the insurance contract or on the surrender of the insurance, subject to any deductions which the insurer is allowed to make. The prescribed deductions are to settle any unpaid premiums, and any payment pursuant to an assignment of the policy or its proceeds. The insurer is not allowed to make any further deductions without the insured person's prior consent.

[56] Section 161(1) of the Insurance Act 1996.

With regard to the position of an insured person of an insurance contract under s.186(3), it is the writer's contention that the group policy owner is the insurer's agent.[57] It thus follows that the insured person is the true owner of the insurance contract, and it may be argued that he enjoys the benefit of s.151 of the Insurance Act 1996. If s.151 applies, he will not be imputed with the group policy owner's misrepresentation, miscommunication or mistakes. As the group policy owner is deemed to be the insurer's agent, the group policy owner's knowledge is deemed to be the insurer's knowledge unless there is a collusion or connivance between the group policy owner and the insured person at the formation of the contract. It follows that all material facts disclosed to the group policy owner are deemed disclosed to the insurer. Similarly, any statement made, including misleading, false or deceptive statements, or act done by the group policy owner is deemed made or committed by the insurer.

In addition, if the insurance contract under s.186(3) is a life insurance, the insured person may enjoy the following rights. First, he may have a minimum cooling-off period of 15 days from the delivery of the certificate of insurance to him to terminate his coverage. If the insured person exercises this right which is conferred by s.148, the insurer is required to refund the premium paid less any expenses incurred towards his medical check-up for the purpose of the insurance coverage.

Secondly, the insured person may have three options under the Insurance Act 1996 if he is unable to pay the premium after the insurance contract has been in force for a minimum period of three years.[58] His first option is to surrender the insurance to the

[57] *Supra*, at 314.

[58] It is to be noted that this is different from the case where the insured person has paid the premium to the group policy owner who, for any reason whatsoever, did not remit the money to the insurer. Section 186(3) deems it that the insurer has received the premium.

insurer in return for its surrender value.[59] Section 155 further protects him by providing that the policy remains in force until the insurer effects payment of the surrender value. The second option is that the insured person may exchange the life policy for a paid-up life policy.[60] The third option is that the insured person may keep silent, for s.156(1) provides that if the policy owner fails to remit the premium or write to the insurer to surrender his insurance, the insurance will be subjected to such modification as to the period for which it is in force or as to the benefits receivable under it.

6.3.3 Rights of the insured person against the group policy owner

Section 186(3) provides that the insurer "shall be liable" to the insured person for the policy moneys, whereas ss.(4) stipulates that the insurer shall pay them to the insured person. Thus, if the insurer releases the moneys to the group policy owner, either intentionally or by mistake, the insurer is still liable to the insured person. With regard to the position of the group policy owner, it is submitted that it would hold the moneys in trust for the insured person. Thus, the insured person should have the option to sue the insurer[61] or the group policy owner.

However, if the group policy owner has agreed with the insured person to pay the insured sum to him, the insured person can sue the group policy owner even where the moneys have not been remitted to the group policy owner.[62] It is also immaterial that the group policy owner has insurable interest in the insured person's life. This can be

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[59] The owner of a policy issued after 1 April 2005 may surrender his policy within one year. A proportionate part of his premium will be refunded to him. See The Star on 12 March 2005. See also s.155.

[60] Section 158 of the Insurance Act 1996.

[61] If the insured person sues the insurer, the insurer may recover from the group policy owner the moneys paid to him by mistake. See s.73 of the Contracts Act 1950 and the discussion in Phang, *supra*, note 43, at 1115-1117.

[62] Section 183 of the Contracts Act 1950 provides, *inter alia*, that an agent is not personally bound by a contract unless there is a contract to the contrary. See also *Bank Bumiputra Malaysia Bhd* v. *Mohamed Salleh*, *supra*, note 35.

seen in *Poominathan Kuppusamy* v. *Besprin Stationers Sdn Bhd*,[63] where the respondent employer effected a group personal accident policy to cover the injuries sustained by its employees who were named in the policy or in the endorsements on the policy. The appellant was named one of the insured persons in the policy. When the appellant sustained injury, the respondent employer gave him all the relevant documents and told him to claim the insured sum from the insurer. However, instead of paying the insured sum to the appellant, the insurer paid the moneys to the respondent employer. When the respondent employer refused to remit the moneys to the appellant, the appellant sued the respondent. The respondent employer's line of defence was that the policy was effected after the appellant came into its employment. "The respondent (employer) had never stated that the coverage by an insurance policy was to be a benefit of employment".[64] In addition, "the fact that the respondent (employer) was expressly named as 'beneficiary' must be construed ... to mean the respondent (employer), not the appellant, was to have the benefit of monies paid under the insurance policy".[65]

The High Court did not agree. Despite the fact that the respondent employer was expressly named a beneficiary, the learned judge, Zaleha Zahari J agreed with the appellant that "the respondent took out the group insurance policy in favour of the named employees".[66] Zaleha J held that the policy was not intended to compensate the respondent for its cost incurred due to the loss of manpower during the period the employee was recuperating from his injuries because there was no express clause to that effect. In addition, the learned judge held that the naming of the appellant as an

[63] [2003] 3 CLJ 118.
[64] *Ibid.*, at 123.
[65] *Ibid.*, at 123.
[66] *Ibid.*, at 124.

"insured person" must be construed to mean that the appellant was the beneficiary of the policy.

With all due respect, the writer submits that the court applied the wrong principles of the law. First, a person is deemed by s.152(2)(b) of the Insurance Act 1996 to have insurable interest in the life of his employee.[67] Further, there is no requirement that the policy must stipulate the nature of the policy owner's insurable interest in the insured person. The absence of an express clause that the policy is effected by the employer to compensate it when the insured event happens does not necessarily mean that the policy is effected for the benefit of its employees.

Secondly, the court had misinterpreted the meaning of "insured person". In a group policy, the policy owner and the insured persons are different persons. When the respondent was named one of the "insured persons", it meant that he was one of the persons who were insured under the group policy. It did not necessarily mean that he was one of the beneficiaries.[68] An insured person is deemed by s.186(3) or (4) to be the beneficiary only when the group policy owner does not enjoy any insurable interest in his life. In this case, the appellant was the respondent's employee and following s.152(2)(b), the respondent employer has insurable interest in the appellant. Thus, s.186(3) and (4) do not apply to confer on the appellant enforceable rights against the respondent employer.

The next issue is whether the appellant could rely on one of the exceptions at common law to recover the policy moneys from the respondent employer. Briefly, the

[67] See also *Simcock* v. *Scottish Imperial Insurance Co* [1902] 10 SLT 286.
[68] *Green* v. *Russell*, *supra*, note 19.

exceptions are first, the policy was incepted in trust for or on behalf of the insured person; secondly, the policy moneys were paid to the group policy owner in trust for the insured person or as the insured person's agent; thirdly, the group policy owner incepted the insurance as the insured person's agent; and fourthly, the group policy owner had agreed to pay the moneys to him.

Applying the aforesaid to the facts in *Poominathan*, it is noted that the policy was expressed to be for the benefit of the respondent employer itself. Thus, it is doubted that the respondent employer was a trustee in respect of the policy. Similarly, it is doubted that the policy moneys were paid by the insurer to the respondent employer in trust for the appellant or as the appellant's agent.

The next question is whether the respondent employer acted as the appellant's agent when it incepted the group policy. It is admitted that the appellant gave evidence that he was not aware of the policy until he was told to claim the insured sum from the insurer.[69] Nevertheless, s.149 of the Contracts Act 1950 provides that a person may ratify an act done on his behalf but without his knowledge or authority. This leads to the argument that the appellant should have ratified the contract within a reasonable time. *Grover and Grover Ltd* v. *Mathews*[70] held that an insurance contract could not be ratified after the occurrence of the insured event. Thus, it is submitted that even if the respondent employer incepted the insurance contract as the appellant's agent, the appellant could not ratify it after the accident.

[69] *Supra*, note 63, at 121.
[70] [1910] 2 KB 401.

The next issue is whether the respondent employer had agreed to pay the policy moneys to the appellant. In this connection, although there was no written contract of service between the respondent employer and the appellant, the court held that when the employer effected the group personal accident policy, it "must be interpreted to mean that the benefit of such a policy was an additional benefit of employment constituting a 'term' of employment to which the employee was entitled to".[71] The writer submits that this was reinforced by the fact that the respondent employer gave all the relevant documents to the appellant and told him to handle the claim against the insurer.[72] The respondent employer intended the appellant to enjoy the moneys.

Thus, it is the writer's opinion that although the learned judge in *Poominathan* applied the wrong principles of law, the final outcome was correct. As the respondent employer had agreed that the appellant should benefit from the policy moneys, he was entitled to recover them from the employer. It is immaterial that the respondent employer had insurable interest in him when the insurance was incepted and when it became a claim.

6.3.4 Rights of the insured person against the Insurance Guarantee Scheme Fund

As discussed in Part 2.4.2.3,[73] s.178(1)(c) of the Insurance Act 1996 provides that Bank Negara Malaysia ("BNM") may utilise the moneys in the insurance guarantee scheme fund ("the IGSF") to meet the liabilities of an insurer which is wound-up on the ground of insolvency, to its policy owners and persons entitled through them. The issues which were raised in Part 2.4.2.3[74] apply here, too. Apart therefrom, it is pertinent to examine whether the insured person of a group policy under s.186(3) or (4)

[71] *Supra*, note 63, at 124.
[72] *Ibid.*, at 121.
[73] *Supra*, at 58.
[74] *Supra*, at 58-67.

is qualified to claim against the IGSF. In Part 2.4.2.3,[75] the writer has opined that only a person who has direct recourse against the insurer is a qualified claimant. Since the insurer is statutorily obliged to pay the policy moneys to an insured person of a group policy under s.186(3) or (4), it is certain that he is a qualified claimant and has direct recourse to claim compensation from the IGSF.

6.3.5 Summary

Sections 186(3) and (4) of the Insurance Act 1996 confer rights on an insured person where the group policy owner does not have insurable interest in the insured person. Section 186(3) also provides that the insurer shall be liable to the insured person if the insured person has paid the premium to the group policy owner. If neither s.186(3) nor (4) applies to the group insurance policy, the insured person who wants to enjoy the benefits of the insurance contract must prove one of the exceptions to the doctrine of privity. They were discussed in Part 6.2.3.[76] To further protect an insured person whom the group policy owner intends to benefit, it is proposed that s.186(3) and (4) should be amended to require the insurer to pay the policy moneys to such insured person.

6.4 Solicitors' Professional Policy

In a professional liability policy, the insurer agrees to indemnify the insured against claims by the insured's clients or persons who are affected by his professional services (collectively "the clients"). It has become important due to the development in the tort of negligence and the rise in civil suits for damages against professionals. Further,

[75] *Supra*, at 58-60.
[76] *Supra*, at 302-311.

some professional bodies have made it compulsory for their members, either by statute or rules, to effect professional liability policies.[77]

The Legal Profession Act 1976 (Act 166) requires every practising advocate and solicitor ("the solicitor") to be insured under a professional liability policy which has been approved by the Bar Council. This is to protect three groups of persons, namely, members of the public who have legitimate claims for damages against solicitors, the solicitors themselves against their professional liabilities, and the legal firms against their liabilities for the negligent misconduct of their employees.[78] The mandatory compulsory insurance scheme is not extended to a practising advocate and solicitor in Sabah or Sarawak, for the Legal Profession Act 1976 applies in West Malaysia only.

For the purpose of this thesis, the writer had obtained and studied the Certificates of Insurance and proposal forms for the professional liability policies which were approved by the Malaysian Bar Council for the years 2003, 2004 and 2005. The Bar Council had also made available to the writer the Master Policies for the years 2003 and 2004, but not for the year 2005. Thus, the discussions on the Master Policy will be on the assumption that the terms in the 2005 Master Policy are similar to the 2004 Master Policy.[79] However, it is also to be noted that the Certificate of Insurance contains most of the terms governing the solicitors' liability policy.

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[77] For further discussion, see Enright, W.I.B., *Professional Indemnity Insurance Law*, (1996), Sweet & Maxwell, London, at paras. 3.001 to 3.013. In *Swain and Anor* v. *The Law Society*, *supra*, note 1, at 618, Lord Brightman held the opinion that professional indemnity insurance was made compulsory to protect the clients from losses which might otherwise be sustained due to the professional's failure to meet the legitimate civil claims established against him. See also the opinion of Lord Diplock in *Swain*, *supra*, note 1, at 608.

[78] Parliamentary Debates, Dewan Rakyat, Official Report, Eighth Parliament, First Session, 19 December 1991, Column 115.

[79] The writer's request for a copy of the 2005 Master Policy was rejected by the Bar Council. The Bar Council also did not respond to the writer's query whether the terms in the 2005 Master Policy were similar to the 2004 Master Policy.

This Part discusses the approved solicitor's professional policy scheme and the rights of the third parties under it. The characteristics of the scheme and the approved solicitors' professional policy will be dealt with in Parts 6.4.1 and 6.4.2 respectively. This will be followed by an examination on the rights of a Firm's Employee and a client against the insurer in Parts 6.4.3 and 6.4.4 respectively. In Part 6.4.5, the writer will study their rights against the Insurance Guarantee Scheme Fund for general insurance business when the insurer is wound-up on the ground of insolvency.

6.4.1 Approved solicitors' professional policy scheme

Section 78A(1) of the Legal Profession Act 1976 provides that "the Bar Council may, with the approval of the Attorney General, make rules concerning the taking out of professional indemnity". Pursuant to this provision, the Bar Council made the Legal Profession (Professional Liability) (Insurance) Rules 1992 (PU(A) 237/1992). Rule 5(a) provides that every solicitor must be insured under the Master Policy taken out in the name of the Bar Council.[80]

The arrangement of Part 6.4.1 is as follows. Part 6.4.1.1 discusses the implementation of the approved solicitors' professional policy scheme. This will be followed by an examination on the status of the Master Policy issued in the Bar Council's name and the Certificate of Insurance issued pursuant to the Master Policy. In Parts 6.4.1.3 and 6.4.1.4, the writer will identify the third parties to the Master Policy and the approved solicitors' professional policy respectively.

[80] It is noted that in Singapore, s.75A of the Legal Profession Act (Chapter 161) when read together with the Legal Profession (Professional Indemnity Insurance) Rules 2000 (S 459/2000) provides that every practicing advocate and solicitor is also required to be insured under a Master Policy taken out in the name of the Law Society. As in the position in Malaysia, neither the Act nor the Rules confers enforceable rights on a member of the public who has legitimate claims against a solicitor. However, if the policy requires the insurer to pay the claimant, the claimant may avail himself to the Contracts (Rights of Third Parties) Act 2001 (Singapore).

6.4.1.1 Implementation

The approved solicitors' professional policy scheme is mandatory, for every solicitor must be insured pursuant to the Master Policy taken out in the Bar Council's name. Towards this end, there are procedures to ensure its compliance. Rule 7 of the Legal Profession (Professional Liability) (Insurance) Rules 1992 requires the solicitor to satisfy the Bar that he is insured under the said Master Policy when he applies for his Sijil Annual. He has to produce his Sijil when he applies for his practising certificate in the following year.[81] Thus, a solicitor who is not covered under the current year's Master Policy will not be able to practise in the following year.

In addition, the legal firm to which the solicitor is attached, applies to the insurer (through the insurance broker appointed by the Bar Council) for coverage under the Master Policy. In the proposal form, the legal firm is required to name the solicitors in the firm. The solicitors include the firm's sole proprietor or partners, its legal assistants and consultants. The legal firm is also required to state the number of pupils chambering in the firm and persons, other than the solicitors, employed in the firm. Upon acceptance of the legal firm's proposal, the insurer issues a Certificate of Insurance to the firm. The Certificate identifies the solicitors who are insured. The Certificate also stipulates that the professional liabilities of any past, present and future partner,[82] legal assistant and consultant, and of the firm's employees, article clerks and chambering students[83] are insured. (For ease of reference, the persons whose professional liabilities are insured under an approved solicitors' professional policy are collectively referred to in this Chapter as "the Insured Solicitors". An Insured Solicitor

[81] Section 29 of the Legal Profession Act 1976 provides that a solicitor must deliver his Sijil Annual for the previous year to the Registrar of the High Court when he applies for his practicing certificate. He cannot practice as an advocate and solicitor unless and until he has applied for his practicing certificate for that year.
[82] Clauses 2.1 and 5.4 of the Certificate of Insurance.
[83] See Clause 3.3 of the Certificate of Insurance for the definition of "the Insured".

who is the legal firm's sole proprietor or partner is referred to as "the Principal". The other Insured Solicitors are referred to as "the Firm's Employees".)

Nevertheless, the writer submits that the aforesaid procedures are not fool-proof. The solicitor of a 'one solicitor practise' who does not intend to practise in the following year, may not effect an approved solicitors' professional policy for the current year. Further, the legal firm to which the solicitor is attached, may, inadvertently or intentionally, omit his name in the proposal form or fail to notify the insurer upon the solicitor joining the firm.

A client who has a legitimate claim for damages against the uninsured solicitor may not receive his damages if the solicitor is insolvent. Though the Malaysian Bar Compensation Fund[84] was established to compensate such an unfortunate client, the client will not be compensated in full. The Bar Council has the discretion to grant only an *ex gratia* amount to him for the purpose of relieving or mitigating his loss.[85]

6.4.1.2 Status of the Master Policy and Certificate of Insurance

The Master Policy issued by the insurer to the Bar Council, is a group insurance policy. Under the Master Policy, the insurer agrees to, *inter alia*, provide insurance coverage to solicitors.[86] It is not an insurance contract insuring the solicitors' liability.

With regard to the Certificate of Insurance issued to the legal firm, it is also a group policy since it covers the professional liabilities of those who are either named or

[84] The contributors of the Fund, which is set up pursuant to s.80 of the Legal Profession Act 1976, are the solicitors themselves.
[85] Section 80(8) of the Legal Profession Act 1976.
[86] Clause 2 of the Master Policy

described as an insured.[87] Clause 1.1 of the Certificate provides that the Certificate and its Schedule "evidence a single contract of insurance under the Master Policy". In addition, Clause 1.2 stipulates that "each Certificate of Insurance issued under the Master Policy shall be interpreted as though a separate contract of insurance subject in all respects to the terms of the Master Policy". Both insurer and Bar Council have expressed their intention that the approved solicitors' professional insurance covering an Insured Solicitor is evidenced by the Certificate of Insurance issued to the legal firm to which he is attached.

6.4.1.3 Third parties to the Master Policy

The Master Policy is a group policy and the parties to it are the insurer and the Malaysian Bar Council. The issue is who the third parties to the contract are. Clauses 2 and 7 of the Master Policy provide that the insurer will provide insurance coverage to the solicitors who are attached to the legal firms which apply for coverage,[88] and the office holders, members and employees of the Bar Council, its committees, the Malaysian Bar Mediation Centre and the Legal Aid Centres operated by the Bar Council (collectively "the employees of the Bar Council").[89] Thus, the third parties to the agreement are first, the solicitors whose professional liabilities are to be insured; and secondly, the employees of the Bar Council. The writer will not attempt to comment on the rights of the Bar Council's employees under the Master Policy as it is not one of the purposes of the compulsory solicitors' professional insurance scheme.

[87] Clause 4.1 of the Certificate of Insurance.
[88] Clause 2 of the Master Policy.
[89] Clause 7 of the Master Policy.

As discussed in Part 6.4.1.1,[90] the solicitors do not apply for coverage under the Master Policy. The applications are made by the legal firms. One important issue is whether a legal firm has any recourse against the insurer if its application for coverage under the Master Policy is rejected by the insurer. From the statement at the end of the proposal form that "complete signature of this proposal does not bind the Proposer or the insurers to complete a contract of insurance", it appears that the insurer has the discretion whether to accept or reject an application submitted to it. If that is the correct interpretation, the legal firm whose application is rejected has no recourse against the insurer. Further, since the legal firm is not a party to the Master Policy, it cannot enforce the insurer's obligation under the Master Policy. Only the Bar Council can sue the insurer for specific performance.

However, the writer is of the opinion that the legal firm whose application is rejected, may argue that the principle in *Swain and Anor* v. *The Law Society*[91] applies in Malaysia.[92] The facts in *Swain* are as follows. Under s.37 of the English Solicitors Act 1974, the Council of the Law Society was empowered to make rules concerning professional indemnity insurance for solicitors. Pursuant to the provision, the Solicitors' Indemnity Rules 1974 were made. The Rules provided for a master policy to be taken out with the insurer and for Certificates to be issued to the solicitors. The issue before the House of Lords was whether the Law Society was accountable to the solicitors for the commission received by it from the insurance brokers. The House of Lords held that the Law Society was not accountable, for it was neither a trustee of the master policy for the benefit of the solicitors, nor a constructive trustee of the

[90] *Supra*, at 329.
[91] *Supra*, note 1.
[92] Developments in English law after 7 April 1956 are not binding on the Malaysian courts. The decisions of the English courts after that date "may be persuasive, but not binding". See the Privy Council case of *Jamil bin Harun* v. *Yang Kamsiah and Anor* [1984] 1 MLJ 217, at 219.

commission received. According to Lord Brighton, the insurance scheme was a statutory indemnity scheme. The master policy and the certificate of insurance had statutory authority as if they were set out in a schedule to the Solicitors' Act 1974 (UK).[93]

If the principle in *Swain* applies in Malaysia, the Master Policy has statutory force because it is deemed to be a schedule to the Legal Profession Act 1976. It follows that the clauses in the Master Policy, including the insurer's agreement to provide insurance coverage to all solicitors, have statutory force. Since the legal firm's sole proprietor or partners are the firm,[94] the firm has recourse against the insurer if its application for coverage under the Master Policy is rejected. The legal firm can enforce the insurer's obligations under the master policy.

The writer further submits that even if the principle in *Swain* does not apply in Malaysia, the legal firm still has recourse in a court of law where the insurer fails to adhere to the principles of natural justice before it rejects the firm's application. In this connection, it must be noted that the solicitors' professional policy scheme is statutory and the insurer has the sole monopoly to insure all solicitors under the Legal Profession Act 1976.[95] The rejection of a legal firm's application will affect the livelihood of the solicitors practising in the firm. Unless insured under an approved solicitors' professional policy, a solicitor will not be issued with a Sijil Annual. Without the Sijil, he will not be able to practise in the following year. Further, the patronage of the firm itself will be affected as most organisations require their solicitors to provide proof of

[93] *Supra*, note 1, at 621. See also Lord Diplock, *supra*, note 1, at 611-612.
[94] See s.6 of the Partnership Act 1961 (Act 135, Rev. 1974).
[95] Clause 2 of the Master Policy.

insurance coverage for their professional liabilities. Thus, the principles of natural justice should apply.[96]

6.4.1.4 Third parties to the approved solicitors' professional policy

The next issue is who the third parties to the approved solicitors' professional policy are. To determine this, its contracting parties should be identified. They are the insurer and the person to whom the Certificate of Insurance is issued, namely the legal firm. Since s.6 of the Partnership Act 1961 (Act 135, Rev. 1974) provides that the partners are the firm, the owner of an approved solicitors' professional policy is the legal firm's sole proprietor or partners. Any incoming partner is also deemed to be a co-owner of the policy, for Clauses 2.1 and 5.4 of the Certificate of Insurance provide that the insurance remains effective notwithstanding any change in the constitution of the legal firm, unless the change is due to the amalgamation or merger with another legal firm.

Since the approved solicitors' professional policy indemifies an Insured Solicitor for his professional liabilities, it follows that the Firm's Employee is a third party to the contract. In Part 6.4.3,[97] the writer will study whether a Firm's Employee has any rights against the insurer.

Another purpose of the approved solicitors' professional policy is to protect members of the public. Thus, a client who has a legitimate claim for damages against an Insured Solicitor is also a third party to the policy. His rights against the insurer will be examined in Part 6.4.4.[98]

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[96] See Jain, M.P., *Administrative Law of Malaysia and Singapore*, (3rd ed., 1997), Malayan Law Journal, Singapore, at 267; and *Tan Tek Seng* v. *Suruhanjaya Perkhidmatan Pendidikan and Anor* [1996] 1 MLJ 261, at 286-289.

[97] *Infra*, at 339-344.

[98] *Infra*, at 344-350.

6.4.2 Approved solicitors' professional policy

The approved solicitors' professional policy scheme is mandatory. Its purpose is to protect, among others, the Firm's Employees and clients. This Part examines the characteristics of the policy which affect their rights. Before the writer embarks on the examination, the writer must emphasis that the phrase "the Insured Solicitor" includes a Firm's Employee.

6.4.2.1 Coverage

Under the approved solicitors' professional policy, the insurer agrees to indemnify an Insured Solicitor for his professional liability. Its coverage is determined by the Bar Council.[99] The coverage of the approved solicitors' professional policy for the year 2005 is found in Clauses 2.2 and 4.1 of the Certificate of Insurance. It covers any civil liability that is incurred by an Insured Solicitor in the course of his conduct of any professional business carried on by the legal firm which is customarily or legitimately performed by the legal profession in Malaysia. It also covers an Insured Solicitor's appointment or assignment which generates fees or income for the legal firm.

6.4.2.2 'Claims made' basis

Like most, if not all, professional liability policies, the approved solicitors' professional policy is written on a 'claims made' basis, rather than on an 'occurrence basis'.[100] This means that the policy covers a claim which is made against an Insured Solicitor and notified to the insurer during the tenure of the policy. It is immaterial that the conduct that gives rise to the claim occurs or the cause of action accrues before the

[99] See Rule 4 of the Legal Profession Insurance (Professional Liability) (Insurance) Rules 1992.
[100] Hodgin, Ray (Ed.), *Professional Liability: Law and Insurance*, (2nd ed., 1999), LLP, London, at 719-720. In an 'occurrence' basis policy, "the insurance in force at the time of a negligent act occurred is the policy which will respond to any claim made in respect of that act".

effective date of the policy. It is also immaterial that the claim will be settled or the legal proceedings for the claim will be initiated after the expiry of the policy.[101]

It is submitted that the approved solicitors' professional policy which is on a 'claims made' basis is disadvantageous to both Insured Solicitor and client. Any claim against a former solicitor must be made during the calendar year of his retirement from practise or of his death. Thus, a retired solicitor or the estate of a deceased solicitor has to effect a liability policy to cover any contingent claims against his past professional conduct.[102] His failure to do so would result in him not being indemnified. Further, a retired solicitor may not have the financial means to satisfy his former client's claims against him. Thus, if the retired solicitor is uninsured and insolvent, the claimant will have to seek compensation from the Malaysian Bar Compensation Fund.[103]

6.4.2.3 Sum insured and excess clauses

Another characteristic of the approved solicitors' professional policy which affects the rights of a third party is the sum which is recoverable from the insurer. The amount recoverable is dependent on the sum insured and the base excess imposed on the claim. The approved scheme prescribes the minimum sum insured. A legal firm which is a 'one solicitor practise', must effect a minimum coverage of RM250,000. The compulsory limit increases by RM50,000 for each additional solicitor in the firm, up to

[101] Hodgin, *ibid.*, at 721.

[102] In addition, it is noted that s.12 and s.14 of the Partnership Act 1961 provide that the partners of a firm are jointly and severally liable for the tortious acts and wrongs committed by or with the authority of one of the partners. Even when a partner retires from the partnership, he continues to be liable for the act committed whilst he was a partner in the firm. When the partner has deceased, his estate will also be severally liable (see s.19 of the Partnership Act 1961). In view thereof, a client who has a claim arising from a wrongful act committed whilst the retired or deceased partner was a partner in the firm, may decide to enforce his claim against the retired partner or deceased partner's estate. This is because as will be seen in Pt. 6.4.2.3, *infra*, at 336-339, the amount recoverable is subject to the insured sum and excess applicable. The client might not be able to recover from the other partners the difference between the awarded or agreed damages and the amount paid by the insurer. Where the claim amount is within the excess applicable to the firm, the insurer is not liable to indemnify the partners.

[103] *Supra*, at 330.

RM2 million for a legal firm with more than 35 solicitors.[104] The limit of the sum recoverable from the insurer is applicable in respect of any one civil claim. All claims "arising from one act or omission or series of acts or omissions attributable to the same underlying cause or event" are regarded as one claim.[105] It is submitted that the sum insured may be insufficient to compensate the claimants if there are numerous claims arising from the same act or omission.

To further compound the problem, an excess amount is imposed on each claim. The base excess for a one solicitor firm is RM10,000 and it is gradually increased to RM150,000 for an Insured Solicitor attached to a firm with 36 to 39 solicitors, and RM175,000 for an Insured Solicitor attached to a firm with 40 to 48 solicitors. If the Insured Solicitor is attached to a legal firm with more than 48 solicitors, he is required to pay a base excess of RM250,000.

Further, the minimum base excess is increased to RM30,000 if the legal firm to which the Insured Solicitor is attached, has a claims history.[106] It is also increased if the client's claim against the Insured Solicitor arises out of or is contributed by one of the circumstances listed in Clause 6.3(a), (b) or (c) of the Certificate of Insurance. First, if the claim is pursuant to a transaction where the Insured Solicitor acted for several parties to a conveyancing of land and building, the minimum excess amount imposed on the claim is RM100,000.[107] Fortunately, for the Insured Solicitor and his client, the base excess applies if the Insured Solicitor has obtained a written waiver from his client. Secondly, the minimum excess amount of RM50,000 is imposed on any claim

[104] Schedule I to the Master Policy.
[105] Clause 4.4 of the Certificate of Insurance.
[106] Clause 6.3(b) of the Certificate of Insurance.
[107] According to Clause 6.3(a), the excess amount applicable to such claim is RM100,000 or double the base excess applicable to the firm, whichever is higher, subject to a maximum of RM300,000.

of conveyancing of land and building[108] if the Insured Solicitor has not implemented a risk management programme at the time the act was committed. Unfortunately, there is no guideline as to what constitutes a risk management programme.[109]

It is noted that the main basis for the minimum sum insured and the excess imposed, is the number of solicitors practicing in the firm. This does not reflect the real risk faced by an Insured Solicitor or a client. Weightage should also be given to the nature of work carried out by the legal firm. A 'one-solicitor practise' could be handling high end conveyancing matters worth millions of ringgit and should be insured accordingly.[110] At the other extreme, there could be a legal firm with more than 48 solicitors, handling general and simple conveyancing matters. It is possible that a claim against an Insured Solicitor attached to this firm might not even exceed the excess amount imposed on it.[111] The insurer is not liable under the policy if the amount of damages does not exceed the excess imposed on the claim. Thus, the writer submits that the Bar Council should negotiate with the insurer for a more reasonable excess amount. The excess amount should not be linked to the number of solicitors in the firm, for there is no link between this factor and the value of a claim by a client.

Further, it is trite that the purpose of the imposition of an excess amount is to reduce the cost of processing and settling trivial claims. It may also have some positive influence on the Insured Solicitor's conduct,[112] for the Insured Solicitor has to bear the first part of the damages. It is unfortunate that the excess imposed on each claim by the

[108] The minimum excess amount on conveyancing matters was first imposed in the 2004 policy.
[109] The Bar Council did not respond to the writer's query on whether a guideline has been issued.
[110] Under the approved solicitors' policy, a legal firm with one solicitor is required to have a minimum coverage of RM250,000 with a minimum base excess of RM10,000.
[111] Its minimum compulsory insured amount is RM2 million. The base excess for each claim is RM250,000.
[112] See Merkin, Robert, *Colinvaux and Merkin's Insurance Contract Law*, (Loose-leaf) (Releases 5&6, March-June 2003), Sweet & Maxwell, London, at para. C-0156.

approved solicitors' professional policy is high and excessive, giving rise to speculation as to its intention.

6.4.3 Rights of a Firm's Employee against the insurer

The Firm's Employee is a third party to the approved solicitors' professional policy, which is effected, *inter alia*, to protect him against his professional liabilities. A vital issue is whether the Firm's Employee has any enforceable right against the insurer.

The writer is of the opinion that due to the following reasons, the insurer is obliged to fulfil its obligations towards the Firm's Employee. First, the legal firm is vicariously liable for the Firm's Employee's misconduct in the performance of his work. This is because an employer is jointly and severally liable with its employee[113] who commits the tortious act when acting on the employer's actual or apparent authority.[114] Thus, the legal firm is not only liable to the client who has a legitimate claim against the Firm's Employee, but it, as the policy owner, is able to enforce the insurer's obligations under the approved solicitors' professional policy.

Secondly, even if the legal firm fails to enforce the insurer's obligations, the Firm's Employee can attempt to argue that he has direct recourse against the insurer pursuant to the principle in *Swain and Anor* v. *The Law Society*.[115] As the principle gives statutory force to the Master Policy and Certificate of Insurance, the Firm's Employee

[113] *Halsbury's Laws of England*, Vol. 2(1) (4th Reissue, 2003), LexisNexis Butterworths Tolley, London, at paras. 177 and 178.
[114] *Tunku Ismail bin Tunku Md Jewa and Anor* v. *Tetuan Hisham, Sobri dan Kadir* [1989] 2 MLJ 488; and Tan, Cheng Han, "The Ostensible Authority of a Solicitor When Giving Undertakings on Behalf of the Firm: A Casenote on United Bank of Kuwait Ltd v. Hammoud; City Trust Ltd v. Levy" [1989] 3 MLJ lx.
[115] *Supra*, note 1, at 611-612, and 621.

has recourse against the insurer if the insurer fails to fulfil its obligations to him. Unfortunately, it is still uncertain whether the principle in *Swain* applies in Malaysia.

In this Part, the writer will analyse the rights of a Firm's Employee against the insurer under the approved solicitors' professional policy, namely, the right to claim, and the exclusion of certain defences which are available to the insurer in an action by the Firm's Employee. The discussion is carried out on the assumption that the principle in *Swain* applies. The writer must re-emphasis that the phrase "the Insured Solicitor" includes the Firm's Employee.

6.4.3.1 Right to claim

Generally, an insurer may indemnify the insured in one or more of the following ways. First, the insurer may defend the claim made against the insured. Secondly, the insurer may discharge the claimant's claim against the insured by paying the claimant directly. Thirdly, the insurer may compensate the insured after the claim has been ascertained or the claimant has been paid.[116] The issue is which of the aforementioned methods applies to the approved solicitors' professional policy.

Clause 5.3.2 of the Certificate of Insurance provides that the insurer, upon being notified by the Insured Solicitor that he has been served with a writ,

> shall appoint solicitors within 14 working days to take conduct of the claim without prejudice to the insurer's right to investigate and subsequently refuse policy coverage or to avoid the claim as provided under this insurance.

Although the Certificate is silent, the insurer may appoint a solicitor to take over the conduct of the negotiation prior to the service of the writ on the insured if the claim is within the scope of the approved solicitors' professional policy and the situation so

[116] Enright, *supra*, note 77, at paras. 3.113 to 3.122; and para. 16.064.

requires. Once the damages have been established, the insurer will pay directly to the client the damages, subject to the limit of the insured amount and applicable excess.[117] There are two interesting points and two issues arising from this practice.

The points are as follows. First, the insurer may be estopped from denying liability if it continues the conduct of the negotiation or defence after it becomes aware of any circumstances which allow it to avoid liability.[118] Secondly, the insurer owes a duty of care to the Insured Solicitor when it conducts any negotiation or defence. Longmore LJ in *K/S Merc-Skandia XXXXII* v. *Certain Lloyd's Underwriters*[119] classified the insurer's duty as part of its continuing duty of utmost good faith towards the insured. However, Merkin is of the opinion that it should not be classified as such. If the insurer breaches its duty of utmost good faith, the contract is void. Thus, the insurer may avoid liability by conducting the negotiation or defence to the detriment of the Insured Solicitor. The Insured Solicitor will not be indemnified. On the other hand, according to Merkin, if the court were to hold that the insurer had breached an implied term to take into account the insured's interest when negotiating or defending the claim, the insurer would be liable to pay damages to the insured.[120] The writer is of the view that Merkin's reasoning is sensible. Otherwise, it is to the advantage of the insurer to conduct the negotiation or defence to the detriment of the Insured Solicitor. It will not be liable as the insurance is avoided.

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[117] As confirmed by the legal officer of the insurer's adjusters to the writer on 31 October 2003. The writer assumes that this remains the current practice. The Bar Council did not respond to the writer's query on the practice which is currently adopted.

[118] See Merkin, Robert, *Colinvaux and Merkin's Insurance Contract Law*, (Loose-leaf) (Release 2, April 2002), Sweet & Maxwell, London, at para. B-0912

[119] [2001] 2 Lloyd's Rep 563, at 572.

[120] See Merkin, *supra*, note 118, at para. B-0914.

The two issues arising from the practise adopted by the insurer are as follows. The first issue is whether the Insured Solicitor has recourse against the insurer if the insurer fails to take over the conduct of the defence or negotiation of a claim against him. The writer submits that even though Clause 5.7 of the Certificate of Insurance gives the insurer the discretion to takeover the conduct of the defence, the insurer is estopped from denying liability to the Insured Solicitor for any judgment in default which is awarded against the Insured Solicitor[121] if first, the Insured Solicitor has notified the insurer of the claim; and secondly, the Insured Solicitor has not been advised by a senior member of the Bar to contest the proceedings. This is in view of Clause 5.9 of the Certificate of Insurance, which provides that the Insured Solicitor is not obliged to contest any legal proceedings against it by a client unless a senior member of the Bar advises so.[122] Further, Clause 5.3.2 of the Certificate of Insurance provides, *inter alia*, that:

> If the Insurer and/or their authorised representatives fail or neglect to appoint solicitors within 14 working days and take conduct of the claim, the Insured shall have the right, if the Insured so chooses, to appoint a firm from the approved panel solicitors to defend the claim and instruct the appointed solicitors as the Insured deems fit. The Insured shall not be liable for any act or omission that compromises the Insurer's right to settle or defend the claim. The Insurer shall be liable to indemnify the Insured as if the Insurer had conduct of the claim.

Thus, the Insured Solicitor, which includes the Firm's Employee, is entitled to an indemnity from the insurer upon his notification to the insurer of the client's writ against him.[123] He is also entitled to recover his defence costs from the insurer if he follows the advice of a senior member of the Bar to defend the claim, and he appoints a firm from the insurer's panel solicitors to do so. However, one point of contention is

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[121] Legh-Jones, Nicholas (*et al.*) (Ed.), *MacGillivray on Insurance Law Relating To All Risks Other Than Marine*, (10th ed., 2003), Sweet & Maxwell, London, at para. 28-27.
[122] See also Merkin, *supra*, note 118, at para. B-0911.
[123] Enright, *supra*, note 77, at paras. 3.025, 3.106 and 16.011. This is also the practice of the insurer. See the discussion above, *supra*, note 117.

with regard to the qualification of a senior member of the Bar. In the absence of its definition, it is disputable who a senior member of the Bar is.

It is further submitted that if a client claims against a Firm's Employee and the Firm's Employee, with the insurer's consent, pays compensation to the client, the Firm's Employee can claim reimbursement from the insurer under the policy. The reimbursement is subject to the sum insured and the excess imposed on the claim.[124] The Firm's Employee can claim the shortfall from his employer if the client's claim arises from a lawful act done by him in exercise of the authority conferred upon him. This is following s.175 of the Contracts Act 1950 which provides that "the employer of an agent is bound to indemnify him against the consequences of all lawful acts done by the agent in exercise of the authority conferred upon him".

The second issue is whether the Insured Solicitor, which includes the Firm's Employee, may require the insurer to pay the compensation sum directly to him or to the client even though such is not expressly prescribed in the policy. According to Enright, he may do so.[125] This is further supported by the House of Lords' decision in *Digby* v. *General Accident Fire and Life Assurance Corporation Limited*.[126] In this case, a court found the appellant negligent and ordered him to pay damages to the claimant. As the appellant's employer had effected a policy to indemnify the appellant against the risk, the claimant claimed under the policy against the insurer. The House of Lords ordered the insurer to pay the claimant even though the appellant had not satisfied the judgment and he was only a third party to the insurance policy.

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[124] *Supra*, at 336-339.
[125] Enright, *supra*, note 77, at paras. 16.064 to 16.068.
[126] [1943] AC 121.

6.4.3.2 Defences available to the insurer

Clauses 7.1. and 7.2 of the Certificate of Insurance limit the defences which are available to the insurer in a claim for indemnity by a Firm's Employee. Clause 7.1 does not permit the insurer to avoid the insurance on the ground that the legal firm fails to first, disclose facts which are not material to the assessment of risk;[127] and secondly, declare in the proposal form any circumstances which may reasonably be expected to give rise to a claim.[128] If the insurer pays the damages, the insurer may recover the monies from the firm's partners as a debt due jointly and severally. Clause 7.2 requires the insurer to indemnify the Firm's Employee if the claim arises out of any act or omission by a person other than the Firm's Employee, which manifest fraudulent intent or material and significant dishonesty or substantial lack of good faith.

It is unfortunate that except for the grounds stipulated in Clauses 7.1 and 7.2, the Certificate of Insurance does not limit the right of the insurer to rely on defences in an action against it by a Firm's Employee.

6.4.4 Rights of a client against the insurer

The preceding Part 6.4.3 analysed the rights of a Firm's Employee against the insurer. Another group which the legislature sought to protect by making the approved solicitors' professional insurance scheme mandatory is the members of the public who have legitimate claims against the solicitors. Thus, one important issue is whether a client has direct recourse against the insurer for the damages awarded to him against an Insured Solicitor. This issue will be examined in two parts, namely when the Insured Solicitor is solvent and when he is insolvent.

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[127] There is a basis of contract clause in the proposal form.
[128] Questions 6 and 7 of the Proposal Form.

6.4.4.1 When the Insured Solicitor is solvent

The Master Policy and Certificate of Insurance do not provide for the insurer to compensate the client but requires the insurer to indemnify the Insured Solicitor for his professional liability. Clause 7.1(b) of the Certificate of Insurance gives the insurer the discretion to pay the compensation directly to the client. It is thus submitted that even if the principle in *Swain and Anor* v. *The Law Society*[129] applies in Malaysia to give statutory force to the approved solicitors' professional policy, the client has no direct recourse against the insurer for any damages which the court has awarded to him against an Insured Solicitor. The only exception is when the Insured Solicitor becomes insolvent, which will be dealt with in Part 6.4.4.2.[130]

The writer proposes that the Legal Profession Act 1976 or the Legal Profession (Professional Liability) (Insurance) Rules 1992 be amended. The insurer should be required by the Act or Rules to pay the damages directly to the client. If this is not feasible, the Master Policy or the Certificate of Insurance should at least provide that the insurer is required to pay the damages directly to the client. If *Swain* applies, the Master Policy or the Certificate of Insurance has statutory authority as if it was set out in the Schedule to the Act or Rules. Then, the client can recover the damages from the insurer. This is in accordance with the purpose of the solicitors' professional policy which is made compulsory to, *inter alia*, protect a member of the public who has a legitimate claim for damages against a solicitor.

[129] *Supra*, note 1.
[130] *Infra*, at 346-350.

6.4.4.2 When the Insured Solicitor is insolvent

In Part 3.5.1.2(a),[131] the writer discussed that the Third Parties (Rights against Insurers) Act 1930 (UK) ("the TP(RI) Act 1930 (UK)") was enacted to reform the common law position of a claimant when the insured becomes insolvent. The TP(RI) Act 1930 (UK) provides that where an insured has incurred liability towards a third party claimant but has not received the insurance moneys from the insurer before he commits an act of insolvency described in s.1(1),[132] his rights against the insurer are transferred to the third party. The insurance moneys do not form part of the insolvent insured's assets for distribution to his creditors. Instead, the third party claimant receives the moneys directly from the insurer. This Act is still in force in the UK[133] and is applicable in Malaysia by virtue of s.5 of the Civil Law Act 1956 (Act 67, Rev. 1972).[134] Thus, it applies to govern the position of a client who has established his claim against an insolvent Insured Solicitor.

The writer will discuss below the rights of the client against the insurer when the Insured Solicitor is insolvent. They are first, the transfer and vesting of the Insured Solicitor's rights in the client; secondly, the client's right to obtain information pertaining to the policy; and thirdly, the ineffectiveness of a settlement between the insurer and the Insured Solicitor on the client.

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[131] *Supra*, at 119-121.

[132] Section 1(1) of the TP(RI) Act 1930 (UK) lists the acts of insolvency as where:

(a) the insured is an individual:
  (i) the insured becomes bankrupt, or
  (ii) the insured makes a composition with his creditors,
(b) the insured is a company:
  (i) a winding-up or administration order is made against the company,
  (ii) a resolution to voluntary wind-up the company (other than for the purpose of reconstruction or amalgamation with another company),
  (iii) its debenture holder has possessed its property subject to a floating charge, or
  (iv) the approval of a voluntary arrangement under Part 1 of the Insolvency Act 1986.

[133] However, according to the 39th Annual Report of the Law Commission (Annual Report 2004/2005), at page 17, the UK Government has accepted the English Law Commission's recommendation to reform the TP (RI) Act 1930 (UK). Some recommendations require legislations.

[134] *King Lee Tee* v. *Norwich Union Fire Insurance Society Ltd* (1933) 2 MLJ 187.

(a) Transfer of rights

The TP(RI) Act 1930 (UK) stipulates that "the insured's ... rights against the insurer ... (are) transferred to and vest in the third party to whom the liability was so incurred". In general, the expression "the insured" in the Act refers to the policy owner. This is because s.1(1) provides for the transfer of the insured's "rights against the insurer under the contract", and as discussed in Part 1.3.1,[135] the doctrine of privity dictates that a third party cannot enforce the contract unless one of its exceptions applies.

It is clear that an Insured Solicitor who is a Principal, is a party to the approved solicitors' professional policy. Thus, where the client has established the insolvent Principal's liability towards him, he is vested with the rights of the insolvent Principal against the insurer. The issue is whether the TP(RI) Act 1930 (UK) confers on a client any rights against the insurer where the client has been awarded a judgment against an insolvent Insured Solicitor who is not a Principal, namely a Firm's Employee. In this connection, it must be stressed that if the principle in *Swain and Anor* v. *The Law Society* applies in Malaysia to confer statutory force on an approved solicitors' professional policy,[136] the doctrine of privity may be overcome. The Firm's Employee may sue the insurer if the insurer fails to fulfil its obligations to him. Thus, when the Firm's Employee becomes insolvent within the meaning of s.1(1) of the TP(RI) Act 1930 (UK), the client will step into the Employee's shoes in relation to the insurer. The client can claim for the moneys that have not been paid by the insurer to the Firm's

[135] *Supra*, at 5-7.
[136] *Supra*, at 339-340.

Employee's liability to him which has been established either by way of a court judgment or an award in arbitration.[137]

However, it must be emphasised that the client does not have better rights against the insurer than the insolvent Insured Solicitor himself. As per Harman LJ in *Post Office* v. *Norwich Union Fire Insurance Society Ltd*,[138] the client cannot "pick out the plums and leave the duff behind". Any rights transferred to the client are subject to the conditions and defences available to the insurer as if the action has been commenced by the Insured Solicitor.[139] As per Lord Brandon in *The Fanti*,[140] "the legislature never intended, except as provided in s.1(3)[141] ... to put a third party in any better position as against an insurer than that of the insured himself". Thus, the insurer can avoid liability if there is a breach of warranty except where Clause 7.1 or Clause 7.2 of the Certificate of Insurance applies.[142] The insurer can also avoid liability if the Insured Solicitor admits liability without the insurer's prior consent.[143]

(b) Right to information

Section 2 of the TP(RI) Act 1930 (UK) imposes on the insolvent Insured Solicitor a duty to provide such information as may reasonably be required by the client to ascertain whether any rights have been transferred to and vested in him by the Act. If the information discloses to the client reasonable grounds that he has been transferred

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[137] As per Lord Denning MR in *Post Office* v. *Norwich Union Fire Insurance Society Ltd* [1967] 2 QB 363, at 374. The distinguished judge also included another method of establishing liability, namely, by an agreement with the insured. However, this method does not apply in this situation because the insurer can avoid liability if the Insured Solicitor admits liability without the insurer's consent. In this respect, see Clause 5.6 of the Certificate of Insurance.

[138] *Ibid.*, at 376.

[139] Section 1(4) of the TP(RI) Act 1930 (UK).

[140] [1991] 2 AC 1, at 29.

[141] Section 1(3) of the TP(RI) Act 1930 (UK) states that any term conferring on the insurer the right to avoid the insurance contract or alter the rights of the insured upon the latter's insolvency is ineffective.

[142] See the discussion in Pt. 6.4.3.2, *supra*, at 344.

[143] Clause 5.6 of the Certificate of Insurance.

rights against any particular insurer, that insurer shall be under the same duty to provide information to him. This provision may be criticised because the client's right to information does not arise until the insolvent Insured Solicitor's liabilities to him have been established.

To further aggravate the problem, the approved solicitors' professional policy is a 'claims made' policy. All claims must be notified to the insurer during the currency of the policy. As the client has to establish the Insured Solicitor's liability before he has the right to obtain information with regard to the insurance policy, he may not be able to notify the insurer in time. The writer submits that since every solicitor is required to be insured under an approved solicitors' professional policy, it should be sufficient for the client to notify the Bar Council of any claim he has against an insolvent Insured Solicitor.[144] Upon receipt of the notice, the Bar could forward it to the insurer. The insurer should then advise the client whether the claim is within an effective approved solicitors' professional policy. If it is, the insurer should take over the conduct of the defence or the negotiation of the claim.

To safeguard the client's interest where the Insured Solicitor is insolvent, the defences available to the insurer should be further restricted. A breach of duty by the Insured Solicitor, particularly his duty to give notice of the claim to the insurer, should not be effective against the client.

[144] The majority of the Court of Appeal in *Barrett Bros (Taxis) Ltd* v. *Davies Lickiss* [1966] 1 WLR 1334 held that a notice requirement could be met by a third party providing adequate information.

(c) Effect of settlement between the insurer and the Insured Solicitor

One concern is that the insurer and the insolvent Insured Solicitor may enter into a settlement or agreement which defeats or affects the rights of the client. In this connection, s.3 of the TP(RI) Act 1930 (UK) protects a client against such settlement or agreement if it is made after the occurrence of two events. The events are first, the Insured Solicitor has incurred liability to the client; and secondly, the Insured Solicitor's bankruptcy has commenced. Unfortunately, the client is not protected if the settlement or agreement is made before the occurrence of both or either one of the said events.[145]

6.4.5 Rights of the Firm's Employee and client against the Insurance Guarantee Scheme Fund

As discussed in Part 6.3.4,[146] s.178(1)(c) of the Insurance Act 1996 provides that Bank Negara Malaysia may utilise the funds in the Insurance Guarantee Scheme Fund to meet the liabilities of an insolvent insurer to a policy owner or a person entitled through him. The issue is whether the Firm's Employee and client are eligible to claim against the IGSF if the insurer is wound-up on the ground of insolvency. The writer has opined in Part 2.4.2.3(a)[147] that a person with legal recourse against the insurer for the policy moneys, is qualified to claim against the IGSF. Thus, if the principle in *Swain and Anor* v. *The Law Society* applies to the approved solicitors' professional policy to confer on the Firm's Employee enforceable rights against the insurer,[148] the Firm's Employee is a qualified claimant. When the insurer is wound-up, the Firm's Employee has a right to be compensated by the IGSF for claims made against him by the client.

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[145] See Pt. 5.3.1.2(c), *supra*, at 256-257.
[146] *Supra*, at 325.
[147] *Supra*, at 58-60.
[148] See Pt. 6.4.3, *supra*, at 339-340.

With regard to the client, the approved solicitors' professional policy does not require the insurer to pay direct to the client the compensation sum. Thus, even if the principle in *Swain* applies in Malaysia to confer statutory force on the policy, the client is not a qualified claimant.[149] The only exception is when the Insured Solicitor is also insolvent. Unless that happens, a client has no recourse against the IGSF for any compensation.

The writer must emphasis that the other issues pertaining to the rights of a claimant against the IGSF which were examined in Part 2.4.2.3,[150] such as the maximum amount of compensation payable by the IGSF and the termination of the policy upon the insurer's winding-up order, apply to a Firm's Employee and a client.

6.4.6 Summary

In West Malaysia, every practising advocate and solicitor must be insured under a solicitors' professional policy approved by the Malaysian Bar Council. It has been noted that there are two master policies. The first being the Master Policy made between the insurer and the Bar. It is a master agreement for insurance. The second master policy is an insurance contract which is evidenced by the Certificate of Insurance. The parties to the Certificate are the insurer and the legal firm. The insureds are the legal firm's sole proprietor or partners, legal assistants and consultants, chambering pupils and other employees. Thus, an insured is a third party to the approved solicitors' professional policy unless he is the legal firm's sole proprietor or partner. The other third parties to the policy are the firm's clients. As third parties, the

[149] See Pt. 2.4.2.3(a), *supra*, at 60, on the scope of the phrase "person entitled through him (the policy owner)".
[150] *Supra*, at 58-67.

Firm's Employees and clients have no enforceable rights under the policy unless one of the exceptions to the doctrine of privity applies.

It is uncertain whether the principle in the House of Lords' case of *Swain and Anor* v. *The Law Society*[151] applies in Malaysia. If it applies, the approved solicitors' professional policy has statutory force since it is approved by the Malaysian Bar Council pursuant to s.78A of the Legal Profession Act 1976. Then, the doctrine of privity will not apply to the policy. The Firm's Employees may enforce the rights conferred on them by the policy. However, it is noted that the policy does not confer on a client any rights against the insurer. Thus, the client whose interests should be protected by the policy has no recourse against the insurer, unless the Insured Solicitor is insolvent and the client steps into the shoes of the Insured Solicitor. This does not support the underlying spirit of the compulsory insurance scheme to protect a client who has a legitimate claim against an Insured Solicitor. The writer proposes that the authorities amend the Legal Profession Act 1976 or the Legal Profession (Professional Liabilities) (Insurance) Rules 1992 to expressly confer enforceable rights on an Insured Solicitor and a client against the insurer.

To further protect the third parties to the approved solicitors' professional policy, the Malaysian Bar Council should also negotiate for a reduction in the excess imposed on each claim. Currently, the base excess imposed ranges from RM10,000 to RM250,000 depending on the number of solicitors practising in the firm. The excess is higher in certain types of claims. It is submitted that the imposition of such high excess amount cannot be justified. It is contrary to the purpose of the compulsory insurance scheme. If

[151] *Supra*, note 1.

the Insured Solicitor is unable to pay the excess to the client, the client will not be compensated. The loser is the client.

In another aspect, the writer strongly recommends that a practising solicitor in Sabah or Sarawak should also be required to be covered by a professional liability policy. The Legal Profession Act 1976 does not apply in the two states. The applicable statutes are the Advocates Ordinance of Sabah (Cap 2) (Reprint 1966) and Advocates Ordinance of Sarawak (Cap 110) (Reprint 1966). Both statutes do not require a practising solicitor to be insured and thus, should be amended.

6.5 Workmen's Compensation Policy

At common law, a workman who sustains injuries must prove his employer's negligence before he is awarded damages against the employer. If he is awarded any damages, he can recover them from only his employer. To protect certain classes of workmen, the legislature enacted the Workmen's Compensation Act 1952. Section 4 requires an employer to compensate its injured workman who is covered by the Act or his dependant in the event of death. In addition, s.26 makes it compulsory for the employer to effect an insurance policy to cover its liabilities to the injured workman or his dependant under the Act. The terms of the policy must be approved by the Commissioner.[152] As such, it is important to study the rights of an injured workman and his dependant under the approved policy. They are third parties to the policy.

[152] The term "the Commissioner" is defined in s.3 of the Workmen's Compensation Act 1952 to include the Director General of Labour in West Malaysia, the Director of Labour in Sabah, the Commissioner of Labour in Sarawak and other officers who are vested with all or any of the powers conferred on a Commissioner by the Act.

The background of the approved workmen's compensation policy scheme is first discussed in Part 6.5.1. Parts 6.5.2 and 6.5.3 examine the rights of an injured workman and his dependant against the insurer. Their position against the insurer when the employer becomes insolvent will be examined in Part 6.5.4. Part 6.5.5 deals with the position of the injured workman and his dependant when the employer fails to effect the policy. In Part 6.5.6, the writer will study the rights of the third parties against the Insurance Guarantee Scheme Fund for general insurance business when the insurer is wound-up on the ground of insolvency.

6.5.1 Approved workmen's compensation policy scheme

At present in Malaysia, there are two schemes established by legislation to protect an injured workman and his dependant. They are the compulsory insurance scheme under the Workmen's Compensation Act 1952 and the SOCSO scheme under the Employees Social Security Act 1969 (Act 4). If a workman is covered by the definition of "employee" in s.2 of the Employees Social Security Act 1969, he must be covered under the SOCSO scheme. The compulsory insurance scheme under the Workmen's Compensation Act 1952 covers only a person who falls within the definition of "workman" in s.2 of the 1952 Act, and who is excluded from the Employees Social Security Act 1969. As a result, the importance of the compulsory insurance scheme was adversely affected when the Employees Social Security Act 1969 was first implemented. However, the scheme is re-gaining importance in the area of workmen protection upon the exclusion of foreign workmen from the SOCSO scheme with effect

from 1 April 1993.[153] Today, the Workmen's Compensation Act 1952 applies only to foreign workmen.[154]

Possibly as a result of the rejuvenation of the compulsory insurance scheme, the Minister charged with the responsibility for labour made the Workmen's Compensation (Foreign Workers' Compensation Scheme) (Insurance) Order 1996 (PU(A) 518/1996)[155] to regulate the insurance policies issued for the purpose of the Workmen's Compensation Act 1952. This Order was subsequently revoked and substituted on 1 March 1998 with the Workmen's Compensation (Foreign Workers' Compensation Scheme) (Insurance) Order 1998 (PU(A) 67/1998). In 2005, the Minister made the Workmen's Compensation (Foreign Workers' Compensation Scheme) (Insurance) Order 2005 (PU(A) 45/2005) ("Workmen's Compensation Order 2005"). The 2005 Order came into effect on 8 February 2005. The provisions in the 1998 and 2005 Orders are similar, except in the following aspects. First, the maximum premium payable by an employee was reduced. Secondly, the benefits granted by the insurer were increased. Thirdly, the Minister's power to require an insurer to furnish to him statistics and data relevant to any matter relating to the scheme was removed. Though it is not expressly stated that the 2005 Order revoked the 1998 Order, the 2005 Order should prevail and render the 1998 Order revoked.

[153] PU(A) 56 of 1993.

[154] Ministry of Human Resources' webpage *http://jtksm.mohr.gov.my/bmver/akta_pampasan.htm* on 22 January 2006.

[155] It is to be noted that the earlier Workmen's Compensation Order pertaining to insurance, namely the Workmen's Compensation (Insurance) Order 1959 (LN 267/1959) and Workmen's Compensation (Insurance) Order 1955 (Rev. 1983) PU(A) 332/1983, did not prescribe an approved scheme. They interpreted the terms "employer" and "insurer".

6.5.2 Rights of an injured workman against the insurer

One of the requirements of the Workmen's Compensation Order 2005 is that the workmen's compensation policy must have been approved by the Commissioner. The approved policy is a group insurance, for it covers the policy owner's contingent liabilities towards its workmen who are identified in the policy or any endorsement thereon. It is an insurance contract, and the parties to the contract are the insurer and employer. The injured workman is a third party to the contract.

The issue that arises here is whether an injured workman has any recourse against the insurer under an approved workmen's compensation policy. In Part 6.2.3,[156] the writer has discussed that as a general rule, an insured person has no recourse against the insurer at common law even where the insurance contract is effected for his benefit. The common law exceptions are when the insurance is effected by the group policy owner as the insured's agent or trustee, or as the insurer's agent, or where the insurer is the insured's trustee. Applying this to an approved workmen's compensation policy, it must be stressed that an employer effects the policy because s.26(1) of the Workmen's Compensation Act 1952 requires him to do so. The employer has to pay the premium from its own funds, for s.26(5) prohibits the employer from defraying the costs of the insurance by making deductions from the earnings of its workmen. Further, as will be discussed in Part 6.5.2.2,[157] there are provisions in the policy which are expressed to be for the employer's benefit. It is thus, submitted that none of the common law exceptions applies. In view of this, the provisions in the Act must be carefully examined.

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[156] *Supra*, at 302.
[157] *Infra*, at 358-359.

The writer has examined the Workmen's Compensation Act 1952, and found only one provision which confers rights on an injured workman against the insurer. It is s.21. This provision pertains to the rights of an injured workman when the employer is insolvent, and it will be studied in Part 6.5.4.1.[158] With regard to the Workmen's Compensation Order 2005, it is noted that Paragraph 3(2)(b) prescribes that an approved workmen's compensation policy should incorporate a term specifying that:

> the compensation payable by the insurer to a workman shall be one which is assessed by the Commissioner in accordance with the Act, and *shall be paid to the workman* within seven days of receipt of the assessment by the insurer.[159]

This Part examines, first, whether an injured workman enjoys the right to sue the insurer under the approved workmen's compensation policy in the light of Paragraph 3(2)(b); secondly, the amount recoverable from the insurer; and thirdly, the defences available to the insurer in a claim by the injured workman.

6.5.2.1 Right to sue

Paragraph 3(2)(b) of the Workmen's Compensation Order 2005 requires the insurer to pay the injured workman his compensation as assessed by the Commissioner. This is a statutory obligation and the doctrine of privity does not apply. Unfortunately, the wording in Paragraph 3(2)(b) omits the alternative to the Commissioner's assessment, that is, the Arbitrator's order[160] when the Commissioner, employer and injured workman fail to reach an agreement on the compensation amount.[161] This is despite the

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[158] *Infra*, at 362-365.
[159] The writer's own emphasis.
[160] The term "Arbitrator" is defined in s.3 of the Workmen's Compensation Act 1952.
[161] Section 28 of the Workmen's Compensation Act 1952 empowers the Commissioner to approve an agreement between the injured workman and his employer with regard to his compensation amount. The Commissioner may refuse to record the agreement if he finds the compensation inadequate or the agreement was obtained by fraud, undue influence or other improper means. Thus, before he records the agreement, he must first assess the compensation which the injured workman is entitled to under the Act. The Commissioner's assessment must be agreed upon also by both employer and injured workman. If either of them does not agree, the matter will be referred to the Arbitrator (see s.30 and s.36 of the Workmen's Compensation Act 1952).

equal standing conferred by s.40 of the Workmen's Compensation Act 1952 on both Arbitrator's order and Commissioner's assessment. The section prescribes that the Commissioner is to submit them to the Registrar of the Sessions Court in the state to be recorded. Once recorded, they "shall for all purposes be enforceable as (judgments) of the Sessions Court, notwithstanding that the same may in respect of amount be in excess of the ordinary jurisdiction of the said Court".[162] Unfortunately, Paragraph 3(2)(b) of the 2005 Order does not include an Arbitrator's order on the compensation amount. It should be amended accordingly.

6.5.2.2 Amount recoverable

Paragraphs 3(2)(b) and 4 of the Workmen's Compensation Order 2005 prescribe the amount of compensation which is due to the injured workman. Paragraph 4 requires the insurer to grant additional benefits at no additional premium. The additional benefits are as follows. First, if the injured workman dies due to personal injury sustained in an accident which arises out of or in the course of his employment, the insurer will pay an additional sum of RM7,000. It is not clear whether this is for the benefit of the employer who suffers losses due to the death of its workman,[163] or for the benefit of the deceased workman's dependant. This uncertainty will be further discussed in Part 6.5.3.[164] Secondly, if the workman sustains the injury in an accident outside his working hours, the insurer will pay to the injured workman[165] an additional sum of RM23,000 together with a sum equivalent to the amount of compensation awarded under s.8 of the Workmen's Compensation Act 1952. Thirdly, if the injured workman

[162] Section 40(1) of the Workmen's Compensation Act 1952.
[163] Clarke, Malcolm A., *Law of Insurance Contracts*, (Loose-leaf) (Service Issue No 6, November 2002), LLP, London, at para. 3-7F.
[164] *Infra*, at 360.
[165] Paragraph 5 of the Workmen's Compensation Order 2005.

or his body is repatriated to his country of origin, the insurer will pay to the employer the actual repatriation expenses incurred or RM4,800 whichever is the lower.

6.5.2.3 Defences available to the insurer

The rights conferred on the injured workman will be futile if the insurer avoids the policy. In this connection, it is noted with dismay that neither the Workmen's Compensation Act 1952 nor the Workmen's Compensation Order 2005 limits any of the defences available to the insurer. Thus, the insurer of an approved workmen's compensation policy may avoid the policy on the ground of non-disclosure or misrepresentation of a material fact by the employer. It can also avoid the policy if the employer fails to pay the premium for the policy, breaches a warranty or fails to comply with a procedural condition. As a result, the purpose of the compulsory insurance scheme, which is to ensure an injured workman receives his dues, is defeated.

6.5.3 Rights of an injured workman's dependant against the insurer

Where the injured workman dies, s.7 of the Workmen's Compensation Act 1952 provides that the person who is entitled to the compensation payable under the Act is the deceased's dependant, and not the deceased workman's estate. A dependant is defined in s.3 of the Act as:

> any member of the family of a deceased workman who wholly or in part depended upon his earnings at the time of his death or would but for the disablement due to the accident have been so depended.
> Provided that a person shall not be deemed to be a partial dependant of another person unless he was dependent partially on contribution from that other person for the provision of the ordinary necessities of life.

Paragraph 3(2)(b) of the Workmen's Compensation Order 2005 prescribes that the insurer shall pay to the "workman" the amount of compensation assessed by the

Commissioner. In view of s.7 of the Act, the term "workman" includes the deceased workman's dependant. Further, s.2(3) provides that any reference to a workman includes his dependant where the workman had succumbed to his injury. Thus, the rights of a workman as discussed in Part 6.5.2[166] also apply to his dependant except for the following.

First, as mentioned in Part 6.5.2.2,[167] the aggregate amount recoverable by the dependant from the insurer is uncertain. This is because Paragraph 4(a) does not make it clear whether the additional compensation of RM7,000 is for the benefit of the dependant or the employer.

Secondly, the dependant's rights are affected by the provision in s.10 of the Workmen's Compensation Act 1952. This provision requires any compensation for a deceased workman's dependant to be deposited with the Commissioner, for any payment made directly to the dependant "shall be deemed not to be a payment of compensation for the purpose of this Act". Only the Commissioner has the right to give a good discharge to the employer or its insurer for the said compensation. Thus, the dependant will not receive the compensation directly from the employer or insurer. Instead, he will receive the compensation from the Commissioner. This requirement is due to the discretion given to the Commissioner to determine the entitlement of each dependant of the deceased workman.

One vital question is whether the dependant has a cause of action against the insurer if the insurer fails to deposit the compensation with the Commissioner. It is uncertain that

[166] *Supra*, at 356-359.
[167] *Supra*, at 358.

the dependant has such a right in view of s.10 of the Act. Thus, if the Commissioner fails to take any action against the insurer for not depositing the compensation with him, the dependant should proceed against the Commissioner for his inaction.

6.5.4 Rights of an injured workman or his dependant when the employer becomes insolvent

Parts 6.5.2 and 6.5.3 examined the position of the injured workman and his dependant against the insurer when the employer is solvent. Before this Part analyses their position when the employer is insolvent, the writer wishes to highlight that s.292(5) of the Companies Act 1965 (Act 125, Rev. 1973) reinforces the position of the injured workman or his dependant when the employer, which is a company, is wound-up. It provides that where the company has insured its liability to a third party claimant, the insurance proceeds shall not form part of the company's assets for distribution to its creditors. The moneys will be paid to the claimant. It is immaterial whether the company's liability to the claimant is incurred before or after the commencement of the company's winding-up.

However, there is no provision in the Bankruptcy Act 1967 (Act 360, Rev. 1988) which is equivalent to s.292(5) of the Companies Act 1965. The omission in the Bankruptcy Act 1967 could be unintentional. The omission should not be held against the injured workman or his dependant where the insured employer is not a company. An employee of an individual should enjoy similar rights as an employee of a company. This deficiency should be corrected.

The writer will now examine s.21 of the Workmen's Compensation Act 1952 which also confers rights on an injured workman or his dependant when the employer is insolvent.

6.5.4.1 Section 21 of the Workmen's Compensation Act 1952

As discussed in Part 6.4.4.2,[168] there is a statute of general application which confers rights on a claimant who has a claim against an insolvent person whose liability is insured. It is the Third Parties (Rights against Insurers) Act 1930 (UK) and it applies in Malaysia by virtue of s.5 of the Civil Law Act 1956.[169] However, the 1930 Act does not apply to an approved workmen's compensation policy because s.1(6) expressly excludes its application to any case to which s.7(1) and (2) of the Workmen's Compensation Act 1925 (UK) applies. Since the genesis of s.21 of the (Malaysian) Workmen's Compensation Act 1952 is based on s.7 of the Workmen's Compensation Act 1925 (UK), it should follow that the TP(RI) Act 1930 (UK) does not confer any rights on the claimant of an approved workmen's compensation policy.

This Part examines the coverage of s.21 of the Workmen's Compensation Act 1952 as well as the position of the injured workman or his dependant when the insurer avoids the policy.

(a) Coverage

An injured workman or his dependant has the right to sue the insurer when the employer becomes insolvent. This is because s.21(1) of the Workmen's Compensation Act 1952 provides, *inter alia*, that upon the insolvency of the employer, its rights

[168] *Supra*, at 346.
[169] *King Lee Tee* v. *Norwich Union Fire Insurance Society Ltd*, *supra*, note 134.

against the insurer in respect of its liability to an injured workman or his dependant shall be transferred to and vested in him. The term "insolvency" is also defined. It provides that where the employer is not a company, he is deemed insolvent when he becomes a bankrupt, or makes a composition or scheme of arrangement with his creditors.

However, the provision pertaining to an employer which is a company lacks clarity. It provides, among others, that the company is deemed insolvent when the company's debenture holder takes possession of its property which is subject to a floating charge in the holder's favour, or when the company itself commences winding-up proceedings for a reason other than that of reconstruction or amalgamation with another company.[170] It appears that where a third party commences winding-up proceedings against the company, it is not deemed insolvent until a liquidator is appointed. If that is the correct interpretation, the rights conferred on an injured workman or his dependant by s.21 will arise much later.

The next issue is whether an injured workman or his dependant is entitled to invoke s.21 against the insurer if the employer becomes insolvent before its liability under the Act has been incurred. Unlike the Road Transport Act 1987 (Act 333)[171] and the TP(RI) Act 1930 (UK)[172] which expressly provide that it is immaterial whether the insured becomes insolvent before or after the incurrence of his liability, the Workmen's Compensation Act 1952 is silent on this aspect. The writer submits that in its absence, there is uncertainty. The legislature should make it immaterial whether the employer becomes insolvent before or after the liability is incurred. This is in line with the

[170] Section 21(7) of the Workmen's Compensation Act 1952.
[171] See Pt. 5.3.1.2, *supra*, at 255-256.
[172] See Pt. 6.4.4.2, *supra*, at 346.

purpose of the compulsory insurance scheme under the Workmen's Compensation Act 1952, that is, to safeguard the injured workman and his dependant.

(b) Avoidance of liability by the insurer

As discussed in Part 6.5.2.3,[173] in an action by the injured workman or his dependant, the insurer can avail itself of any defences as if the action has been commenced by the insured employer. Fortunately, according to s.21(3) of the Workmen's Compensation Act 1952, when the employer is insolvent, the insurer cannot avail itself of the defence that the insured employer has failed to comply with any terms or conditions in the policy except for the following. The exceptions are first, the employer has failed to pay the premium for the policy; and secondly, the injured workman or his dependant has failed to notify the insurer of the accident and the workman's injury "as soon as practicable after he (became) aware of the institution of the bankruptcy or liquidation proceedings and that the employer was insured and with whom".[174]

However, it is proposed that to protect the workman, the legislature should impose further restrictions on the defences available to the insurer when sued by the injured workman or his dependant. This is because the injured workman or his dependant has to prove the assessed compensation against the employer in bankruptcy if the insurer is successful in avoiding liablity. According to s.21(4) of the Workmen's Compensation Act 1952, the injured workman or his dependant ranks as a preferential creditor if the amount of compensation accrues before the employer is deemed insolvent. However, his ranking as a preferential creditor in relation to the employer's other preferential creditors depends on whether the employer is a company or otherwise.

[173] *Supra*, at 359.
[174] Section 21(3) of the Workmen's Compensation Act 1952.

If the employer is a company, the applicable provision is s.292(1)(c) of the Companies Act 1965. It provides that if the amount of compensation due to the injured workman or his dependant accrues before the commencement of the employer's winding-up,[175] the compensation has priority over the following three types of debts. The first type covers the remuneration payable to any employee in respect of his vacation leave which accrued in respect of any period before the commencement of the winding-up. The second type of debt is the contributions payable during the twelve months before the commencement of the winding-up proceedings to the Employer's Provident Fund, or any superannuation or retirement benefit scheme approved under the federal law relating to income tax. The third type comprises all federal taxes assessed up to the expiry date for the proving of debts.

Where the employer is not a company, the applicable provision is found in s.43(1)(e) of the Bankruptcy Act 1967. It provides that if the amount of compensation due to the injured workman or his dependant accrues before the employer's receiving order, the compensation is also a preferential debt. However, unlike s.292(1)(c) of the Companies Act 1965, s.43(1)(e) of the Bankruptcy Act 1967 does not confer any priority on the compensation due to the injured workman or his dependant. It ranks last in the list. Thus, the rights of the injured workman or his dependant in relation to the employer's other creditors are much affected if the employer is not a company. The legislature should streamline the aforementioned provisions in the Companies Act 1965 and Bankruptcy Act 1967.

[175] The winding-up commences after the events stated in s.21(1) of the Workmen's Compensation Act 1952. According to s.21(1), the employer is deemed insolvent when its debenture holder takes possession of its property that is subject to a floating charge in the holder's favour, or when it commences winding-up proceedings for a reason other than that of reconstruction or amalgamation with another company.

6.5.4.2 Lacuna in section 21 of the Workmen's Compensation Act 1952

As discussed in Part 6.5.4.1,[176] the TP(RI) Act 1930 (UK) does not apply to confer rights on the injured workman or his dependant when the employer becomes insolvent. Instead, s.21 of the Workmen's Compensation Act 1952 applies. However, it is unfortunate that s.21 of the 1952 Act does not include some of the rights conferred by the TP(RI) Act 1930 (UK). They are discussed below.

(a) No right to information

Section 2 of the TP(RI) Act 1930 (UK) confers on a claimant the right to obtain from an insolvent person such information as may reasonably be required by him to ascertain whether any rights have been transferred to and vested in him by the Act. If the information discloses to the claimant reasonable grounds that he has been transferred any rights against an insurer, he has similar rights against the insurer.

The provision in s.2 of the TP(RI) Act 1930 (UK) is subject to much criticism, for the claimant's right does not arise until he has established the insured's liability to him. Nevertheless, it is better than the current position of the injured workman or his dependant. He is not conferred any right to obtain the necessary information from the insolvent employer or the insurer.

(b) Settlement between the insurer and insolvent employer is effective

Section 3 of the TP(RI) Act 1930 (UK) protects the claimant against any settlement or agreement between the insurer and insured which defeats or affects the rights transferred to the claimant if it is made after first, the insured has incurred liability to the claimant; and secondly, the insured's bankruptcy or winding-up has commenced.

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[176] *Supra, at 362.*

Unfortunately, there is no similar provision in the Workmen's Compensation Act 1952. In its absence, it appears that any agreement between the insurer and insolvent employer is effective against the injured workman or his dependant. It is immaterial that the settlement defeats his rights. It is also immaterial that the employer has incurred liability to him or the employer's bankruptcy or winding-up has commenced.

6.5.5 Rights of an injured workman or his dependant when the employer fails to effect an approved workmen's compensation policy

Section 26 of the Workmen's Compensation Act 1952 prescribes that an employer who is required to effect an approved workmen's compensation policy but failed to do so, is guilty of an offence. This Part examines the issue whether the injured workman or his dependant has a cause of action against the employer or its officer if the employer fails to effect the policy. In this connection, it is noted that the general principle is that a person who breaches his statutory duty is liable in tort to the person who suffers injury from the non-performance of that duty.[177]

6.5.5.1 Rights against the employer

The writer will first examine the issue whether the employer is liable to the injured workman or his dependant for breach of its statutory duty under s.26. There is no reported case in Malaysia. In the UK, s.5 of the Employers' *Liability (Compulsory* Insurance) Act 1969 (UK) also imposes a statutory duty on an employer to effect an insurance policy to cover its contingent liabilities to its workmen. If an employer fails to do so, it "shall be guilty of an offence". However, according to the UK's Court of

[177] Breach of statutory duty is a tort *in its own right*. It is distinct from negligence. See *Bux* v. *Slough Metals Ltd* [1973] 1 WLR 1359 and Stanton, K.M., *"New Forms of* the Tort of Breach of Statutory Trust" [2004] *LQR* 324.

Appeal in *Richardson* v. *Pitt-Stanley and Ors*,[178] an employer who breaches his duty is not liable to the injured workman or his dependant for the breach.

The writer submits that it is immaterial to an injured workman or his dependant whether he can sue the employer for breach of its statutory duty. This is because s.4 of the Workmen's Compensation Act 1952 already requires the employer to compensate him. The employer is liable to pay the injured workman or his dependant even if it has an effective insurance to cover its liability and the insurer fails to pay him for any reason whatsoever. Thus, an injured workman or his dependant will receive compensation from either the insurer or the employer unless the employer is insolvent[179] and he did not insure its liability towards the workman or his dependant.

6.5.5.2 Rights against the employer's officer

The next question is whether the injured workman or his dependant can claim his compensation from the employer's officers who are the employer's decision-makers if the employer is both insolvent and uninsured against its liability to the injured workman or his dependant. Unfortunately, the Workmen's Compensation Act 1952 does not impose any obligation on the officers to pay the compensation or to ensure that the employer effects the policy. Thus, it is submitted that the injured workman or his dependant has no recourse against the employer's officers unless the employer is a corporation and the court lifts the employer's veil of incorporation. There is no

[178] [1995] 2 WLR 26.

[179] The rights of an injured workman and his dependant when the employer is insolvent were discussed in Pt. 6.5.4, *supra*, at 361-367.

reported case, and it is uncertain whether the court will do so to find for the injured workman or his dependant.

In the UK, s.5 of the Employers' Liability (Compulsory Insurance) Act 1969 provides that where the failure to effect a workmen's compensation policy was commited by the employer which is a corporation, with the consent or connivance of, or facilitate by any neglect on the part of any officer, the officer and the corporation shall be guilty of an offence.[180] Despite that, the majority of the Court of Appeal in *Richardson* v. *Pitt-Stanley and Ors*[181] held that an employer's officer who was found guilty of an offence under s.5, was not liable to the injured workman for breach of his statutory duty. Stuart-Smith LJ said,[182] "It seems to me to be strange that civil liability should be imposed on a director ... when the company itself is not civilly liable". A learned author, Poh Chu Chai,[183] agrees with the decision. However, the writer submits that the position in Malaysia is different, for there are numerous statutory provisions where the company's officers, and not the company, are imposed with civil liability.[184]

It is recommended that the Malaysian legislature enacts, with modification, the provision found in s.5 of the UK's Employer's Liability (Compulsory Insurance) Act 1969 in the (Malaysian) Workmen's Compensation Act 1952. The new provision should stipulate that the employer's officer who consents, connives or neglects the non-

[180] The relevant portion of s. 5 of the Employers' Liability (Compulsory Insurance) Act 1969 (UK) reads:

> "An employer who on any day is not insured in accordance with this Act when required to be so shall be guilty of an offence ...; and where an offence under this section committed by a corporation has been committed with the consent or connivance of, or facilitated by any neglect on the part of, any director, manager, secretary or other officer of the corporation, he, as well as the corporation shall be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly".

[181] *Supra*, note 178.

[182] *Ibid.*, at 33.

[183] Poh, Chu Chai, *Law of Life, Motor and Workmen's Compensation Insurance*, (5th ed., 1999), Butterworths Asia, Singapore, at 604-606.

[184] Examples are found in s.67(4), s.121(2)(c), and s.365(2)(b) of the Companies Act 1965.

compliance of s.26(2) of the Act commits an offence and is liable to the injured workman or his dependant for breach of his duty. It is a strict liability. Such a provision will motivate the officers to ensure that an approved workmen's compensation policy is incepted, for otherwise the injured workman or his dependant has the option to recover the compensation from them. The rights of the injured workman and his dependant will be strengthened.

6.5.6 Rights of an injured workman or his dependant against the Insurance Guarantee Scheme Fund

The Insurance Guarantee Scheme Fund was established to, *inter alia*, meet the liabilities of an insurer arising out of a workmen's compensation policy issued by the insurer prior to its winding-up. In other words, an injured workman could claim compensation under the original scheme fund. However, pursuant to s.178(1)(c) of the Insurance Act 1996, the moneys in the IGSF are to be utilised to, *inter alia*, meet the liabilities of an insurer which is wound-up, to a policy owner or a person entitled through him. The issue is whether an injured workman or his dependant is currently qualified to claim compensation from the IGSF. He is a qualified claimant if he has legal recourse against the insurer for the policy moneys. Thus, an injured workman is a qualified claimant with regard to the compensation assessed by the Commissioner and the additional sum of RM23,000 prescribed by Paragraph 4 of the Workmen's Compensation Order 2005. However, it appears that he is not a qualified claimant for any compensation awarded by the Arbitrator. This is in view of the wording of Paragraph 3(2)(b) of the 2005 Order. A deceased workman's dependant is also not a qualified claimant against the IGSF, for he has no legal recourse against the insurer. To protect the position of an injured workman and his dependant, the writer reiterates the need to amend the Workmen's Compensation Act 1952 and the Workmen's

Compensation Order 2005 to strengthen the rights of the injured workman and his dependant against the insurer.

6.5.7 Summary

Section 26 of the Workmen's Compensation Act 1952 requires an employer to effect an insurance policy in respect of a liability which he may incur under the Act to its workmen who are covered by the said Act. The policy is a group insurance, for it covers the employer's contingent liabilities towards its workmen who are identified in the policy and any endorsement thereon.

Paragraph 3(2)(b) of the Workmen's Compensation Order 2005 requires the insurer to pay the injured workman his compensation which is awarded by the Commissioner. Unfortunately, Paragraph 3(2)(b) does not recognise an award made by the Arbitrator on the compensation amount payable by the employer. This is despite s.40 of the Workmen's Compensation Act 1952 which stipulates that once the Arbitrator's award is recorded by the Registrar of the Sessions Court, it is enforceable as a judgment of the Sessions Court. In view thereof, it appears that the injured workman or his dependant is not entitled to receive from the insurer the compensation awarded by the Arbitrator.

In addition, the Workmen's Compensation Act 1952 does not limit the defences available to the insurer. Thus, the insurer may be able to avoid liability to an injured workman or his dependant. It is submitted that in view of the fact that an approved workmen's compensation policy is pursuant to a compulsory insurance scheme, any breach of duty of good faith, warranty or condition by the employer should be ineffective against an injured workman or his dependant. Otherwise, the purpose of the scheme is defeated. Bearing in mind the need to protect the workman, the insurer

should be required to compensate the injured workman or his dependant and claim reimbursement from the insured employer.

Section 21 of the Workmen's Compensation Act 1952 prescribes the position of an injured workman or his dependant when the employer becomes insolvent. The writer finds it inadequate. First, unlike the relevant provisions in the Road Transport Act 1987 and the Third Parties (Rights against Insurers) Act 1930 (UK), s.21 does not expressly provide that it applies regardless of when the insured employer becomes insolvent. It should expressly provide that it is immaterial whether the insured employer incurred the liability before or after it becomes insolvent. Secondly, the rights which are transferred to the injured workman or his dependant are restricted to the rights which the insolvent employer has against the insurer in respect of his liability to the injured workman or his dependant under the Act. The rights do not include the additional benefits granted by the insurer under Paragraph 4 of the Workmen's Compensation Order 2005. Thirdly, some of the rights conferred by the TP(RI) Act 1930 (UK) on a claimant are not found in s.21 of the Workmen's Compensation Act 1952. They are the rights to obtain information from the insolvent insured and insurer, and the ineffectiveness on the injured workman or his dependant of any settlement between the insolvent insured and insurer which is prejudicial against him. The legislature should review s.21 and effect the necessary changes to protect the rights of an injured workman and his dependant.

Section 178(1)(c) of the Insurance Act 1996 provides that BNM may utilise the moneys in the IGSF to meet the liabilities of an insurer which is wound-up, to a qualified claimant. In view of the uncertainty of some of the rights of an injured

[illegible] his dependant against the insurer, it is submitted that his position in [illegible] is uncertain when the insurer is wound-up.

In conclusion, the writer reiterates that the legislature should review and amend the Workmen's Compensation Act 1952 and the Workmen's Compensation Order 2005. An injured workman or his dependant should be conferred the right to sue the insurer for the employer's liability under the Workmen's Compensation Act 1952, and all other moneys payable under the approved workmen's compensation policy. The language of the amended provisions should be clear and unequivocal.

6.6 Concluding Remarks

In a group insurance, a number of persons are insured severally pursuant to a single contract made between the insurer and the policy owner. On most occasions, the insurance is incepted for the benefit of the insured persons. However, due to the doctrine of privity, the insured person cannot enforce any of the benefits conferred on him in the contract unless he proves one of the exceptions to the doctrine. In Malaysia, the legislature has enacted statutory provisions pertaining to the rights of the insured persons and claimants in four types of group policies. They are the group life policy, group personal accident policy, solicitors' professional liability policy and workmen's compensation policy. The legislature's initiative should be applauded. However, much could still be done to enhance the position of the insured person and claimant. The writer has noted that there are instances where there is confusion as to the status of the insured person. The writer will propose some statutory reforms to the Insurance Act 1996, Legal Profession Act 1976 and Workmen's Compensation Act 1952 in the concluding chapter of this thesis, namely Chapter 7, which is the next Chapter.

CHAPTER SEVEN

CONCLUSION AND RECOMMENDATIONS FOR LEGISLATIVE REFORM

7.1 Introduction

One of the primary objectives of a compulsory liability insurance scheme is to protect third parties. Likewise, one of the reasons why a person effects a policy on his own life is to benefit third parties, such as his dependants. Since the doctrine of privity may act against these objectives, the Malaysian legislature has enacted provisions to remove its application and to confer rights on selected third parties. The legislature has also limited the defences available to the insurer in an action commenced by the third party. However, much could still be done to enhance the rights of third parties in insurance law in Malaysia. In fact, there are occasions where the legislature has eroded the said rights through the enactment of statutes or the amendment to the existing statutory provisions.

In this thesis, the writer's aim was to demonstrate that the third parties are inadequately protected in insurance law in Malaysia. In this concluding Chapter, the writer will highlight the major shortcomings and recommend reforms to improve the existing statutory rights conferred on the third parties. For ease of reference, the discussion is carried out according to the arrangement of this thesis, first, the rights of a nominee; secondly, the rights of an assignee; thirdly, the rights of a beneficiary of a statutory trust; fourthly, the rights of third parties in a motor insurance; and lastly, the rights of third parties in a group insurance.

7.2 Rights of a Nominee as a Third Party

Section 172 of the Insurance Act 1996 (Act 553) provides that the payment of policy moneys under a life policy or a personal accident policy, effected by a person on his own life providing for payment of policy moneys on his death ("own-life policy") is regulated by Part XIII of the Act. The provisions in this Part override any contrary terms in the policy, and it is immaterial that the policy was effected before the Act came into force.

One of the provisions in Part XIII is s.163. It prescribes the procedure that must be complied with by the owner of an own-life policy who wishes to effect a nomination. Since it is a statutory nomination, the issue whether the nomination is a testamentary disposition or merely an act of contract does not arise. Although the nominee's rights are more certain as they are statutorily prescribed, it was seen in Chapter 2 of this thesis that his rights had been eroded by the Act.

7.2.1 Nominee as an executor

Although the Insurance Act 1996 confers on the nominee the rights to sue and give a good discharge to the insurer for the policy moneys, s.167(1) expressly provides that the nominee receives the moneys as an executor. Following s.172(1), it is not material that the nomination was effected before the Act came into force. As discussed in Part 2.4.2.1,[1] the pre-Insurance Act 1996 decision in *Manonmani* v. *Great Eastern Life Assurance Co Ltd*[2] that the nominee would receive the moneys as a beneficiary if the policy owner intended it so, no longer applies.

[1] *Supra*, at 54.
[2] [1991] 1 MLJ 364.

The consequences that arise from the appointment of a nominee as an executor are far-reaching. First, it may defeat the commonly known purpose of a nomination, namely, the policy owner intends the nominee to receive the policy moneys as a beneficiary. Secondly, a nominee who is aware of the onerous duties and obligations as an executor, and who is not the deceased policy owner's heir, may reject his nomination. If he rejects his nomination after the deceased's death, he may cause delay. Thirdly, a nominee who is not aware of his status as an executor, may apply the moneys for his own benefit. If he does so, he breaches his duties and is liable to be sued by the rightful beneficiary of the moneys.

In view of the aforesaid, this thesis proposes the following. First, the policy owner's intention should be given effect. To ensure certainty, the policy owner should be required to expressly state in the nomination form whether the nominee is to receive the moneys as a beneficiary or an executor. Secondly, if the policy owner intends his nominee to receive the moneys as an executor, the nominee should be notified of his nomination and his duties as an executor. This is to give the nominee an opportunity to reject his nomination during the policy owner's lifetime. If the policy owner is informed of the nominee's reluctance to act as an executor, the policy owner can take remedial steps and appoint another nominee.

7.2.2 Coverage of nominee

At common law, a nominee may be a body corporate or a natural person. He may be identified by description or as a member of a class of persons. Unfortunately, s.163(1) of the Insurance Act 1996 requires the policy owner to provide his nominee's personal particulars when he effects the nomination. Thus, the policy owner can nominate only a

natural person who is in existence and known to him. This restricts the scope of persons who are recognised as nominees by the Act. This thesis recommends that the legislature reviews s.163(1). There should be some flexibility to ensure that more third parties can be nominated. Further, a policy owner should be permitted to nominate an organisation, such as the Public Trust Corporation, to receive the policy moneys as an executor upon his death.

7.2.3 Time period for notification

There are occasions where the insurer is notified of the policy owner's death by a person other than the nominee. Although s.165(2) requires the insurer to notify the nominee of his entitlement, it does not fix a time period for the insurer to do so. This is despite s.165(4) which requires the insurer to apply the policy moneys in accordance with the procedure prescribed in s.169 if the nominee fails to submit his claim within 12 months from the time the insurer is notified of the policy owner's death. As a result, an insurer may notify the nominee just before the expiry of the 12 months, giving the nominee little time to submit his claim. This, the writer submits, is not in accordance with the spirit of Part XIII of the Act. A nominee should be given ample time to submit his claim. It must be stressed that the insurer would be aware of the nominee's existence, but the nominee may not be aware of his nomination. Thus, the time period should be imposed on the insurer, and not on the nominee.

7.2.4 Time period for payment

Sections 161(1) and 165(1) of the Insurance Act 1996 provide that the insurer shall remit the policy moneys of an own-*life policy* to its claimant within 60 days upon receipt of his proper and complete claim. An insurer who fails to adhere to this *is liable*

to pay a compound interest of a minimum of 4% per annum, or such other rate as may be prescribed, on the amount unpaid until the date of payment. These provisions are lacking in the following aspects.

First, the time period of 60 days is imposed only on a claim under an own-life policy. The provisions should be extended to cover all policies. Secondly, the time period given to the insurer to process the claim and remit the payment to the claimant is too long. This thesis proposes that the time period be shortened to a more reasonable and acceptable period. Thirdly, the prescribed interest rate of 4% per annum is low. It is even lower than the rate prescribed for a judgment sum. The insurer should be required to pay a higher rate which is deterrent in nature. In fact, the legislature should consider conferring on the claimant a right to claim for compensatory damages where there is unjustified delay on the insurer's part and the delay causes grave hardship to the claimant.[3]

7.2.5 Rights of the nominee when the insurer is wound-up

Part XIV of the Insurance Act 1996 provides for the establishment of the Insurance Guarantee Scheme Fund ("the IGSF") for life insurance and general insurance businesses to meet the liabilities of insurers which are wound-up on the ground of insolvency, to their respective policy owners and persons entitled through them. Unfortunately, some of the provisions do not appear to protect a rightful claimant of the proceeds of a policy issued by an insolvent insurer.

[3] The English Law Commission and Scottish Law Commission Joint Scoping Paper, *Insurance Contract Law*, (2006), at paras. 2.63-2.68.

First and foremost, there is uncertainty as to the eligibility of a person who can claim compensation from the IGSF. According to s.178(1)(c), only a "policy owner" or a "person entitled through him (the policy owner)" is a qualified claimant. It is uncertain whether a person to whom the insurer is contractually or statutorily liable is a qualified claimant. This thesis recommends that s.178(1)(c) be amended to expressly provide that the IGSF shall be liable to meet the *contractual and statutory* liabilities of an insolvent insurer pursuant to a policy issued by it.

Secondly, the qualified claimant is required to notify the liquidator of his claim within six months from the insurer's winding-up order or such other period as Bank Negara Malaysia ("BNM") may allow. The time period is too short. This thesis recommends that the qualified claimant be allowed to claim against the IGSF so long as his claim against the insurer is not time barred.

Thirdly, this thesis proposes that the maximum amount receivable by a qualified claimant from all sources should not be limited to 90% of the amount lawfully due to him. This is the current position under s.178(2). It is more than sufficient that s.180 provides that BNM has regard to the insolvent insurer's assets which are available for distribution before fixing the maximum amount. In all circumstances, BNM should make all attempts to compensate a qualified claimant in full.

Fourthly, Part XIV of the Insurance Act 1996 does not prescribe a time period within which BNM should remit payments to a qualified claimant. Section 182(1) merely prescribes that BNM may pay the claim after the effective date of the insurer's winding-up order. This thesis proposes that the Act prescribes a reasonable time

period. Pending the decision on the exact amount to be paid to the claimant, BNM should be empowered to make interim payments to the claimant against an assignment to the IGSF of his right to claim the actual amount received from BNM.

Fifthly, s.121 of the Insurance Act 1996 provides that a policy lapses when the insurer is wound-up unless the policy is a life policy and the liquidator has transferred the policy to a solvent life insurer. This thesis recommends that a policy for a short term period of not more than one year is to remain in force until its expiry. For a long term policy for a period of more than one year, BNM should be given the power to compel a solvent insurer to take over the said policy. It should not be material whether the policy is a life or general policy. These measures are to safeguard the position of not only the policy owner, but also a third party who may be prejudiced by the policy's early termination due to the insurer's insolvency.

It is to be noted that the above recommendations are not restricted to a nominee. They apply to all third parties of an insurance policy where its insurer is wound-up on the ground of insolvency.

7.3 Rights of an Assignee as a Third Party

In an assignment, the assignor transfers his rights under his contract with the insurer to the assignee. As an insurance policy may not be assignable due to its nature and the requirement of insurable interest, the legislature has enacted provisions giving recognition to the assignment of selected policies and their proceeds upon the compliance of certain conditions or occurrence of certain events. The selected policies

are a life policy, a marine policy and a non-marine policy protecting property, and the relevant statutory provisions were examined in Chapter 3 of this thesis.

7.3.1 Life policy

Part XIII of the Insurance Act 1996 recognises the rights of the owner of an own-life policy to assign the policy and its proceeds. In fact, a policy owner who wishes his nominee to receive the policy moneys as a beneficiary is encouraged to effect an assignment in his favour. Unfortunately, the requirement of insurable interest and the requirement of stamp duty on an assignment countermand the advice.

7.3.1.1 Requirement of insurable interest

As was discussed in Part 3.4.2.3(a),[4] the requirement of insurable interest which is prescribed in s.152 of the Insurance Act 1996 has eroded the rights of the assignee of a life policy or its proceeds. Unless one of the exceptions to s.152 applies, a person who effects a life policy must have insurable interest in the life insured on two occasions, namely when the policy is incepted and when it becomes a claim. Section 152(1) also prescribes that the amount recoverable by the claimant shall not exceed the amount of the policy inceptor's insurable interest in the life insured when the policy b claim. Thus, unlike the position before the Insurance Act 1996 where the policy owner was required to have insurable interest only at the inception of the policy and was entitled to recover the said amount, the insurer may now pay less than what it originally bargained for with the policy inceptor. It is submitted that this is unfair. Although the insurer collects premiums based on the sum insured, it is legalised to pay a sum lesser than the sum insured.

[4] *Supra*, at 111-113.

of the policy, the nominee will receive the moneys as an executor. Thus, it is recommended that the legislature either abolishes or reduces the stamp duty payable on an assignment of a life policy or its proceeds to make it more attractive for a policy owner to assign his life policy or its proceeds as a gift.

7.3.2 *Marine policy*

The English Marine Insurance Act 1906 applies in Malaysia by virtue of s.5(1) of the Civil Law Act 1956 (Act 67, Rev. 1972).[5] If the Malaysian legislature enacts a Marine Insurance Act, it should include clear provisions on first, the procedure for an assignment of a marine policy or its proceeds; and secondly, the priority rule governing competing interest holders. It should not adopt the current s.50 of the English Marine Insurance Act 1906, which prescribes that an assignment of a marine policy or its proceeds may be created by an indorsement on the policy or *in any other customary manner*. The phrase "any other customary manner" creates much uncertainty.

7.3.3 Non-marine policy protecting property

The writer had discussed in Part 3.5.1.2(b)[6] that at common law, the risk in relation to a property which is purchased is on the purchaser. If the property is damaged or destroyed before the property is conveyed to the purchaser, he will still have to pay the purchase price as stated in the contract of sale. In addition, he has no right to the proceeds of the insurance policy effected by the vendor on the property. In England, the legislature had enacted s.83 of the Fires Prevention (Metropolis) Act 1774 and s.47 of the Law of Property Act 1925 to confer rights on the purchaser.

[5] *The Melanie* [1984] 1 MLJ 260, at 264.
[6] *Supra*, at 121-122.

In Malaysia, there is no provision equivalent to either of the English provisions. It is uncertain whether either or both of them apply in Malaysia pursuant to s.5 of the Civil Law Act 1956. Thus, this thesis recommends that the legislature in Malaysia legislates either that the risk to the property does not pass to the purchaser until the completion of the contract of sale or that the vendor's rights against the insurer under an insurance policy effected on the property are assigned to the purchaser upon full payment of the purchase price. The National Land Code 1965 (Act 56) and the Sale of Goods Act 1957 (Act 382, Rev. 1989), or the Insurance Act 1996 should be amended accordingly to protect the purchaser of a property.

7.3.4 Priority rule governing competing assignees and interest holders

Currently, there is no local case law or statutory provision which regulates the priority between competing assignments of a life policy or its proceeds other than the following. First, reference must be made to the English Policies of Assurance Act 1867. The Act regulates the priorities of assignments of a life policy created pursuant to the procedure prescribed in the Act. Unfortunately, it is uncertain whether the English Act applies in Malaysia.

Secondly, s.168(2) of the Insurance Act 1996 prescribes the priority rule in a contest between the assignee of the proceeds of an own-life policy with another assignee, an ordinary nominee, and a beneficiary of a trust under s.166. However, as discussed in Part 3.5.2.2,[7] there are weaknesses in s.168(2) and the writer has questioned its effectiveness.

[7] *Supra*, at 131-137.

In view of the aforementioned problems and the lack of a comprehensive priority rule governing assignments and competing interest holders of other types of policies, this thesis recommends that the Malaysian legislature enacts a priority rule that is clear and comprehensive. It is suggested that the priority of an assignment over a policy or its proceeds and a competing interest holder is governed by the dates on which notices thereof are given to the insurer.[8] To facilitate this priority rule, the insurer should be required to keep a register of policies and interests. A member of the public should, with the policy owner's consent, be allowed to obtain from the insurer information pertaining to the status of the policy and interests over it. This proposal may be implemented by amending s.47 of the Insurance Act 1996 which currently requires every life insurer to establish and maintain a register for its policies and claims.

7.3.5 Rights of the assignee when the insurer is wound-up

The Insurance Guarantee Scheme Fund accords protection to policy owners and persons entitled through them, who have claims against an insurer which is wound-up on the ground of insolvency. The issue is whether an assignee is a qualified claimant. Although the definition of the phrase "policy owner" includes the assignee of the policy, it is uncertain whether the phrase includes an equitable assignee. To protect an equitable assignee, the definition should be amended to include him.

As indicated in Part 7.2.5,[9] under the current position, a policy is automatically terminated upon the winding-up of the insurer unless the policy is a life policy and the liquidator of the insurer has transferred the policy to a solvent insurer. If the policy is not transferred to another insurer, the policy owner is eligible to claim the actuarial

[8] This priority rule should not apply to the competing interest holders of a marine policy. See Pt. 7.3.2, *supra*, at 383.
[9] *Supra*, at 380.

valuation reserve in respect of his life policy. Thus, it is certain that the legal assignee of a life policy or its proceeds is entitled to claim the reserve from the IGSF. However, the legal assignee of a general policy can only claim reimbursement of the premium paid by the policy owner in proportion to the unexpired period of the policy. The legal assignee of a general policy proceeds is not entitled to the refund of the premium, for it is not part of the policy proceeds. To protect an assignee, this thesis reiterates that a policy should not be automatically terminated upon the winding-up of the insurer. The other issues raised in, and recommendations proposed in Part 7.2.5[10] apply here, too.

7.4 Rights of the Beneficiary of a Statutory Trust as a Third Party

As discussed in Chapter 4, a person could create a trust in favour of his immediate family members by effecting a policy on his life for their benefit. Before the Insurance Act 1996 came into force, there was only one statutory trust device which could be used by a policy owner. The device was found in s.23 of the Civil Law Act 1956. After 1996, s.166 of the Insurance Act 1996 also provides for the creation of a statutory trust over an own-life policy. Both have different coverage. As discussed in Part 4.4.1,[11] it is not clear whether s.23 of the Civil Law Act 1956 continues to apply.

7.4.1 New section 166 of the Insurance Act 1996

The purpose of a statutory trust is to protect its beneficiaries. Thus, it does not benefit anyone, particularly the beneficiaries, if there is uncertainty on the applicability of s.23 of the Civil Law Act 1956. To resolve this, it is recommended that the legislature enacts a new statutory trust device which incorporates the advantages offered by s.23

[10] *Supra, at 379-380.*
[11] *Supra, at 175-178.*

of the Civil Law Act 1956 and the existing s.166 of the Insurance Act 1996, to replace both existing devices. This could be done by amending s.166 of the *1996 Act.*

7.4.1.1 Trust not avoided when the settlor becomes insolvent

It appears from the current wording of s.166(1) that a trust created under the provision may be avoided if it is found that the policy owner paid the premiums or part thereof to defraud his creditors. This deficiency was highlighted in Part 4.4.2.7.[12] To overcome this deficiency, this thesis proposes that the position under s.23 of the Civil Law Act 1956 should be retained. The trust is not avoided even if the policy was effected *and* the premiums were paid by the policy owner with intent to defraud his creditors. The amount of premiums paid with such intention may be paid to the creditors and the balance of the policy moneys should be given to the beneficiary of the trust.

7.4.1.2 Trust *inter vivos* should include all interests in the policy

Part 4.4.2.4 of this thesis[13] highlighted the uncertainty of the status of a trust under s.166. It is uncertain whether the trust is a trust *inter vivos* or a testamentary disposition. This thesis strongly recommends that s.166 should be amended to expressly provide that the trust is a trust *inter vivos*. There should be an immediate transfer of interest to the beneficiary upon nomination.

Further, it appears from the current wording of s.166 of the Insurance Act 1996 that the trust property consists of only the policy moneys payable upon the policy owner's death. This thesis recommends that the position under s.23 be adopted. The trust property should include all interests in the policy.

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[12] *Supra*, at 196-202.
[13] *Supra*, at 187-189.

beneficiaries. This will allow him to provide for his existing or future spouse and children by describing his beneficiaries as 'my wife and children'. If these recommendations are accepted, more persons would be entitled to benefit from the statutory trust device.

7.4.1.4 Settlor

Only a policy owner who has attained the age of 18 years may create a trust under s.166. As highlighted in Part 4.4.2.1,[14] this as unsatisfactory. This thesis proposes that a person who has attained the age of understanding and prudence should be permitted to create a statutory trust over his own-life policy.

7.4.1.5 Trustee by default

Section 166(3) of the Insurance Act 1996 provides that if the settlor of a trust under s.166 fails to appoint a trustee, the trustees by default shall be, first, the beneficiary; or secondly, the beneficiary's parent if the beneficiary is incompetent to contract; or thirdly, the Public Trust Corporation if the beneficiary has no living parent. This thesis submits that the position can be improved.

First, an incompetent beneficiary may be a person who has not attained the age of majority or a person who is mentally incapacitated. Currently, the Public Trust Corporation Act 1995 (Act 532), which established the Public Trust Corporation does not prescribe a procedure to deal with the trust property which the Corporation holds for a mentally incapacitated person who has attained the age of majority. As a result, the Corporation has to apply to the court for directions. This will result in delay and

[14] *Supra*, at 181.

If the aforementioned recommendations are adopted, the settlor will not be able to deal freely with the policy or any part thereof to the beneficiary's detriment. In addition, in the event the insurer is wound-up on the ground of insolvency, and the insurer's liquidator fails to transfer the life policy to another life insurer, the beneficiary will be entitled to the policy's actuarial valuation reserve. His position is safeguarded.

7.4.1.3 Beneficiaries

The beneficiaries of a trust under s.23 are restricted to the policy owner's spouse, legitimate children and lawfully adopted children. Under s.166 of the Insurance Act 1996, the policy owner may name his spouse and children, and *also his parents* provided that he has no spouse or child living when he named the parents, as his beneficiaries. The term "child" includes not only the policy owner's legitimate and lawfully adopted child, but also his illegitimate child and child adopted under any custom or foreign law.

The writer submits that although the coverage of a trust under s.166 is preferred to that of a trust under s.23, it can be improved. First, a parent who is named after the policy owner has started his own family, should also enjoy the benefits conferred by s.166. Secondly, the term "parent" should be defined in the Insurance Act 1996 to include the policy owner's natural parents, step-parents and adopted parents. Such definition will be consistent with the extensive meaning given to the term "child". Thirdly, s.166 should clarify that the term "spouse" includes a customary spouse.

This thesis also proposes that the owner of an own-life policy may create a statutory trust at the policy's inception or any time thereafter by identifying or describing his

beneficiaries. This will allow him to provide for his existing or future spouse and children by describing his beneficiaries as 'my wife and children'. If these recommendations are accepted, more persons would be entitled to benefit from the statutory trust device.

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[14] *Supra*, at 181.

more expenses being incurred to the beneficiary's detriment. This thesis recommends that the Act be amended accordingly.

Secondly, s.166(3)(b) of the Insurance Act 1996 provides that the parent of an incompetent beneficiary is the trustee by default. It is uncertain whether a parent who is mentally incapacitated or a bankrupt will be a trustee by default despite his condition. This thesis proposes that only a person who is competent to contract may be appointed as a trustee by the policy owner or by default.

7.4.1.6 Trustee's discretion

It appears from the current wording of s.166(4) that the trustee of a trust under s.166 has the discretion whether to consent to the settlor revoking the trust, varying or surrendering the policy, or assigning or pledging the policy as security. In Parts 4.4.2.4[15] and 4.4.2.6[16], the writer questioned whether the trustee has absolute discretion, for he should act in the beneficiary's best interest. This thesis strongly recommends that the new s.166 should clarify that the trustee shall not consent to any dealing which affects the beneficiary's rights unless the beneficiary is *sui juris* and has consented to it.

7.4.2 Statutory trust device which complies with the Muslim Law

Section 166 expressly excludes its application to a Muslim policy owner. Since it is uncertain whether s.23 of the Civil Law Act 1956 is still applicable, this thesis recommends that a statutory trust device which complies with the principles of Muslim law of inheritance be enacted. This may be achieved by amending the Takaful Act

[15] *Supra*, at 189.
[16] *Supra*, at 190-191.

1984 (Act 312) and the respective state legislations pertaining to the administration of Muslim laws.

7.4.3 Rights of the beneficiary when the insurer is wound-up

When the insurer is wound-up on the ground of insolvency, a person may claim compensation from the IGSF only if he has direct recourse against the insurer. A beneficiary of a trust under s.166 or s.23 does not have direct recourse against the insurer and thus, is not a qualified claimant against the IGSF. The trustee is the qualified claimant. The issues raised, and the recommendations proposed, in Part 7.2.5[17] apply to a beneficiary of a trust under s.166 or s.23.

7.5 Rights of Third Parties in Motor Insurance

Chapter 5 examined the statutory rights conferred on third parties in compulsory and non-compulsory motor policies respectively. Though a third party to a compulsory motor policy is better protected, his rights were eroded by the enactment of the Road Transport Act 1987 (Act 333) ("the RTA 1987") and the agreement made by the Motor Insurers' Bureau of West Malaysia ("MIB (Malaysia)") with the Minister of Transport in 1992. The current body of laws conferring rights on third parties in motor insurance law is definitely inadequate and thus, reforms are necessary to enhance their rights.

7.5.1 Scope of the compulsory motor insurance scheme

An injured third party can recover from the insurer the judgment sum awarded to him in respect of a risk which is covered by s.91(1) of the RTA 1987. Unfortunately, when the RTA 1987 was enacted to substitute the Road Traffic Ordinance 1958 ("RTO

[17] *Supra*, at 379-380.

1958"), the scope of the compulsory motor policy was narrowed. The term "road" is defined in the Act, and as discussed in Part 5.2.6[18], the term appears to exclude a road which is maintained and kept by private persons or bodies. It is immaterial that the road is accessible to the public. Since the compulsory motor policy covers an accident that takes place on a "road", the redefinition of the term "road" is contrary to the purpose of the compulsory scheme. This thesis proposes that a compulsory motor policy should cover an accident that happens in any place that is accessible to the public. If this is too wide, the least the legislature could do is to redefine the term "road" to include any road which is accessible to the public. It should not be material who maintains or keeps the road.

It is also unfortunate that the legislature did not widen the scope of the compulsory motor policy scheme to include the following risks. First, the scheme does not include damage to property. It is also uncertain whether the scheme covers damages for an injured third party's mental injury which is not caused by a physical injury, or a mental injury which does not cause adverse physical symptoms.

Secondly, it is not compulsory to cover the insured's liability towards his passengers, unless they are carried for hire or reward, or by reason of or in pursuance of a contract of employment.[19] There are numerous decisions on the definition of the two phrases. The writer views that instead of relying on judicial creativity, the Malaysian legislature should extend the compulsory motor policy scheme to cover the insured's passengers.

[18] Supra, at 237-238.
[19] Supra, at 217-222.

Thirdly, it is not compulsory to cover the insured's liability to his employee for the employee's death or bodily injury arising out of and in the course of his employment.[20] This should be reviewed because not every employee is covered by a liability policy effected by the employer or by the compensation scheme under the Employees Social Security Act 1969 (Act 4). Although the percentage of cases involving such employees may be small, the legislature should not disregard them.

Fourthly, certain categories of vehicles are currently excluded from the compulsory motor policy scheme.[21] The writer recommends that only a government-owned vehicle or a vehicle that has been issued with a certificate of security, or a vehicle driven by a person or his employee who has deposited the prescribed sum of money with the Accountant-General, be exempted. More particularly, the user of a vehicle that is being driven by a person under the direction of a road transport officer in connection with his application for a driving licence, should be covered by a compulsory motor policy.

In addition, the amount of undertaking presently provided for under the certificate of security and the amount of deposit should be revised in accordance with the present value of money. Currently, the amounts of undertaking are fixed at RM225,000 for a public service vehicle and RM45,000 for other types of vehicle, and the amount of deposit is fixed at RM125,000. These amounts have remained unchanged since 1937.

7.5.2 Rights of an injured third party against the insurer

Apart from failing to extend the scope of the compulsory motor policy scheme when the legislature enacted the RTA 1987 to supercede the RTO 1958, the legislature had

[20] *Supra*, at 215-217.
[21] *Supra*, at 229-234.

also removed some of the protection conferred on an injured third party by the 1958 Ordinance. In Part 5.3.1.1(d),[22] the writer highlighted that the time and the grounds on which an application is made to the court for a declaration that the compulsory motor policy is void, are no longer restricted. The court's declaration is effective against the injured third party so long as it is obtained before the third party's judgment against the insured is quantified. This thesis proposes that the position prior to the RTA 1987 be reinstated.

Further, the insurer is not required to notify the injured third party if it has obtained the court declaration or if it has commenced its declaration proceedings before the injured third party commences his action against the insured. As a result, the injured third party may not be able to make an informed decision whether to proceed against the tortfeasor or claim compensation from the MIB (Malaysia). Thus, this thesis recommends that the insurer who knows the identity of the injured third party, should be obliged to inform the third party of its proceedings or declaration against the insured.

To enhance the protection of the injured third party, the legislature should review the circumstances when the injured third party can sue the tortfeasor's insurer for the judgment sum awarded to him. The current position is as follows. If the tortfeasor is insolvent, the third party can sue the insurer for the judgment sum. However, if the tortfeasor is solvent, he can sue the insurer only for the judgment sum in respect of a compulsory third party risk. This thesis proposes that the insured's rights against his insurer should be transferred to the injured third party after the third party has obtained judgment against the insured irrespective of the insured's financial status. This will

[22] *Supra*, at 246-249.

give effect to one of the general purposes of a liability insurance, that is, to protect the interests of a third party claimant.

The legislature should also review the present law relating to the certificate of insurance. Currently, the injured third party has recourse against the insurer only if the insurer has delivered the certificate to the policy owner before the injured third party obtains judgment against the insured. This thesis reiterates that the delivery of the certificate of insurance to the policy owner should not be made a condition precedent. This is because the insurer's risk commences upon the issuance of the cover note, and not the delivery of the said certificate.

Further, the legislature should render all restrictive or exclusive clauses in a compulsory motor policy ineffective against an injured third party. As opined by Robert Merkin,[23] these clauses defeat the purpose of a compulsory motor insurance scheme, which is to ensure that the injured third party receives compensation for his loss.

In addition, the legislature should review s.100 of the RTA 1987. Due to its current wording, it is uncertain whether the protection conferred by Part IV of the RTA 1987, other than those prescribed by s.97 to s.99, is extended to an injured third party when the insured becomes insolvent. This thesis proposes that the legislature should legislate in no uncertain terms that a person injured in a road accident caused by an insolvent insured is conferred similar, if not more, rights to a person injured in a road accident caused by a solvent insured. The insured's state of insolvency should not adversely

[23] *Merkin, Robert, Colinvaux and Merkin's Insurance Contract Law* (Loose-leaf) (Release 1, March 2002), Sweet and Maxwell, London, at para. D-0353.

affect the third party's rights, for an insolvent insured is in no position to satisfy the awarded judgment sum.

The legislature should also amend s.98. An injured third party should be authorised to obtain information from the insured and the insurer to enable him to ascertain whether any rights have been transferred to and vested in him under the RTA 1987 upon the insured's act of insolvency. The injured third party's right to information should not commence after the injured third party has established the insolvent insured's liability, as was held in *Woolwich Building Society* v. *Taylor*.[24] Reform by way of legislation to overcome the effect of that decision is necessary.

7.5.3 Rights of an injured third party against the MIB (Malaysia)

The rights of an injured third party against the MIB (Malaysia) were examined in Part 5.4.[25] It was pointed out that the 1992 MIB (Malaysia) Agreement had eroded the benefits conferred by the 1968 MIB (Malaysia) Agreement on a person injured in a road accident caused by an uninsured driver. Now the MIB (Malaysia) is required merely to consider making compassionate payments at its absolute discretion to the injured third party. The MIB (Malaysia) appears to have reneged on its purpose of incorporation. This thesis has questioned the validity and fairness of the 1992 Agreement. It was submitted that the Minister of Transport did not have the power to enter into a contract with the MIB (Malaysia) which effectively revoked its statutory obligations under s.89 of the RTA 1987. If the validity of the 1992 Agreement cannot be challenged, this thesis hopes that the principles of administrative law will be applied to the MIB (Malaysia) in interpreting the provisions of the Agreement.

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[24] [1995] 1 BCLC 132, as cited in the English Law Commission's Consultation Paper No 152 on the *Third Party (Rights Against Insurers) Act 1930* (1998), at para. 4.16.
[25] *Supra*, at 258-279.

This thesis also questioned the validity of the clause which limits the time period for the injured third party to lodge his claim against the MIB (Malaysia) to three years from the date of the accident. It is contrary to s.29 of the Contracts Act 1959 (Act 136, Rev. 1974) and s.6(1)(a) of the Limitation Act 1953 (Act 254, Rev. 1981). Under the Limitation Act 1953, a plaintiff in West Malaysia has six years to claim against the MIB (Malaysia). The MIB (Malaysia) should not arbitrarily reduce the time period.

This thesis recommends that the Minister of Transport and the MIB (Malaysia) review the 1992 MIB (Malaysia) Agreement to implement the purpose of the incorporation of the MIB (Malaysia). They should also consider seriously the directions taken by the various Motor Insurers' Bureaus in other countries to compensate the victims of hit-and-run accidents.

7.5.4 Rights of an injured third party against the permitter

A person who permits an uninsured person to use a vehicle on a road commits a criminal offence. Under the principle in *Monk* v. *Warbey and Ors*[26], he is also subject to civil liability to a person who suffers injury from the non-performance of his statutory duty. The principle gives the injured third party another avenue for compensation. Unfortunately, it is uncertain whether the principle in *Monk* v. *Warbey* applies in Malaysia. Even if it applies, there is the uncertainty when the cause of action against the permitter arises. To avoid any potential problems faced by an injured third party where the tortfeasor is insolvent and uninsured, the legislature should take steps to enact clear provisions on the civil liability of the permitter and when it arises.

[26] [1935] 1 KB 75.

7.5.5 Rights of the authorised driver against the insurer

Section 91(3) of the RTA 1987 requires the insurer to indemnify an authorised driver in respect of any liability which the policy purports to cover. Thus, even though he is a stranger to the policy, he has direct recourse against the insurer. However, he has no better rights against the insurer than the policy owner. He is required to reimburse the insurer where the insurer has paid the injured third party pursuant to s.95 or s.96(1) despite a contractual limitation or condition in the policy. This thesis does not propose any reform in this aspect, for the protection of a tortfeasor is not one of the purposes of the compulsory motor policy scheme.

7.5.6 Rights of the hospital that treated the injured third party against the insurer

Section 91(2)(a) of the RTA 1987 confers a right on a hospital to recover from the insurer its expenses for rendering emergency medical treatment to an injured third party. However, the maximum amount of an insurer's statutory liability towards the hospital has remained unchanged since 1958. It is fixed at RM400 where the injured third party is given in-patient treatment and RM40 where he is given out-patient treatment. If the legislature is sincere in conferring rights on the hospital, the amount claimable should be reviewed. This thesis also recommends that the term "hospital" be amended to include private hospitals and clinics.

7.5.7 Rights of the third parties when the insurer is wound-up

It was pointed out that the Insurance Guarantee Scheme Fund was originally established to meet the liabilities of an insurer which was wound-up on the ground of insolvency to, among others, an injured third party. Currently, s.178(1) of the Insurance Act 1996 provides that the moneys in the fund may be utilised to meet the liabilities of

an insurer which is wound-up on the ground of insolvency, to its policy owners and persons entitled through them. The issue is whether the third parties to a motor policy, particularly an injured third party, come within the term "person entitled through him (the policy owner)", and are thus qualified to claim against the IGSF.

There is much uncertainty. It is uncertain whether the IGSF is liable to compensate the injured third party if the policy issued by the insolvent insurer is void or cancelled pursuant to the terms of the policy. It is also uncertain whether the IGSF is liable if the policy owner breaches any warranty. In other words, there is much uncertainty whether the rights conferred by Part IV of the RTA 1987 on an injured third party against an insurer are extended against the IGSF when the insurer is wound-up on the ground of insolvency. In view of the uncertainties, this thesis suggests that s.178(1) be amended. Bank Negara Malaysia should be empowered to withdraw funds from the IGSF to pay the statutory liabilities of an insolvent insurer. Apart therefrom, the issues raised and the recommendations made in Part 7.2.5,[27] apply here, too.

7.6 Rights of Third Parties in Group Insurance

In a group insurance, a number of persons are insured severally pursuant to a single contract made between the insurer and the group policy owner. As such, generally, the persons who are insured under the policy are third parties. The Malaysian legislature has enacted provisions pertaining to a group life policy, a group personal accident policy, a solicitor's professional policy, and a workmen's compensation policy. However, the provisions are inadequate in the protection of the third parties in the said group policies.

[27] *Supra*, at 379-380.

7.6.1 Group life and personal accident policies

Sections 186(3) and (4) of the Insurance Act 1996 were enacted to protect a person insured under a group life or personal accident policy. The purpose of the provisions is to confer on the insured person the right to sue the insurer where the group policy owner has no insurable interest in the insured person's life and where the insured person has paid the premiums to the group policy owner. To further protect the insured person and a person entitled through him, this thesis recommends that the legislature amends s.186(3) and (4) to confer rights on a person whom the group policy owner and the insurer intend to benefit.

7.6.2 Solicitors' professional policy

In West Malaysia, r.5 of the Legal Profession (Professional Liability) (Insurance) Rules 1992 (PU(A) 237/1992) requires every practising advocate and solicitor to be insured under a solicitors' professional policy effected pursuant to a Master Policy which is taken out in the name of the Malaysian Bar Council. The insurance is evidenced by the Certificate of Insurance issued to the legal firm where the solicitor is attached. The third parties in an approved solicitors' professional policy are the firm's legal assistants, consultants, other employees and chambering students (collectively "the Firm's Employees") whose professional liabilities are being insured, and the firm's clients. In Part 6.4 of Chapter 6[28], the writer discussed the position of the third parties as prescribed by the Legal Profession Act 1976 (Act 166), the Legal Profession (Professional Liability) (Insurance) Rules 1992, the approved solicitors' professional policy and other relevant statutes.

[28] *Supra*, at 326-353.

7.6.2.1 Provisions in the Legal Profession Act 1976 and the Legal Profession (Professional Liability) (Insurance) Rules 1992

The position of the third parties in an approved solicitors' professional policy is weak. The Legal Profession Act 1976 and the Legal Profession (Professional Liability) (Insurance) Rules 1992 do not confer rights on a Firm's Employee, and a client who has claims against the Insured Solicitor. This thesis strongly recommends that the legislature takes steps to amend the Act or the Rules to expressly confer rights on the third parties of the policy. Then, an Insured Solicitor and a client who have enforceable rights against the insurer will also be able to claim compensation from the Insurance Guarantee Scheme Fund when the insurer is wound-up on the ground of insolvency.

7.6.2.2 Provisions in the approved solicitors' professional policy

It was further noted that the approved solicitors' professional policy does not appear to protect the client who has a legitimate claim against an Insured Solicitor. First, there is no provision in the policy requiring the insurer to pay to the client his damages. Secondly, the approved policy is written on a 'claims made' basis. Thus, a client who discovers his losses and makes a claim against the Insured Solicitor at a time when the Insured Solicitor is no longer in practise may not be compensated. This thesis recommends that the approved solicitors' professional policy should continue to cover a client's claim which is lodged against an Insured Solicitor within a reasonable period after the solicitor's retirement from practise or death provided the claim arises from the solicitor's professional conduct during the currency of the policy.

Thirdly, the main basis for the compulsory insured amount is the number of solicitors in the firm. This thesis suggests that another important factor which should be taken

into account is the nature of work carried out by the firm. It cannot be generalised that a big firm handles high end jobs, whereas a small firm handles low end jobs.

Fourthly, there is a base excess amount imposed on each claim. It ranges from RM10,000 to RM250,000, depending on the number of solicitors in the firm. It is submitted that the base excess is high and is contrary to the purpose of the insurance scheme. The Bar Council should negotiate for a more reasonable base excess.

Fifthly, the only restrictive clause which is ineffective against the client is the non-disclosure of any circumstances which may reasonably be expected to give rise to a claim. This thesis suggests that since the purpose of the compulsory insurance is to ensure that the client is compensated for his losses, more warranties and exclusions should be made ineffective against him.

7.6.2.3 Provisions in other statutes

Currently, the rights of a client where the Insured Solicitor becomes insolvent are prescribed in the Third Parties (Rights against Insurers) Act 1930 (UK) ("the TP(RI) Act 1930 (UK)"). The Act applies in Malaysia by virtue of s.5 of the Civil Law Act 1956.[29] However, steps are being taken to reform the TP(RI) Act 1930 (UK). Upon the enactment of the new statute, the new Act may apply to the states of Malacca, Penang, Sabah and Sawarak. However, for the other states in Malaysia, the TP(RI) Act 1930 (UK) will continue to apply. This strange state of affairs is due to s.5 of the Civil Law Act 1956.

[29] See *King Lee Tee* v. *Norwich Union Fire Insurance Society Ltd* (1933) 2 MLJ 187.

It is proposed that the Malaysian legislature enacts a local statute to protect the rights of such third party claimant. The legislature may refer to the reports of the English Law Commission on the TP(RI) Act 1930 (UK), namely its Consultation Paper No. 152 and Report No. 272, and adopt the recommendations made therein which are suitable to the Malaysian legal environment.

As discussed in Part 7.2.5[30], the legislature should also review Part XIV of the Insurance Act 1996 to ensure that the Insured Solicitor and the client are adequately compensated when the insurer is wound-up on the ground of insolvency. The points raised in Part 7.2.5 apply here, too.

7.6.3 Workmen's compensation policy

The Workmen's Compensation Act 1952 (Act 273, Rev. 1982), which applies to foreign workmen, requires an employer to effect an approved workmen's compensation policy. The salient terms of the approved workmen's compensation policy are regulated by the Workmen's Compensation (Foreign Workers' Compensation Scheme) (Insurance) Order 2005 (PU(A) 45/2005) ("the Workmen's Compensation Order 2005").

7.6.3.1 Provisions in the Workmen's Compensation Act 1952 and Workmen's Compensation Order 2005

It was observed in Part 6.5[31] that the provisions in the Workmen's Compensation Act 1952 and Workmen's Compensation Order 2005 are found lacking in the protection of the injured workman and his dependant. First, Paragraph 3(2)(b) of the Order requires the approved workmen's compensation policy to contain a term that the insurer will

[30] *Supra*, at 379-380.
[31] *Supra*, at 353-373.

pay to the injured workman or his dependant the amount of compensation assessed by the Commissioner. There is an alternative method of deriving at the compensation payable by the employer under the Act, that is, pursuant to an order from an Arbitrator. Unfortunately, Paragraph 3(2)(b) omits this method. This thesis recommends that the Workmen's Compensation Order 2005 should require the insurer to pay to the injured workman or his dependant the compensation payable by the employer under the Act. It should be immaterial whether the compensation is assessed by the Commissioner or Arbitrator, so long as it is recorded by the Registrar of the Sessions Court.

Secondly, the Workmen's Compensation Order 2005 also requires the insurer to confer benefits which are additional to those prescribed by its parent Act. However, it is not clear whether the additional sum of RM7,000 which is payable when the injured workman succumbs to his injuries is meant for the deceased workman's dependant or the employer. This thesis recommends that if the legislature intended the dependant to enjoy the additional RM7,000, the Workmen's Compensation Act 1952 or the Workmen's Compensation Order 2005 should stipulate so. Otherwise, due to the doctrine of privity, the dependant has no recourse against the insurer for the additional sum. He also does not have recourse against the employer for the additional benefit as it is not part of the employer's liabilities to him.

Thirdly, even though the approved workmen's compensation policy is pursuant to a compulsory insurance scheme, the insurer can avoid the policy if the employer breaches a warranty or fails to comply with a procedural condition prescribed in the policy. If the employer is insolvent, the injured workman or his dependant will not be compensated. This undermines the purpose and intention of the scheme. This thesis

submits that any breach or failure by the employer should be made ineffective against the injured workman and his dependant.

Fourthly, the enactment of s.21 of the Workmen's Compensation Act 1952 is to safeguard the position of an injured workman or his dependant when the employer becomes insolvent. However, the employer and the insurer are not imposed with any obligation to provide the necessary information to the injured workman or his dependant to enable him to ascertain whether any rights have been transferred to and vested in him by virtue of the provision. Also, s.21 does not prohibit the insurer and the employer from making any settlement or agreement which may defeat or affect the rights of the injured workman or his dependant. This thesis recommends that the legislature amends s.21 of the Workmen's Compensation Act 1952 to ensure that an injured workman and his dependant are protected.

7.6.3.2 Provisions in other statutes

In Parts 6.5.4[32] and 6.5.6,[33] the writer referred to the relevant provisions in the Companies Act 1965 (Act 125), the Bankruptcy Act 1967 (Act 360, Rev. 1988) and the Insurance Act 1996, which are prejudicial to an injured workman or his dependant. This thesis calls for these provisions to be reviewed.

(a) When the employer is insolvent

There are situations where the employer's liability to the injured workman or his dependant is not covered by an approved workmen's compensation policy, either because the employer did not effect one, or the insurer has successfully defended the

[32] *Supra*, at 361-362, and 365.
[33] *Supra*, at 370-371.

claim against it. If the compensation payable to the injured workman or his dependant is assessed by the Commissioner or ordered by the Arbitrator before the commencement of the employer's winding-up or receiving order, it is a preferential debt payable from the insolvent employer's assets. However, its ranking in relation to the employer's other preferred creditors depends on whether the employer is a company or otherwise. If it is a company, s.292(1) of the Companies Act 1965 provides that the compensation ranks third in the list. If the insolvent employer is an individual, s.43(1) of the Bankruptcy Act 1967 provides that the compensation ranks last.

This thesis recommends that the aforesaid provisions be reviewed. The rights of the injured workman or his dependant against the insolvent employer should not be dependent on whether the employer is a company or otherwise. In addition, the compensation payable by an insolvent and uninsured employer to the injured workman or his dependant should be a preferential debt even where his cause of action against the employer commences after the employer becomes insolvent.

(b) When the insurer is wound-up

An injured workman or his dependant could claim compensation from the original Insurance Guarantee Scheme Fund. However, his rights for compensation against the current IGSF is made uncertain by the phrase "the person entitled through him (the policy owner)" in s.178(1)(c) of the Insurance Act 1996. Further, as pointed out in Part 6.5.6,[34] even if the injured workman or his dependant is a qualified claimant, he cannot claim any compensation awarded by the Arbitrator. Thus, this thesis reiterates the need

[34] *Supra*, at 370.

to clarify the eligibility of a person who has recourse against the IGSF and to amend the relevant provisions in the Workmen's Compensation Act 1952 and Workmen's Compensation Order 2005 to ensure that the injured workman or his dependant receives his dues from the insurer. The other issues raised and discussed in Part 7.2.5[35] apply here, too.

7.7 Concluding Remarks

In conclusion, the writer is of the view that much could still be done to protect and improve the rights of third parties in insurance law in Malaysia. It is indeed disheartening that the authorities have not fully comprehended the purpose of a compulsory insurance scheme such as in the cases of a motor policy, a solicitors' professional policy and a workmen's compensation policy. In some instances when the legislature reviewed the existing statutory provisions pertaining to third party rights, it did not enhance them. Instead, it took a few steps backwards, and introduced rules which affect the third party rights. As a result, the underlying principle of a compulsory insurance scheme to confer protection on the third parties was compromised.

It is clear that the respective statutory provisions conferring enforceable rights on third parties do not cover all types of contracts made for their benefit. This weakness is not limited to only the statutory provisions analysed in this thesis. Therefore, the writer calls on the legislature to review the application of the doctrine of privity in the general law of contract. The English Law Commission saw a need to it and issued a Consultation Paper, followed by a Report on the matter. As a result, the Contracts (Rights of Third Parties) Act 1999 (UK) was enacted in 1999. A similar Act was also

[35] *Supra*, at 379-380.

enacted in Singapore and it came into force on 1 January 2002. Although the writer applauds the move taken by the English and Singapore legislatures, she does not suggest that the Malaysian legislature adopts the Contracts (Rights of Third Parties) Act 1999 (UK). Instead, it should review and amend the Contracts Act 1950 to abrogate, or at least modify, the application of the doctrine of privity in Malaysia. The law should support the commercial needs of the contracting parties. It should give legal effect to the contracting parties' intentions and expectations.

However, if it is found that such encompassing reform is not feasible, the legislature should at the very least, review the application of the doctrine of privity in insurance law. The nature of most insurance contracts requires its exclusion. Rather than rely on judicial creativity to give effect to the intention of the contracting parties and to protect the third parties, the legislature should be proactive. The legislature has modified the application of the rule on non-disclosure and misrepresentation by enacting s.150 of the Insurance Act 1996. Similarly, it should review the application of the doctrine of privity in insurance law in Malaysia.

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