retain the damages within their Group through a subsidiary Life Company.

Structured settlements were touched on in both the House of Commons and the House of Lords following the (defeated) Rosie Barnes National Health Service Bill. The Secretary of State for Health, William Waldegrave, said that the Lord Chancellor's Department were considering structured settlements with the Law Commission. There was concern regarding claims where the Plaintiffs had died unexpectedly early leaving the family virtually millionaires overnight! This would not occur in a structured settlement where the payments are linked to the life of the Plaintiff.

Finally it is worth considering the remarks of Mr. Justice Rougier who approved the structured settlement in the Heeley case where there was a saving to Insurers of some £100,000.00 but gains to the Plaintiff of well in excess of that sum. He referred to the "hit and miss" basis of conventional lump sum awards and said "..I have absolutely no hesitation not only in approving the [structured] settlement, but giving it positive blessing".

SOFI -v- PRUDENTIAL ASSURANCE COMPANY LIMITED (1990)
Erosion of the Duty of Due Care?
By Deborah Tompkinson, Alsop Wilkinson, Solicitors

Those working in the Insurance field will be familiar with the duty of insureds to take all reasonable care to avoid loss, sometimes expressed as the duty to act as if uninsured. However, the question of what action is necessary to discharge the duty is a vexed one. The recent decision of the Court of Appeal in *Sofi -v- Prudential Assurance Company Ltd.* (1990) was assumed at first glance to be a watershed in favour of the insureds. The purpose of this article is to examine the decision and consider whether it is likely to have any significant impact on the applicable standard of care.

The Insurance

The insurance was a standard householder's policy with an All Risks extension for household contents. It also gave cover for third party liability, the importance of which will be seen.

Under "General Policy Conditions", it was provided:

"The insured and any person entitled to claim under this policy must take all reasonable steps to safeguard any property insured and to avoid accidents which may lead to damage or injury..."

The schedule of property insured under the All Risks section listed, inter alia, various items of jewellery. Each piece was individually valued and the total came to £42,035.00.

The History

Before departing for a holiday in France, the plaintiff, Mr. Sofi, explained to the defendant's agent that he intended to take his jewellery with him, giving as a reason his concern over a prior burglary. There is no suggestion in the transcript that the plaintiff considered putting the jewellery in the bank. On 26th January 1986, the plaintiff and four members of his family departed by car to Dover.

At Dover, the party left the car and the judge found that a discussion took place as to what should be taken with them. The jewellery was in a soft leather case, 12" x 6". This was put into the glove compartment, since it was not a "physically small piece of handbag.... it would not fit into any pockets. It would be slightly more dangerous to carry it in hand than leaving it in the car." The glove compartment was locked. The party was out of sight of the car for about 5 minutes and away from the car for less than 15 minutes in total.

The trial judge did not accept the plaintiff's account of events; he specifically found that the plaintiff's claim for loss of suitcases was "greatly exaggerated" and he was troubled as to how such a theft could have taken place so quickly in broad daylight without attracting attention.

He, nevertheless, accepted the testimony of the son-in-law and gave judgment for the plaintiff on the grounds that he had complied with the condition of reasonable care.

The Court of Appeal Decision

The Court considered:

1) the definition of "reasonable care" as it applied to the policy and

2) whether all reasonable steps had been taken to safeguard the property.

The Court was unanimous that a limitation had to be placed upon the scope of General Policy Condition 2. Their reasoning was that it applied to all sections of the policy, including the liability section. Lloyd LJ said: "If the clause were to be taken as meaning that the insured was to take all reasonable care of the property insured and all reasonable care to avoid accidents, then the insurers could never be liable under section 11 (covering third party liability) ... Legal liability in the great majority of cases depends upon want of reasonable care." Further, insurers would escape all legal liability under sections 1 (covering the house) and 2 (covering contents) in the "very ordinary case" of damage to a house or its contents by fire if the fire were caused by the negligence of the insured.

The Court of Appeal's decision in *Sofi* is, therefore, based upon a definition of the standard of due care applied to policies of liability only. It follows that, where a policy or clause is not construed by reference to third party liability cover, a wider and more rigorous standard of care should apply. There is no reason to suppose this is not the one which the industry has always applied.

General Policy Condition 2 was construed by reference to the dictum of Diplock L.J. in *Fraser -v- B.N. Furman (Productions) Limited [1967]* 3 AllER in which a clause in an Employer's Liability contract required the insured to "take reasonable precautions to prevent accident and disease." He found that "reasonable precautions" meant "reasonable as between the insured and the insurer having regard to the commercial purpose of the contract, which is, inter alia, to indemnify the insured against liability for his (the insured's) personal negligence. The insured, where he does recognize a danger should not deliberately court it by taking measures which he himself knows are inadequate to avert it". Diplock LJ made it clear that the standard of care was not to be that of the hypothetical employer exercising due care (the standard which is generally understood by insurers to apply) because failure to observe such a standard would be grounds for liability in negligence and thus defeat the purpose of the contract. "In other words it is not enough that the employer's omission should be negligent: it must be at least reckless....The purpose of the condition is to ensure that the insured will not, because he is covered against loss by the policy, refrain from taking precautions which he knows ought to be taken."

In other words, there are two tests:

a) all reasonable care: this is an objective test applying to indemnity policies; and

b) recklessness: this is a subjective test, applying to insurances of liability or to situations where the insured's negligence is a pre-condition of the insured peril.

The trial judge in *Sofi* applied this test in two ways; firstly, he considered the amount of time for which the car would have been out of sight or sound. "This is not a case of a car being left unattended for a lengthy period of time in an obviously vulnerable place. With property of this value that plainly would have been reckless. With hindsight the decision might not have been the same. The plaintiff did act within the bounds of reasonable prudence."

The Court of Appeal approved this test, with the reservation that the reference to reasonable prudence may have been too favourable to the insurer.

The problem with the above is that the judge seems to have placed some stress upon the length of time the car was out of sight whereas it is suggested that recklessness requires some element of intention or lack thereof on the part of the insured. The difficulty can be illustrated thus:

Three drivers park their cars in a car park, leaving valuables inside the vehicles, with the intention of going for a walk. Driver A intends to be away no more than 10 minutes; drivers B and C intend to be absent for a couple of hours. Drivers A and C return as planned but driver B changes his mind and returns to the car park at the same time as driver A. During the brief absence, all three cars have been vandalized. On the test as applied by the judge, drivers A and B (B being the case under discussion) would recover; driver C would not, despite the fact that his intention was identical to that of driver B and it was only fortuitous that driver B returned to the car park within a short time of the theft.

Secondly, the judge placed weight upon the debate which took place as to whether or not to leave the jewellery in the car. In other words, the reasonable prudence was displayed by considering taking precautions even though the wrong decision was reached. The judge said: "Mr. Wordsworth argued that it was reckless of the plaintiff not to take the jewellery with him when he climbed the mount or not to have left somebody behind in the car, having regard to the value of the jewellery. I do not accept that submission. If the plaintiff had given no thought at all to the jewellery, this submission might have succeeded. ...The plaintiff and his son-in-law considered together what was best to do. They decided that in the circumstances the safest thing to do was to leave the jewellery in the locked glove compartment. I cannot regard that decision as having being taken recklessly". This was upheld by the Court of Appeal. It should be appreciated however that if the objective test of all reasonable care had

been applicable, the same decision might not have been reached.

To summarize, the position is now as follows:

1. There are two standards of reasonable care: Objective and subjective. The subjective standard will apply if there is a liability element in the perils to which the due care clause applies.

2. Where there is no liability element, ie where the policy or the clause in question deals with indemnity or does not seek to protect the insured against the consequences of his own negligence, the objective standard will still apply. If a hypothetical prudent man would not have done what the insured did or would have done something which the insured left undone, then there will be a breach of the duty of care and the claim may be declined.

3. Where the purpose of the insurance is to protect the insured against the consequences of his own negligence, a literal application of the requirement of due care would defeat the purpose of the policy. Accordingly, the subjective test as set out by Lord Diplock will apply. The insurer will only be able to decline the claim if the insured was "reckless".

4. Following *Sofi* it would appear that an insured will not be taken to be reckless if he recognizes a danger and, in good faith, takes a course of action which, in retrospect, proves to be wrong.

Consequences

1. Where the *Sofi* test applies, it seems it will be sufficient for a claimant to show that he had thought about the best course of action and had unfortunately selected the wrong one. This is hard news for insurers because such an allegation will be very hard to disprove.

2. Lloyd LJ in the Court of Appeal held, obiter, that the duty of care is not a condition precedent and the burden of proving a breach is on the defendant insurer.

3. Greater care will be required in the drafting of composite policies.