Judgment Book

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO: 75/87

BEFORE: The Hon. Mr. Justice Forte, J.A.
The Hon. Mr. Justice Downer, J.A.
The Hon. Mr. Justice Gordon, J.A. (Ag.)

BETWEEN THE ADMINISTRATOR GENERAL (Administrator Estate Hopeton Samuel Mahoney Deceased) APPELLANT

AND NATIONAL EMPLOYERS MUTUAL ASSOCIATION LIMITED RESPONDENTS

Carl Rattray, Q.C., with Norman Samuels for Appellant

Hugh Small, Q.C., with Michael Hylton instructed by Myers, Fletcher & Gordon, Manton & Hart for Respondents

October 10, 18, 19 & November 29, 1988

FORTE, J.A.

On 19th May, 1987, after a trial of 2 days, Patterson J., gave judgment for the defendant/respondents and on the 27th November, 1987, delivered written reasons for so doing.

The case had its origin when Jonathan Daley entered into a contract of insurance with the defendant/respondents to insure his motor vehicle registered NC 3590 in return for the payment of premiums to them by Mr. Daley. A certificate of insurance No. 010019 was subsequently issued to Mr. Daley.

On the 10th January, 1978, while driving the said motor vehicle Mr. Daley was in an accident which resulted in the death of Hopeton Mahoney. On the 9th January, 1979, the Administrator General, the executor of the estate of Mahoney, instituted proceedings in the Supreme Court against Jonathan Daley, alleging negligence in Daley and claiming damages for the

death of Mahoney under and by virtue of the Fatal Accidents Act and the Law Reform (Miscellaneous Provision) Act.

On the 15th April, 1983 judgment was entered for the plaintiff/appellant for $271,000.00 with costs to be taxed. On the 5th May, 1983, the interest awarded by the Court amounted to $70,569.85. The judgment remained unfulfilled because of the lack of means of Daley and consequently the plaintiff by virtue of section 18 of the Motor Vehicle (Third Party Risks) Act - brought this action against the defendant to recover the sum of $271,000.00 plus $70,569.85 interest, plus $7.50 expended on the Writ of Seizure and Sale effected with no success upon Daley.

The defendant contended successfully before Patterson, J., that the Policy of Insurance entered into with Jonathan Daley exempted the company from liability for any loss suffered while the vehicle was being used for hire or reward, and that the incident giving rise to the claim arose out of the use of the vehicle for that purpose. For this he relied on the policy which was produced, and which had the following provisions:

> GENERAL EXCEPTIONS
>
> The Association shall not be liable in respect of
>
> (1) any accident loss, damage or liability caused, sustained or incurred.
>
> (a) .....
>
> (b) whilst the Motor Vehicle is being
>
> (i) used otherwise than in accordance with the 'Limitations as to Use.'

In the Schedule of Policy - under "Limitation as to Use" it states:

> Use for social domestic and pleasure purposes
> Use in connection with the Policyholder's business
> Use for the carriage of passengers (other than for hire or reward) in connection with the Policyholder's business.

The Policy does not cover:

(1) Use for hire or reward or for racing pacemaking reliability trial or speed testing

(2) Use whilst drawing a trailer except the towing (other than for reward) of any one disabled mechanically propelled vehicle.

The sole witness at the trial was called by the defendant/respondent. He was Jonathan Daley who testified in brief that on the fateful day 11th January, 1976 while coming from Point Hill, and in the vicinity of the March Pen Road he was stopped by two men whom he did not know before. They asked him to carry a piece of iron from the Arawak Museum to March Pen Road for the consideration of $20.00. He went to the Museum, where the men loaded the iron into the truck. It was while in the process of delivering the iron that the accident resulting in the death of Mahoney, occurred. In effect then, the Insured Daley gave evidence which the learned trial judge accepted as supporting the defendant's contention that the vehicle was being used at the time for "hire or reward" and therefore outside the limitation of use as stated in the policy. He accordingly entered judgment for the respondent.

Two questions arose for decision in the hearing of this appeal.

(1) Do the provisions of section 18 (1) of the Motor Vehicle Insurance (Third Party Risks) Act entitle a third party to recover from the insurer, a judgment obtained against the insured, in circumstances where the incident giving rise to the claim occurred at a time when the vehicle was being used for a purpose which was not permitted by the Policy by virtue of its 'Limitation of Use' clause, and

(2) In any event, was there sufficient evidence that the insured was in fact using the vehicle for a purpose not permitted by the policy, so as to deny him the benefits of it?

The purpose of the Motor Vehicle Insurance (Third Party Risks) Act is the protection of third parties who are the victims of the negligent driving of persons who use motor vehicles on the roadway. Consequently it makes compulsory the insurance of all vehicles being used upon the roads.

Section 4 (1) provides:

> "Subject to the provisions of this Act, it shall not be lawful for any person to use, or to cause or permit any other person to use a motor vehicle on a road, unless there is in force in relation to the user of the vehicle by that person or that other person, as the case may be, such a policy of insurance or such a security in respect of third party risks as complies with the requirements of this Act."

and section 4 (2) makes contravention of subsection (1) a criminal offence.

Of significance, is the fact that section 4 (1) is not directed at the driver of the vehicle but to the 'user' of the vehicle. This is clear from the following words of the subsection:

> "It shall not be lawful for any person ..... unless there is in force in relation to the user of the vehicle."

This view is supported by the dicta of Humphreys J., in the case of John T. Ellis Ltd v. Hinds (1947) 1 All E.R. 337 at page 341:

> "..... It is not any particular person who uses the vehicle who is required by section 35 (equivalent to section 4 (1)) to be insured. What is required is that the user on the road by the person or persons in fact using should be covered by the insurance in respect of third parties."

Section 5 (1) states the circumstances for which a policy must be provided and in its proviso makes certain exceptions. It may be useful to set out the section in so far as relevant.

"In order to comply with the requirements of this Act the policy of insurance must be a policy which -

(a) is issued by a person who is an insurer; and

(b) insures such person, persons or classes of persons, as may be specified in the policy in respect of any liability which may be incurred by him or them in respect of the death of, or bodily injury to, any person caused by, or arising out of, the use of the motor vehicle on a road:

Provided that such a policy shall not be required to cover -

(i) liability in respect of the death arising out of, and in the course of his employment of a person in the 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

(ii) except in the case of a motor vehicle duly licensed for the purpose in which passengers are carried for hire or reward, and except in the case of a motor vehicle in which passengers are carried by reason of, or in pursuance of a contract of employment with a person insured by the policy, 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 vehicle at the time of the occurrence of the event out of which the claims arise."

In so far as this case is concerned it was not in dispute that the policy issued to the insured, did not come within the exceptions expressed in the proviso to section 5 (1) (b) and that the vehicle of Mr. Daley was required to be insured under the provisions of the Act.

It was contended, however, that that being so, section 18 (1) of the Act would give to the appellant a right to recover the judgment obtained against the insured, even if it were found (as the learned trial judge in fact did) that the insured was using the vehicle for "hire and reward" a user which was not covered by the policy.

In my opinion this argument is fallacious. Section 18 (1) states as follows:

> "18. (1) If after a certificate of insurance has been issued under subsection (4) of section 5 in favour of 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 5 (being a liability covered by the terms of the policy) is obtained against any person insured by the policy, then notwithstanding that the insurer may, be entitled to avoid or cancel, or may have avoided or cancelled, the policy, the insurer shall subject to the provisions of 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 enactment relating to interest on judgments."

The sub-section requires the following condition precedent to the third party's right to recover from the insurers -

(1) A certificate of insurance must have been issued by virtue of section 5 (4).

(2) Judgment in respect of any such liability as is required to be covered by a policy under section 5 (1) (b) has been obtained against the insured.

(3) The liability must be a Liability covered by the terms of the policy.

It is conceded that both (1) & (2) were fulfilled in this case. The question therefore is whether or not the liability was one which was covered by the terms of the policy. As already outlined, the "Limitation as to Use" clause in the policy, limited the use of the vehicle and specifically states that the "Policy does not cover Use for hire or reward etc."

In my opinion, unless it can be shown that the liability was one which was covered by the terms of the policy, the section cannot avail the appellant.

In the case of Herbert Railway Passengers Assurance Co., (1938) 1 All E.R. 650:

> "W., was insured with the defendant company against third party risks in respect of a side-car and the policy provided that the defendant company should not be liable in respect of any accident incurred while any motor cycle was being driven by or was for the purpose of being driven by him in the charge of any other person other than the insured.
>
> W., while driving with a friend, fell ill, and allowed the friend to drive the side-car. While being so driven the side-car collided with a lorry, with the result that the plaintiff was injured. In an action against W., the plaintiff recovered damages and now sought to recover them from the insurance company."

In holding that the plaintiff could not recover in the action under section 10 of the Road Traffic Act 1934, (which is similar in terms to section 18 of the Motor Vehicle Insurance (Third Party Risks) Act) Porter J., said thus:

> "I did raise the question and Mr. Elkin raised it before me, as to whether there might not be a claim under section 36 (1) (b) (similar to section 5 (1) (b)) in that the wording of that section was so wide that it included any case where the assured was liable owing to the use of any motor on the road, and in that section 10 of the Act of 1934 imposed a liability upon the insurers where the assured was liable and could not pay. But section 10 does not, I think, impose any such liability in a case where the insurers have limited their liability by the wording of the policy, but only in a case where there is an apparently valid policy covering the liability which yet they could have avoided or cancelled because of some misrepresentation of concealment on the part of the assured." (emphasis mine)

With this dicta of Porter J., I agree. If the use to which the vehicle is put is contrary to the contract of insurance between insured and insurer, then it is my view that its user is outside the scope of the policy, and the vehicle is therefore not insured for that particular user. Any liability arising out of such user, would therefore not be covered by the terms of the policy. Indeed, any such user would be subject to a criminal prosecution by virtue of section 4 of the Act - in that it is an offence to use or permit to be used a motor vehicle on the roads "unless there is in force in relation to the USER of the vehicle ..... such a policy of insurance. This view, is also supported by the case of Gray v. Blackmore (1933) 1 K.B. 95. The facts, as they are stated in the head-note were as follows:

> "The plaintiff made to the defendant and other underwriters a proposal for insurance of a motor car, and disclosed the fact that he was a garage proprietor. The underwriters issued a policy which provided (inter alia) for indemnity against liability to third persons in respect of bodily injury in the event of accident arising out of the use of the car. The policy also expressly provided that it should not cover liability caused sustained or incurred while the car was being used otherwise than for 'private purposes' which were defined as meaning 'social, domestic and pleasure purposes and use by the assured in person in connection with his business or profession. The term 'private purposes' does not include ..... use for any purposes in connection with the motor trade. A certificate of insurance under paragraph 11 of the Road Traffic Act 1930, containing a similar limitation was also issued to the plaintiff.
>
> While using the car as the judge found, for purposes in connection with the motor trade the plaintiff had an accident, as a result of which a third party claimed damages for personal injuries. The underwriters having refused to indemnify the plaintiff he claimed a declaration that they were bound to do so.

In delivering judgment, Branson J., in a reference to sections 35 and 36 of the Road Traffic Act 1930, which are in terms similar to sections 4 and 5 of the Motor Vehicle Insurance (Third Party Risks) Act, had this to say:

> "That it seems to me is simply prescribing what cover the man must have if he is to escape the consequences of section 35. Section 35 relates to the use by him of a motor car upon the road, and it is that use by him of that vehicle on the road that must be covered in order to free him from liability under section 35. All that section 36 does is to prescribe the kind of cover that he must have in order to escape the consequences of using the vehicle in contravention of section 35.

> "What is sought in this case is a construction of the section which should say that any policy issued in respect of any vehicle which may be used on the road must cover that vehicle wherever used on the road for any purpose for which any vehicle can be used on the road. I do not see that the statute says anything of the sort. It is defining the protection which a man must have if he is to escape the consequences of section 35. That that is so, appears from the provisions of section 36 itself."

In coming to his conclusion he states as follows:

> "I see nothing in the statute which prevents an underwriter and an assured from agreeing to a policy with any conditions that they choose; but if the assured takes the car upon the road in breach of those conditions he cannot thereby throw a greater obligation upon the underwriter. All that happens is that he is on the road without a policy which is covering him under the Road Traffic Act and he is liable under section 35 as though he had never taken out a policy at all. He is using a car which is not covered by a policy which insures him under the words of section 36 (1) (b). That is the result of it, not to put an extra burden upon people who have never agreed to undertake it" (emphasis mine)

The appellant seeks support for his argument, in the words of section 18 (1) which states that:

> "..... notwithstanding that the insurer may, be entitled to avoid or cancel or may have avoided or cancelled, the policy, the insurer, shall ..... pay to the persons entitled to the benefit of the judgment any sum payable thereunder in respect of liability, including any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any enactment relating to interest on judgments."

In this regard, reliance was also placed on section 18 (5) which defines the expression in subsection (1) "liability covered by the terms of the policy" as "a liability which is covered by the policy or which would be so covered but for the fact that the insurer is entitled to avoid or cancel or has avoided or cancelled the policy." The argument before us proceeded on the basis that the respondents could have avoided or cancelled the policy for the reason that it was put to a use not permitted by the policy, and consequently the liability would have been so covered but for the fact that the insurer is entitled to avoid or cancel.

In my view this argument is untenable. If the vehicle was being used for a purpose not permitted by the policy, then it was not insured, and consequently there would be no valid policy of insurance in respect of that user existing, and the insurer would have no necessity to avoid or cancel.

To my mind, instances to which the reference of avoidance and cancellation may be found are:

(I) to the provisions of section 18 (3) where an insurer may seek a declaration that he is entitled to avoid the policy for misrepresentation or non-disclosure and

(II) for breaches of conditions stated in the policy, as opposed to a limitation of user placed on the vehicle in respect of liability.

It is to circumstances, such as these that section 18 refers.

The only restrictions on the contractual relations between the insurer and the insured are as revealed in section 8 of the Act, which is set out hereunder:

"8. (1) Any condition in a policy or security issued or given for the purposes of this Act, providing that no liability shall arise under the policy or security, or that any liability so arising shall cease, in the event of some specified thing being done or omitted to be done after the happening of the event giving rise to a claim under the policy or security, shall be of no effect in connection with such claims as are mentioned in paragraph (b) of subsection (1) of section 5:

Provided that nothing in this subsection shall be taken to render void any provision in a policy or security requiring the person insured or secured to repay to the insurer any sums which the latter may have become liable to pay under the policy or security and which have been applied to the satisfaction of the claims of third parties.

(2) Where a certificate of insurance has been issued under subsection (4) of section 5 in favour of the person by whom a policy has been effected, so much of a policy as purports to restrict the insurance of the persons insured thereby by reference to any of the following matters -

(a) the age or physical or mental condition of persons driving the vehicle; or

(b) the condition of the vehicle; or

(c) the number of persons that the vehicle carries; or

(d) the weight or physical characteristics of the goods that the vehicle carries; or

(e) the times at which or the areas within which the vehicle is used; or

(f) the horse power or value of the vehicle; or

(g) the carrying on the vehicle of any particular apparatus; or

" (h) the carrying on the vehicle of any particular means of identification other than any means of identification required to be carried by or under the law for the time being in force relating to motor vehicles,

shall as respects such liabilities as are required to be covered by a policy under paragraph (b) of subsection (1) of section 5, be of no effect:

Provided that nothing in this subsection shall require an insurer to pay any sum in respect of the liability of any person otherwise than in or towards the discharge of that liability, and any sum paid by an insurer in or towards the discharge of any liability of any person which is covered by the policy by virtue only of this subsection shall be recoverable by the insurer from that person.

Section 8 specifically provides the circumstances where the provisions of the policy will have no effect on claims made on the policy in respect of third party risks.

Of particular significance is section 8 (2) which outlines in details the provisions which if included in a policy of insurance would have no effect on the liability of the insurers to third parties and indeed also makes provision for recovery by the insurers from the insured any sums paid by them in discharge of a liability by virtue only of the subsection.

It will be noticed that the subsection has no reference to the user (i.e. the type of use) of the vehicle and a fortiori it may be implied that the Act, continues to allow freedom between the insured and the insurer to contract as to the terms of the policy as it affects the user of the vehicle to be insured.

In Jones v. Welsh Insurance Co., Ltd (1937) 4 All E.R. 149 which was a case decided after the Road Traffic Act (1934) in England, containing similar provisions to section 18 (1) of the Act the facts were as follows:

> "The plaintiff obtained a judgment against T in respect of injuries caused by the negligent driving of T's motor car. T having no means, the plaintiff sued T's insurers, the defendant corporation, under the provisions of the Road Traffic Act 1934 S. 10 (1). (Similar in terms to section 18 (1) of the Act). T's insurance policy covered the use of his car 'for social domestic and pleasure purposes, and for use in connection with his business or profession' as stated in the schedule T was a motor mechanic, and was described as such in the schedule, but in his spare time farmed a few sheep. At the time of the accident, which caused the injuries, the car was being used to convey some sheep. Goddard J., held that at the time of the accident the car was not being used by the insured in person in connection with his business of a motor mechanic, but for the carriage of goods in connection with the business of sheep farming. The plaintiff had called in aid, the provision of section 12 (d) of the Road Traffic Act 1934 which as in section 8 (2) (d) render ineffective a restriction in the weight or physical characteristics of the goods that the vehicle carries."

In dismissing this contention Goddard J., used the following words, which are applicable to the state of the law in Jamaica today, as it was then in England.

> "He Mr. Tucker submitted that the restriction related to the physical characteristics of the goods and so was of no effect against the plaintiff. The question here is not as to the actual nature of the goods carried, or their physical characteristics but whether the use of the car was for domestic or business purposes, or whether the goods carried, whatever their nature were in connection with business.
>
> The result is that the action fails and must be dismissed, though I come to this conclusion with as much regret as a judge may properly feel when he gives effect to what he decides are the legal rights of the parties. For this adds another to the growing lists of cases which show that in spite of

> "the statutory provisions for compulsory insurance, persons injured by motor cars through no fault of their own may be left with no prospect of obtaining compensation, ... The public believe, and with reason, that the Road Traffic Act insures that, if they have the misfortune to be killed or injured by a driver's negligence, there will at least be compensation for themselves or their dependents knowing nothing of the pitfalls which still abound in policies in spite of section 12 of the Act of 1934. No one can fairly expect insurers to pay on a risk additional to that for which they have received a premium. ..... No legislation can guard against the criminal who wilfully drives an uninsured car, but it is just as well that it should be realized that, though there may be a policy in force, and an authorised person, is driving the car which causes injury, there is no certainty that a liability will attach to the insurers."

In England, the problem has been solved by the establishment of a Motor Insurance Bureau which entered into a contract with the Ministry of Transport in which the bureau "undertook to satisfy judgments in respect of any liability which is required to be covered by a policy of insurance in terms of the Road Traffic Act and which is not otherwise satisfied." Except for the Jamaica Claims Bureau which covers third party liability in respect of public passenger vehicles, that is not the case in Jamaica; the third party in other cases, depending always on the provisions of the Motor Vehicle Insurance (Third Party Risks) Act (and in particular section 18) to recover the fruits of a judgment in respect of any liability which is required to be covered by a policy of insurance in terms of the Act.

In answer to the first question raised in this appeal, I would assert that the third party in such an action cannot recover the sums payable by virtue of a judgment on the basis of section 18 of the Act, unless the liability is one which is covered by a policy of insurance. If it can be established that the vehicle was being used for a purpose outside of the

scope of an existing policy of insurance, then no liability would exist under that policy and consequently section 18 would not apply.

I turn now to the second question, the answer to which determines the fate of this appeal. The matter being put in issue in the pleadings, it was conceded at the trial that the respondent had the burden of proving that the policy of insurance did not include a liability in respect of which the respondent could recover from the appellants, the fruits of his judgment against the insured.

The area of dispute concerned the question whether the insured was using the vehicle for a purpose which came within the "Limitation as to Use" clause in the policy i.e., "use for hire or reward" which the policy specifically stated would not be covered by it.

Patterson J., in his judgment came to a finding of fact which is set out hereunder:

> "The Court accepted the evidence that at the material time, Jonathan Daley was using his truck to convey a bit of iron from White Marl to March Pen Road pursuant to a binding agreement he had entered into with two men. He had further agreed to perform that task for the sum of $20.00 and although he had not been paid prior to the commencement of the journey he nevertheless was entitled to receive the said amount, and he expected to receive it. He was not transporting the iron for his own purpose. The Court also found that the insured had on previous occasions used his vehicle to transport goods for persons unconnected with his business and had charged for those services."

This finding of fact is based on the evidence of Jonathan Daley himself whose testimony in examination-in-chief, appears to have been contradictory. It may be convenient for the purpose of clarity to set out the relevant evidence. He stated thus:

> "Used truck to carry goods for other purpose than my own - if anybody ask me to carry anything I would help them - I could not sustain the truck with my income alone, so if I got a job - somebody say they would pay me to carry something I would carry it."

Further in his examination he states:

> "I picked up things because sometime I dont have money. I expected to get the $20.00 that day. This was the first time I was using the vehicle to carry goods for money."

Patterson J., in his findings made no reference to the evidence of Daley that when he transported the iron, it was the first time he was using the vehicle to carry goods for money. This was in direct contradiction to his earlier testimony that he used the truck to carry goods for other purpose than his own. At the end of his testimony, therefore it must have been impossible to determine which of the two statements reflected the true circumstances i.e., whether he had used the vehicle for 'payment' on this one occasion, or had habitually done so even before the incident which resulted in the appellant's claim. In my opinion on the face of this inconsistency on a very material aspect of the evidence, it was unreasonable, (on a balance of probabilities) for Patterson J., to conclude that the insured had on previous occasions used his vehicle for transporting goods and had charged for those services. The words for "hire or reward" have been considered in many English cases, some of which were cited in the Court below, and again in argument at the hearing of this appeal. In this case the meaning of the words as used in the insurance policy determines whether or not the provisions of section 18 (1) can avail the appellants. For if the respondents failed to establish that the use of the vehicle was not a liability covered by the policy, it being one required to be covered by section 5 (1) (b) of the Act, then they would be required to indemnify the third party i.e., the appellants. In Albert v. Motor Insurers Bureau (1971) 2 All E.R. 1345 the meaning of the words as used in the Road Traffic Act 1960 section 203 (4) was clarified by the House of Lords (section 203 is the equivalent of section 5 (1) (b) of the Act.)

Although the words were interpreted as they are used in the proviso excepting from the exception of persons who must be covered, 'passengers being carried for hire or reward' the dicta is of value in respect to the instant case, which concerns the meaning of the words as used in the "Limitation of Use" clause in the policy. Lord Donovan in dealing with the subject at p. 1352 asserted that the words did not refer to:

> ".... some fleeting use of the vehicle to carry passenger on some isolated occasion even though it may have been arranged at the outset that he shall contribute something towards the expense, but on the contrary, some settled plan to carry passengers for reward which has been put into operation with a regularity and frequency (both actual and intended) which justifies the conclusion that this is one of the vehicle's normal functions."

In my opinion those words are applicable to the instant case, and the burden rested on the respondents to establish that the insured used the vehicle not on one isolated instance to help two men to transport a piece of iron, albeit for a fee which was never collected, but with a regularity and frequency from which it could be concluded that that was one of the vehicle's normal functions. This, having regard to the nature and quality of the evidence, the respondent failed to do.

I would therefore answer the second question - No. In the result, I would find that the respondent having failed to prove that the insured used the vehicle for a purpose outside the scope of the policy the appellant would be entitled to succeed on his claim by virtue of section 18 (1) of the Motor Vehicle Insurance Third Party Risks) Act. Consequent on these conclusions, the question arises whether the appellants are entitled to recover (1) the full amount of the judgment of $271,000.00 plus interest (11) the amount in the policy purporting to limit liability to $250,000.00 or (111) the statutory minimum provided for in paragraph (v) of the proviso to section 5 (1) (b) which states as follows:

"In order to comply with the requirements of this Act the policy of insurance must be a policy which -

(a) is issued by a person who is an insurer; and

(b) insures such person, persons or classes of persons, as may be specified in the policy in respect of any liability which may be incurred by him or them in respect of the death of, or bodily injury to, any person caused by, or arising out of, the use of the motor vehicle on a road:

Provided that such a policy shall not be required to cover -

(iii) any contractual liability; or

(iv) liability in respect of the first ten dollars of any claim by any one person; or

(v) liability in respect of any sum in excess of two thousand dollars arising out of any one claim by any one person; or

(vi) liability in respect of any sum in excess of twenty thousand dollars arising out of the total claims for any one accident for each motor vehicle concerned."

This issue arose in the case of Jamaica Co-operative Fire and General Insurance Co., Ltd v. Sanchez (1968) 13 W.I.R. 138 where the plaintiff had been awarded damages of £3,515.1.6 against the assured and sued successfully by virtue of section 16 (1) (now section 18 (1))of the Motor Vehicle Insurance(Third Party Risks) Law Cap 257) for recovery of that sum from the insurance company with whom the assured had a policy in respect of the user of the motor vehicle. Under that policy the liability of the Insurance Company in respect of any one accident was unlimited. The Insurance Company appealed, contending that they were liable only to the extent of the minimum liability which a policy under the statute was required to cover in respect of any one claim by any one person.

In delivering the main judgment of the Court Luckhoo J.A., interpreted the dicta of Lord Evershed in Free Lanka Insurance Co., Ltd v. Ranasinghe (1964) 1 All E.R. 452 as follows:

> "It seems clear that the Privy Council in the Free Lanka case went no further than to hold that the insurer's liability to the third party under section 133 was to be determined by the limitation of liability actually imposed in the policy itself, such limitation having been imposed pursuant to the provisions of section 128 (1)"

And consequently concluded:

> " ..... In respect of section 16 (1) of the Jamaica Law (section 18 (1) of the Act) if as in the instant case, the liability of the insurers to the assured under the policy is unlimited in respect of any one accident, the amount payable by the assured under a judgment obtained by a third party against him in respect of liability required to be covered would be the amount awarded in respect of such liability. In the instant case, the amount is the amount awarded by the learned trial judge in that regard."

It is to be noted that although Luckhoo J.A., found that the amount would be the amount awarded that was based on the fact that the liability under that policy was unlimited.

In Central Fire and General Insurance Co., Ltd., v. Sylvester Hylton S.C.C.A. 84/84 dated 10th July, 1985 (unreported) this Court through Carberry, J.A. recognized (at page 37) that the decision of this court in the Sanchez case (supra) "clearly established for Jamaica that if the coverage on the actual policy exceed the minimum prescribed in the Act, the statutory remedy would allow recovery to the extent of the policy coverage."

In an expression of doubt however he opined that the decision may be in the future open to question 'elsewhere'. He recognized nevertheless that "the decision has however stood for some seventeen years and countless settlements must have been made on the basis that the actual coverage of the policy represents the ceiling of the liability of the insurer."

The real issue in the case of Central Fire and General Insurance Co., Ltd., v. Sylvester Hylton, was as stated in the judgment of Rowe, J.A. (as he then was) at page 4:

> "In essence these grounds complained that the decision in Hansen's case does not represent the law of Jamaica, that where an insurance company takes over and conducts a defence in a suit against its insured, it acts as an agent for the insured and not as a principal, and that if the insurance company agrees to a settlement of the claim, there is no automatic estoppel as would render it liable to pay to the successful plaintiff the amount of this settlement."

In fact the defence in the case pleaded that its liability was limited under the policy to $250,000.00 which it was willing to pay.

The comments by Carberry, J.A. were therefore obiter and consequently are not to be taken at this time, as affecting the validity of the decision in the Sanchez case. Section 18 (1), by virtue of which the respondent brought this case, has already been carefully examined by Luckhoo, J.A. in the Sanchez case (supra) and in spite of the expressions of doubt by Carberry, J.A. in the Sylvester Hylton case (supra), I see no reason to, express any disagreement with the reasons and conclusions of Luckhoo J.A. I however add some comments of my own.

In the policy of insurance between the assured and the appellants, the appellants agreed to indemnify the insured as set out hereunder:

"Section 1 - Liability to Third Parties

1. The association will subject to the Limits of Liability stated in the Schedule hereto indemnify the insured in the event of accident caused by or through or in connection with the Motor Vehicle or in connection with the loading or unloading of such vehicle against liability at law for damages and claimant's cause and expenses in respect of:

   (a) death of or bodily injury to any person

   (b) damage to property.

In the schedule the Limits of Liability clause states:

> Limit of the amount of the Association's liability under sub-section 1 (a) of section 1 arising out of any one claim by any one person $250,000.00

By the policy, therefore the appellant clearly contracted with the assured to indemnify him in respect of the death or bodily injury to any person to an amount in excess of the minimum requirement provided for by paragraph (v) of the proviso to section 5 (1) (b), the liability to third parties under the policy being $250,000.00.

However, the third party not being a party to the contract, can only bring action for the amount of the judgment by virtue of section 18 (1) of the Act. This section follows the terms of section 10 of the English Road Traffic Act 1934, with the important exception that the latter had no proviso limiting the extent of the pecuniary amount of liability that required mandatory insurance.

In the English Act, the term "judgment in respect of any such liability as is required to be covered by a policy" had no reference to the amount of damages recovered in the judgment, but to the liability to pay damages in respect of the user of the vehicle by the persons specified in the policy.

Section 5 (1) (b) of the Motor Vehicle Insurance (Third Party Risks) Act sets out the circumstances for which a vehicle must be insured, and in the proviso, paragraphs (v) and (vi), in my opinion do nothing more than set the minimum amounts for which the insured must be insured.

The words in section 18 (1), ... "judgment <u>in respect</u> of any such liability as is required to be covered by a policy under paragraph (b) of subsection 1 of section 5 refers to the liabilities set out in that paragraph i.e., '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 on the road."

The first question argued in this appeal demonstrates a good example of the 'liability' to which the Act refers i.e., whether or not the

liability, the insured incurred by his user of the vehicle was one required to be covered by the policy. Indeed, the expression in the section "being a liability covered by the terms of the policy" does not suggest the question as to what amount he was insured, but to the question of the purpose for which the vehicle was insured i.e. was the vehicle required by section 5 (1) (b) to be insured for the particular user to which it was put at the time of the accident.

As I understand the contrary interpretations of the section, there is a suggestion that the words "such liability as is required to be covered by a policy under paragraph (b) of subsection (1) of section 5 denies the third party's right to recover the amount insured in the policy if it is in excess of paragraph (v) of the proviso to section 5 (1) (b) of the Act and restricts him to the minimum amount for which the insured is required to be insured by those provisions. Such a construction would in my opinion not be in keeping with the purpose of the Act i.e. to protect the rights of third parties, particularly when the insured is unable to pay. To say that the insurer could enter into a contract of insurance to indemnify, the insured in respect of liabilities to third parties, to an amount in excess of the minimum statutory requirements, and then deny the third party of that protection by reliance on the very section of the statute which is directed at securing his protection, would to my mind, be absurd, and would do injustice to the intention of the legislation.

I would allow the appeal for the reasons given in answer to questions (1) and (2), and enter judgment for the plaintiff in the sum of $250,000.00 being the amount limited in the policy of insurance together with interest and cost, both here and in the Court below.

DOWNER, J.A.:

On 15th April, 1983, the appellant obtained a judgment from Malcolm J., for the sum of $265,000 general damages and $600 special damages under the Fatal Accident Act and the Law Reform (Miscellaneous) Act with interest at 8% general damages from 8th January, 1978. The judgment was against Johnathan Daley but thar judgment has remained unsatisfied. The appellant then went before Patterson J., to have these monies paid by the insurer who is the respondent in this case, but that learned judge decided that the insurer was not liable. The question to be decided in this appeal is whether the estate of Hopeton Mahoney is entitled to have the judgment sum paid or the amount due on the policy paid by the insurer. In lawyers language the issue is whether on the true construction of the Motor Vehicle Insurance (Third Party Risks) Act the respondent must pay over the judgment sum or the amount of $250,000 specified in the policy to the appellant.

To appreciate how the question of law arose it is necessary to rehearse the facts in the court below. The parties agreed that the proposal for policy of Motor Insurance and supplementary proposal together with Policy and Certificate of Motor Insurance be admitted in evidence. Also admitted was the unsatisfied judgment and the statutory notice which was served on the insurance company. It was also agreed that as the insurers were taking the point that a clause in the "Limitation as to use" in the policy entitled them to refuse payment to the estate, they should begin. They did and called the insured Johnathan Daley to give evidence that he was carrying goods for hire or reward when the accident occurred, which resulted in the death of Mahoney and that as that was outside the protection of the policy they were not liable to pay.

Specifically he said that on 11th January, he was asked to carry a piece of iron for two men from the Arawak Musuem to March Pen Road, and that while on that journey an accident occurred at the back of the motor truck. He said, that he did not get the $20 offered and that this was the first time he was using the vehicle to carry goods for money. Earlier in his evidence, however he had said the income from his woodwork shop could not run the motor vehicle so he augmented his income with occasional trucking jobs if he was offered payment. This conflict in the evidence was never cleared up. The only other

witness called by the Insurers was Gloria Bryan who admitted that as motor insurance manager she had received a notice of the proceeding between the Administrator General v. (Estate Mahoney) Johnathan Daley and that the insurer had refused to renew the policy because the vehicle was being used contrary to the terms of the policy. The Administrator General called no witness and the case was contested on the basis of whether the insurers were protected by the limitations in the policy. Patterson J., decided that they were, and from that judgment the Administrator General acting on behalf of the estate has appealed. In coming to that decision, it does not appear that sufficient attention was given to the construction of the Motor Vehicle Insurance (Third Party Risks) Act. The construction of the policy and admissibility of the evidence of the insured were the issues debated. Mr. Small for the respondent told this court that this matter was of importance to the insurance company and we intimated that the true construction of the act may well be an important issue in the determination of the appeal. The provisions of that Act, therefore, must now be examined.

As far back as 1941 Parliament passed the Motor Vehicle Insurance (Third Party Risks) Act. It was recognized that many serious accidents were caused as a result of negligent driving and as the average driver was unable to meet the justifiable claims in running down cases, a system of compulsory insurance against Third Party Risks was instituted. The United Kingdom legislation provided a ready model. Section 4(1) made such insurance compulsory and that section reads as follows:

> "4(1) Subject to the provisions of this Act, it shall not be lawful for any person to use, or to cause or permit any other person to use a motor vehicle on a road, unless there is in force in relation to the user of the vehicle by that person or that other person, as the case may be, such a policy of insurance or such a security in respect of third party risks as complies with the requirements of this Act."

Criminal Sanctions were provided in subsection (2) which included disqualification from holding a licence.

The next important section to consider is section 5(1)(b) which stipulates whom the compulsory insurance must cover and that it should cover death or bodily injury. The relevant section is as follows:

> "5(1) In order to comply with the requirements of this Act the policy of insurance must be a policy which:
>
> (a) is issued by a person who is an insurer; and
>
> (b) insures such person, persons or classes of persons as may be specified in the policy in respect of any liability which may be incurred by him or them in respect of the death of, or bodily injury to, any person caused by, or arising out of, the use of the motor vehicle on a road."

That insurance policies for third party risks cannot be considered without examining the provision of the Act is illustrated in section 8. This section recognises the inappropriateness of freedom of contact, when ranged on one side are insurance companies and on the other uninformed clients. Moreover there are the rights of the Third Party whom the Act is designed to benefit. Section 8(1) reads:

> "8(1) Any condition in a policy or security issued or given for the purposes of this Act, providing that no liability shall arise under the policy or security, or that any liability so arising shall cease, in the event of some specified thing being done or omitted to be done after the happening of the event giving rise to a claim under the policy or security, shall be of no effect in connection with such claims as are mentioned in paragraph (b) of subsection (1) of section 5."

The correct analysis of this section is of vital importance. It prohibits any condition in a policy which provides that no liability shall arise under the policy in the event of some specified thing being done or omitted to be done. Additionally it ordained that liability should not cease, if something specified was done or omitted to be done after the event which gave rise to the claim. Of equal importance is the proviso to section 8(1) which reads:

> "Provided that nothing in this subsection shall be taken to render void any provision in a policy or security requiring the person insured or secured to repay to the insurer any sums which the latter may have become liable to pay under the policy or security and which have been applied to the satisfaction of the claims of third parties".

The aspect to note is that the insurer becomes liable to pay under the policy when the policy is one issued or given for the purposes of the Act. Also it gives the insurer the protection that he can recover from the insured.

These provisions 5(1)(b) and 8(1) illustrate the intention of the legislature to confer statutory rights of subrogation on third parties. These statutory rights are further regulated by subsection 2 of section 8 which stipulates that some terms in a policy are to be of no effect as against third parties. To grasp the significance of this it is necessary to refer to subsection 4 of section 5. That section reads:

> ""5(4) A policy shall be of no effect for the purposes of this Act unless and until there is issued by the insurer in favour of the person by whom the policy is effected, a certificate (in this Act referred to as a 'certificate of insurance') in the prescribed form and containing such particulars of any conditions subject to which the policy is issued and of any other matters as may be prescribed, and different forms and different particulars may be prescribed in relation to different cases or circumstances."
> (Emphasis supplied)

As this subsection permits conditions in the policy, the 'Limitations as to use' which form part of the Certificate of Motor Insurance must now be assessed. These Limitations in part read:

> "Limitations as to use:
>
> Use for social domestic and pleasure purposes.
>
> Use in connection with the Policyholder's business.
>
> Use for the carriage of passengers (other than for hire or reward) in connection with the Policyholder's business.
>
> The Policy does not cover:
>
> 1) Use for hire or reward ...."

Turning to the evidence in this case, the law is that the onus of proof is on the insurers to prove that the limitation applied. At its highest, the evidence established that the carriage of the iron pipes was an isolated occasion.

The learned trial judge recognized this for he said at page 29 of the record:

> "It mattered not that this was an isolated case. Once it was shown that at the time of the accident the vehicle was being used by the policyholder for a purpose otherwise than what is stated in the 'limitation as to use' clause, then the insurers would not be bound to pay the damages recovered by an injured third party."

This finding by the learned trial judge is at odds with the dictum of Lord Pearson in Albert v. Motor Insurers' Bureau (1971) 2 All E.R. 1345 at 1364 which reads as follows:

> "If there is only one isolated occasion on which he has carried a passenger for a money payment, that can reasonably be regarded as incidental to the use of a private car as such and not as constituting carriage of passenger for hire or reward."

If this dictum is to be preferred and Lord Donovan used similar language at page 1352 then the judge's finding must go, and the unusual evidence in this case would be of no avail to the respondent. The 'Limitations as to use' in the 'Certificate of Motor Insurance' and on the Policy would not have been breached so as to defeat the right of the claimant Third Party.

I would, however, add that an alternative way of disregarding the judge's finding was to say that it was unreasonable as the contradiction concerning how frequently the vehicle was used for hire or reward which appeared in chief was never resolved. It was, therefore, unnecessary to decide that the evidence of Johnathan Daley was inadmissible as Mr. Rattray contended as it was ineffective, and could not support the respondent's claims.

We must next turn to the true construction of section 18(1) of the Act in the context of an insurance policy which stipulates the minimum cover of $20,000 as required by section 5(vi) of the Act. It is necessary to set out the relevant subsection of section 18, to appreciate the necessary connection between the policy and the entitlement of the third party. Section 18(1) reads:

> "If after a certificate of insurance has been issued under subsection (4) of section 5 in favour of 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 sub-section (1) of section 5 (being a liability covered by the terms of the policy) is obtained against any person insured by the policy, then, notwithstanding that the insurer may, be entitldd to avoid or cancel, or may have avoided or cancelled, the policy, the insurer shall, subject to the provisions of 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 enactment relating to interest on judgments.

Initially the critical phrase which must be construed is 'judgment in respect of any such liability as is required to be covered by a policy under

paragraph (b) of subsection (1) of section 5 (being a liability covered by the policy) is obtained against any person insured by the policy'. It is true that by the proviso 5(vi) such a policy shall not be required to cover a liability in excess of $20,000, but the law contemplates a policy with unlimited liability or for a fixed sum in excess of $20,000. That this is so can be gathered from a full reading of section 5 itself. It sets out the two basic conditions in 5(1)(a)(b) of the Act for a policy to comply with the requirements of the Act and it must be emphasised that it is in the priviso that the minimum amount of $20,000 is stipulated. The relevant sections are set out again for ease of reference:

> "5(1) In order to comply with the requirements of this Act the policy of insurance must be a policy which -
>
> (a) is issued by a person who is an insurer; and
>
> (b) insures such person, persons or classes of persons, as may be specified in the policy in respect of any liability which may be incurred by him or them in respect of the death of, or bodily injury to, any person caused by, or arising out of, the use of the motor vehicle on a road"

Then the proviso in issue reads in part -

> "Provided that such a policy shall not be required to cover -
>
> .....
>
> (vi) liability in respect of any sum in excess of twenty thousand dollars arising out of the total claims for any one accident for each motor vehicle concerned."

If a policy of unlimited liability, or one with a fixed coverage in excess of $20,000 did not comply with 5(1)(b) of the Act, then we would have the absurd situation where only a coverage of $20,000 would comply with the requirement of the Act. The reality is that the proviso deals with the case of minimum coverage and this minimum coverage is commonly referred to as coverage by an 'Act' policy.

In the instant case a judgment in respect of any such liability as is required to be covered pursuant to 5(1)(b) of the Act was obtained from Malcolm J by the estate of the Third Party, and such a liability was covered by the terms of the policy, even if the insurer was entitled to cancel or avoid the policy.

The next critical phrase to construe in 18(1) of the Act is "pay to the persons entitled to the benefit of the judgment any sums payable thereunder in respect of the liability including any amount payable in respect of interest on the sum by virtue of any enactment relating to interest on judgments".

The Act directs the insurer to pay the person entitled to the benefit of the judgment of Malcolm J and that must be the appellant as the Third Party. Then come the crucial words "any sum payable thereunder in respect of liability". If the policy is the minimum of $20,000 stipulated in the privlso then although the judgment exceeds this then only $20,000 together with interest and costs is payable. If the policy was one for unlimited liability then the amount recovered in the judgment is the amount the insurer must pay together with costs and interest. If the amount stipulated in the policy is $250,000 as in the instant case and the judgment sum exceeds this, then the insurer must pay the amount on the policy, together with costs and interest. "Any sum", therefore, covers all three situations.

The reason for making Third-Party insurance compulsory was that third parties would benefit from the proceeds of the insurance policy effected. Section 16(1) illustrates this. It reads:

> "Any person against whom a claim is made in respect of any such liability as is required to be covered by a policy under paragraph (b) of subsection (1) of section 5 shall, on demand by or on behalf of the person making the claim, or by the Registrar of the Supreme Court or the Clerk of the Courts of any Resident Magistrate's Court, state whether or not he was insured in respect of that liability by any policy having effect for the purposes of this Act, or would have been so insured if the insurer had not avoided or cancelled the policy, and, if he was or would have been so insured, give such particulars with respect to that policy as were specified in the certificate of insurance delivered in respect thereof under subsection (4) of section 5."

This section refers specifically to such liability as is required to be covered by a policy under paragraph (b) of subsection (1) of section 5 and such a policy

can either be the minimum required or of unlimited or fixed liability above the minimum. It seems that the purpose of this is to enable the claimant Third Party to know what to anticipate from the insurer as it is well known that most accident claims are settled and the same subsection of section 5 is specified in section 18 which reinforces the contention that the recovery section contemplated recovery of the proceeds of the policy.

Section 5(3) is another section which emphasises that the insurer is compelled to indemnify the insured in terms of the policy and that if an accident occurred the third party would benefit from that insurance. Section 5(3) reads:

> "5(3) Notwithstanding any rule of law or anything in this or any other enactment to the contrary, a person issuing a policy of insurance under this section shall be liable to indemnify the persons, or classes of persons, specified in the policy, in respect of any liability which the policy purports to cover, in the case of those persons or classes of persons."

The Third Party would benefit if the holder of the policy is the tortfeasor and in an action he could claim the indemnity so as to satisfy the judgment. All that section 18(1) does is enable the Third Party to satisfy his judgment against the insurer, if necessary, in certain circumstances.

How does this construction of section 18 of the Act and the policy fit in with the authorities. The earliest one is Free Lanka Insurance Co. Ltd. v. Ranasinghe (1964) A.C. 541 the Privy Council had to construe the comparable legislation in Ceylon, and they decided that the Third party was entitled to the amount stipulated in the policy in that case where the policy was Rs20,000 and the judgment in favour of the injured third party was Rs30,000. In delivering the opinion of their Lordships' Board, Lord Evershed at p. 554 said:

> "In approaching the problem their Lordships are impressed by the reflection that it would appear as a matter of principle unlikely that a third party having no contract with the insurers should yet be entitled to recover from the insurers a sum greater than the limit imposed by the insuror properly in accordance with the Ordinance in the policy of insurance."

Their Lordships recognised the forceful arguments in favour of the respondent that a third party on one construction of section 133 Ceylon (S 18 Ja) could be said to have an entitlement to the benefit of the decree for Rs30,000.

However, they emphasised the limitation of Rs20,000 in the proviso [5(vi) Ja.] as the minimum amount required by section 128(1)(b) Ceylon,5(1)(b) Jamaican, to be covered by a policy of insurance. Lord Evershed further stated on p. 554:

> "It therefore follows that in the case of a lorry the liability "required" to be covered is a liability which shall not be less than Rs 20,000 but need not exceed that figure - so that any liability in the present case (having regard to the terms of the policy) in excess of Rs 20,000 was not one "required" to be covered by the policy." (Emphasis supplied)

On the basis of this reasoning, if the policy complied with the requirement of section 5(1)(b) in Jamaica and the policy is more than $20,000 as is required by section 5(vi) then it is the amount in the policy which the insurer must pay in order to comply with section 18. This interpretation of section 18 is in accordance with that propounded by the Privy Council.

The Free Lanka case was considered by this court in Jamaica Co-operative Fire & General Insurance v Sanchez [1968] 13 W.I.R. 138 where the policy was comprehensive and of unlimited liability and the third party contended that he was entitled to the full amount of the judgment in those circumstances, while the insurer argued that they were liable for the minimum liability which a policy under the statute was required to cover in respect of any one claim by one person. This court decided in favour of the third party. In applying the principles of the Free Lanka case Lukhoo JA said at p. 144:

> "Similarly, in respect of 16(1) now 18(1) of the Jamaican law, if as in the instant case the liability of the insurers to the assured under the policy is unlimited in respect of any one accident, the amount payable by the assured under a judgment obtained by a third party against him in respect of liability required to be covered would be the amount awarded in respect of such liability. In the instant case the amount is the amount awarded by the learned trial judge in that regard."

Implicit in this passage is a recognition that a policy of unlimited liability complies with 5(1)(b) of the Act and the full judgment sum is recoverable under section 18(1).

The third authority which addresses the problem of the true construction of section 18 is a recent authority of this court Central Fire & General Insurance Co. Ltd. v. Sylvester Hylton unreported S.C.C.A. 84/84 where

Carberry JA analysed the decisions in Free Lanka and Sanchez as well as the House of Lords' decision Harker v. Caledonia Insurance Co. [1980] 1 Lloyds 556 with a view to recommending reform of the Act. In Harker the problem before the court was similar to that posed in the Free Lanka case. The legislation was that of Belize as the case involved an accident in that country. The third party sought to recover the full amount of the judgment where the policy was the minimum required by the Act. He recovered the minimum.

It was in those circumstances that Carberry JA ventured to suggest that Sanchez might be overruled on appeal. This was not necessary for the decision in the case before him and neither Rowe P nor Campbell JA, who agreed with him, found it necessary to comment on the prospects of Sanchez before the Privy Council. In the opinion of Carberry JA unless the Act is amended it may not be possible to recover more than the minimum of $20,000 in the proviso, in any case. On this reading of the Act the proviso, instead of covering the special case of minimum requirement, would preclude any greater amount being recovered. This is an odd way of reading an Act. The point is that there are similarities in policies which comply with the requirements of the Act. The policy may be of unlimited liability which is the situation in Sanchez or may cover a sum higher than $20,000 as in this case or it may be a policy which complies with the minimum standards laid down in the Act which is the circumstance in Free Lanka and Harker.

In all these cases the amount recoverable by the third party by virtue of section 18 is the amount stipulated in the policy although in the case of minimum coverage the amount on the policy coincides with the amount in the proviso. The words of section 18 which read "judgment in respect of any such liability as is required to be covered by a policy under paragraph (b) of subsection (1) of section 5", apply to all three types of policy. The respondent insurers recognised this as paragraph 10 of their Defence in the Court below reads:

> "If, which is denied, the Defendant is liable, then it says that its liability is limited to the sum of $250,000.00 as specified in the said Policy."

This explains why their contention on appeal was that they were not liable at all.

To my mind, the appellants have succeeded and the order of the court below must be set aside. I would order judgment for the appellants in the sum of $250,000 as stipulated in the policy. The appellant is entitled to the interest and to costs both here and below.

Henderson Downe

GORDON, J.A. (Ag.):

I have read the judgments of my learned colleagues Forte and Downer JJA. The facts have been carefully chronicled and I do not propose to repeat them. I agree with the reasoning and the conclusions arrived at and wish merely to add a short comment.

The learned trial judge in his judgment said:

> "The instant case did not proceed on a construction of any of the terms of the Act, and consequently, the Court's decision was arrived at purely on the interpretation of the relevant sections of the policy as pleaded and on the facts of the case as found. The provisions of the Act were not argued."

In limiting his deliberations in this manner the learned trial judge overlooked the fact that the policy of insurance was issued pursuant to the provisions of the Motor Vehicles Insurance (Third Party Risks) Act and prudence should have dictated that an examination of the Act was desirable in order to determine whether the Policy complied with the requirements of the Act.

The Policy of Insurance is a contract between the insurers and the insured and the law provides that persons who are not privy to the contract can benefit from it. This is a departure from the norm in contract law and a scrutiny of the Act determines the conditions stipulated therein for third parties to benefit.

The law recognises that persons not being carried on the vehicle while it is lawfully on the road may be injured by it and it provides for their protection. Section 4 of the Act requires that the vehicle should not be used on a road unless there is in force in relation to the use of the vehicle a policy of insurance in respect of third party risks as complies with the requirements of the Act. Failure to comply is a criminal offence.

Section 5(1)(b) indicates the persons or classes of persons to be covered by the policy. They are "such person, persons or classes of persons as may be specified in the policy in respect of any liability which may be incurred by him or them in respect of the death of, or bodily injury to any person caused by or arising out of the use of the motor vehicle on a road".

The proviso to this section reads in part:

> "Provided that such policy shall not be required to cover -

" (I) liability in respect of the death arising out of, and in the course of his employment of a person in the 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

(II) liability in respect of the death of or bodily injury to persons getting into or alighting from, the vehicle at the time of the occurrence of the event out of which the claim arises; or

(III) any contractual liability."

What the law requires is that there must be in force in relation to any motor vehicle which is used on the road a policy of insurance which provides for compensation to be paid to persons not in the employment of the insured or in any way connected with the user of the vehicle, who suffer death or bodily injury as a result of the use of the vehicle. The law requires that the insured must cover these risks. It does not prevent the insured from embodying in the contract of insurance terms which provide protection for the classes of persons not required to be protected.

The concern of the law is the protection of third parties and in furtherance of this protection section 18 provides for the third party to recover from the insurer the judgment he had obtained against the insured which remains unsatisfied. This obtains "notwithstanding that the insuror may be entitled to avoid or cancel, or may have avoided or cancelled the policy". The liability in respect of which the third party can proceed must be a "Liability covered by the terms of the policy".

The frequent use in the Act of the words "Liability covered by the terms of the policy" recognises that the policy of insurance embodies a contract between the insured and the insurers and that this policy can contain terms limiting the user of the vehicle and providing for the avoidance of the policy and the avoidance of liability if the user of the vehicle does not conform with terms stipulated in the contract. See Herbert v. Railway Passenger Assurance Co. [1938] 1 All E.R. 650; Albert v. Motor Insurers' Bureau [1971] 2 All E.R. 1345; Gray v. Blackman [1933] 1 K.B. 95. In the policy,under the heading "Limitations as to use" it is provided: "The policy does not cover (1) use for hire or reward."

The use being made of the vehicle at the time when the incident in

respect of which liability on the part of the insured is claimed has to be determined. Mr. Rattray in the Court below and here on appeal contended that the insured should not have been allowed to give evidence as the plaintiff was subrogated to him by virtue of section 18(1) of the Motor Vehicle Insurance (Third Party Risks) Act. He submitted that the estate stood in the shoes of the insured; the respondent in calling upon the insured to give evidence opened infinite possibilities of fraud. He referred to the famous and now hackneyed observation of Lord Morris LJ in Ellis vs. Home Office [1953] 2 All E.R. 149 at p. 161(c):

> "One facet of public interest is that justice should always be done and should be seen to be done."

The Evidence Act, section 3 provides:

> "On the trial of any issue joined, or of any matter or question, or on any inquiry arising in any suit, action, or other proceeding in any court of justice, or before any person having by law, or by consent of parties, authority to hear, receive, and examine evidence, the parties thereto, and the persons in whose behalf any such suit, action, or other proceeding may be brought or defended, shall, be competent and compellable to give evidence, either viva voce, or by deposition, according to the practice of the court, on behalf of either or any of the parties to the said suit, action, or other proceeding."

The respondent is sued by virtue of section 18(1) of the Act. The plaintiff now stands in the shoes of the insured as he seeks to enforce the indemnity. The insured, therefore, by subrogation, as contended by Mr. Rattray, or otherwise, is a party to the suit and is a competent witness. If the insured cannot be so classified then he is an ordinary witness and on either view Mr. Rattray's objection cannot be supported.

Johnathan Daley, the insured, said:

> "I used truck to carry lumber for my own use - when I was working at Ideal Kitchens. Used truck to carry goods for other purpose than my own - if any body ask me to carry anything I would help them - I could not sustain the truck with my income alone, so if I got a job - somebody say that they would pay me to carry something, I would carry it."

This statement was made early in his examination in chief. The last sentence of his examination in chief is -

> "This was the first time I was using the vehicle to carry goods for money."

These statements cannot both be true. They are irreconcilable and they remain on record unexplained. He who asserts must prove and the onus of proving the user of the vehicle was the respondents. How did the tribunal of fact treat these statements:

> "The court accepted the evidence that at the material time, Johnathan Daley was using his truck to convey a bit of iron from White Marl to March Pen Road pursuant to a binding agreement he had entered into with two men. He had further agreed to perform that task for the sum of $20 and although he had not been paid prior to the commencement of the journey he nevertheless was entitled to receive the said amount, and he expected to receive it. He was not transporting the iron for his own purpose. The court also found that the insured had on previous occasions used his vehicle to transport goods for persons unconnected with his business and had charged for those services."

The learned trial judge did not state the basis of his acceptance of the first statement or how or why he preferred it over the second.

Further on in his judgment he said:

> "It mattered not that this was an isolated case. Once it was shown that at the time of the accident, the vehicle was being used by the policy-holder for a purpose otherwise than what is stated in the limitation of use clause, then the insurers would not be bound to pay the damages recovered by an injured third party."

Was he here referring to the second statement as to user made by the insured in his evidence that "This was the first time I was using the vehicle to carry goods for money"?. If that is so then his conclusion is at variance with the dicta of the court in Albert v. Motor Insurers' Bureau [1971] 2 All E.R. 1345, (Lord Donovan, Lord Pearson and Lord Diplock). Where they held that the phrase "for hire or reward" would not cover a vehicle "conveying passengers on some isolated occasion" it did not mean "some fleeting use of the vehicle", per Lord Donovan (at p. 1352h).

The respondent's burden in this case was to establish on a balance of probabilities that the insured used the vehicle regularly to carry goods or provide services for hire or reward. The evidence given by the witness

Johnathan Daley to this end was contradicted by the said witness in his last sentence in examination in chief. What the court was left with is an averment which was contradicted. How much reliance can be placed on such evidence? What should the court accept? In this sorry state of the evidence can it be said that the respondents had established their case on the balance of probabilities? I am of the view that much reliance cannot be placed on the evidence of the witness Johnathan Daley with the result that the respondents failed to establish their case.

This exercise necessarily involves a review of the facts before the court and the authorities indicate the circumstances in which the Court of Appeal will embark on an exercise which may result in revising the finding of a trial judge on the facts. In Derrick Walters vs. Shell Co. (W.I.) Ltd. (unreported), Carberry JA said:

> "There are a great many cases in which courts of appeal have had to consider the circumstances in which they should review the findings of fact of a trial judge, and upset them, and it is clear that when those findings are based on the judge's considered opinion and his assessment of the credibility of witnesses whom he saw and heard give evidence, the Court of Appeal will not lightly upset a judgment based on those advantages which the trial judge had merely on a consideration of the written record, unless it can be established that the trial judge failed to make proper use of his advantages in seeing and hearing the witnesses, or that it is a case in which the ultimate conclusion is an inference, and one which the Court of Appeal is able to draw with the same facility as the trial judge."

The witness Johnathan Daley is a person who may have an interest to serve. The plaintiff appellant has an unsatisfied judgment against him, his evidence should be scrutinised with care. It should be cogent and credible evidence. Nowhere in his judgment is it indicated that the learned trial judge assessed the credibility of this witness, if he did he has failed to indicate the basis of his preference for the first statement the witness made as to the use he made of the vehicle and his reason for rejection of the later statement. There is no analysis by him of the evidence which indicates how he reconciled the two statements that appear irreconcilable.

In Bookers Stores Limited v. Mustapha Ali [1972] 19 W.I.R. 230 at 231, Lord Morris of Borth-Y-Gest said:

> "There were issues which had to be resolved by the learned judge which involved questions of credibility. If a learned Judge has reached conclusions on such questions after seeing and hearing witnesses and forming his opinion in regard to them it is accepted and in well known authorities it has been laid down that only by reason of some very telling factors or compelling circumstances will an appellate court differ from such conclusions."

I am of the view that the trial judge failed to make use of the advantage he had of seeing and hearing the witness. Were we to assume he did make use of this advantage the question "How did he resolve the two inconsistent statements? would remain unanswered.