IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. 1983/A170

BETWEEN	THE ADMINISTRATOR GENERAL (Administrator Estate of Hopeton Samuel Mahoney, Dec'd)	PLAINTIFF
AND	NATIONAL EMPLOYERS' MUTUAL GENERAL INSURANCE ASSOCIATION LIMITED	DEFENDANT

Mr. C. Rattray Q.C. instructed by Mr. Norman O. Samuels for Plaintiff.

Mr. Hugh Small Q.C. and Mr. Arthur Hamilton instructed by Myers Fletcher & Gordon, Manton and Hart for Defendant.

18th & 19th May, 27th November, 1987

PATTERSON, J.

At the conclusion of this case on the 19th May, 1987, I gave judgment for the defendant and promised then to put my reasons for judgment in writing, and this I now do.

It may be said that this action had its origin in an unfortunate fatal accident which occurred on the 10th January, 1978 - almost ten years ago. The sequence of events are gleaned from the pleadings and the evidence given by Jonathan Daley, whose negligence was the direct cause of the death of Hopeton Samuel Mahoney, represented in this action by the administrator of his estate, the Administrator General for Jamaica.

On the 25th April, 1977 Jonathan Daley completed a proposal form with the defendant, National Employers' Mutual General Insurance Association Limited, for motor insurance in respect of a 1968 Bedford pick-up truck registered NC 3580. A certificate of motor insurance was issued to him that very day in terms of his proposal, and subsequently a policy of insurance was issued, incorporating the proposal, with an expiry date of 24th April, 1978.

It was during the currency of that policy of insurance and while Jonathan Daley was using his truck to convey a length of iron along the Spanish Town highway at White Marl that Hopeton Samuel Mahoney came to his untimely death. The uncontroverted evidence is that two men had engaged the services of Jonathan Daley to convey the length of iron in his truck from White Marl to March Pen Road for the sum of $20. The men loaded the iron onto the truck and Jonathan Daley started his journey which took him along the left side of the dual carriageway going towards Kingston. It was while he was in the act of crossing the median strip in the said dual carriage-way thatthe accident occurred resulting in the death of the deceased. Neither the pleadings nor the evidence disclosed the manner in which the accident occurred but it is a fact that the deceased was not a passenger on the truck. The Administrator General for Jamaica, (the administrator in the estate of Hopeton Samuel Mahoney deceased,) instituted proceedings in the Supreme Court of Judicature of Jamaica against Jonathan Daley to recover damages for the death of the said deceased.

On the 15th April, 1983, the plaintiff obtained judgment for a total sum of $265,000.00 general damages and $600.00 special damages under the Fatal Accidents Act and the Law Reform (Miscellaneous Provisions) Act, with interest at 8% p.a. on the general damages from the 8th January, 1980 and 4% p.a. on the special damages from the 10th January, 1978. Jonathan Daley could not pay that vast amount, and a writ of execution against his goods was issued for $341,572.35. The Bailiff returned the writ into court endorsed "nulla bona". The judgment remained wholly unsatisfied.

In consequence, the plaintiff brought this action against the defendant company, claiming that the defendant is liable to indemnify the policy holder, Jonathan Daley, and to satisfy the judgment by virtue of S.18 of the Motor Vehicles Insurance (Third-Party Risks) Act. The relevant parts of S.18 of the Act reads as follows:-

(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".

(2) No sum shall be payable by an insurer under the foregoing provisions of this section;

(a) liability for which is exempted from the cover granted by the policy pursuant to any of the provisos to section 5 subsection (1);"

The defendant denied liability to satisfy the judgment relying on the "General Exceptions" and "Limitation as to use" clauses in the policy of insurance, (paragraphs 8A and 8B of defence) and averred "that at the material time, the said Jonathan Daley was using the motor vehicle, the subject of the said policy, for hire or reward and the defendant is therefore not liable to indemnify him under the said policy".

In his reply, the plaintiff denied that the vehicle was being used as alleged by the defendant and said that the defendant was using it for his own purpose, but "that if, which is not admitted, the insured Jonathan Daley was at the material time transporting the said pieces of steel for anyone other than himself then the circumstances of the carriage did not amount to a binding agreement between the insured and any such person or persons so as to make the use of the said motor vehicle "for hire or reward" thereby bringing the use within the exception mentioned in 8B(1) of the defence".

The court had to identify the issues raised on the pleadings and determine what should be proved. The plaintiff submitted that the defence had made allegations as to the use of the vehicle and that the burden of proving those allegations was on the defendant, and so the defendant should commence by calling witnesses. The defendant agreed. The vital issue to be decided was whether or not the vehicle was being used at the material time for hire or reward outside the coverage of the policy of insurance, and if so, whether the defendant would be bound to indemnify Jonathan Daley and to pay the fruits of the judgment to the plaintiff in those circumstances.

Counsel for the defendant, in opening his case, intimated that his first witness would be Jonathan Daley. Counsel for the plaintiff objected to any proposed evidence by Jonathan Daley on the ground that the plaintiff now stood in the shoes of the insured Jonathan Daley "by reason of subrogation", and that what would be happening was tantamount to the defendant calling the plaintiff to give evidence. The plaintiff's objection did not find favour with the court, and the testimony of the witness was received in evidence.

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 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 certificate of motor insurance issued under subsection (4) of section 5 in favour of Jonathan Daley sets out the limitations as to use imposed on the policy holder and clearly states:

"The Policy does not cover:

(1) use for hire or reward....."

and the motor vehicle policy itself states under the "General Exceptions" clause that:

"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 Limitation as to Use" .....

The proposal for motor insurance ("Ex.1") signed by Mr. Daley showed that he represented to the defendant that his vehicle would be used as a private commercial motor car "CMC", the policy for which "permits use in

connection with the Insured's business but NOT use for hire or reward". He was insured to use the vehicle for the carriage of goods for or in connection with his trade or business in "woodwork", but not for the carriage of goods for hire or reward.

The court had to decide whether in the circumstances of this case, the vehicle was being used for "hire or reward", as the defendant contended it was.

The defendant placed great reliance on the dictum of MacKinnon, L.J. in Bonham v The Zurich General Accident and Liability Insurance Co. Ltd. [1945] ALL E.R. (Annotated) Vol. 1 - 427 at 429:-

> "I think carriage for hire or reward imports carriage for some monetary or other remuneration pursuant to some form of contract by which the owner of the car would be entitled legally to claim the payment of that monetary reward from the passengers".

MacKinnon L.J. made the point that "hire or reward" meant "a hire or reward in respect of which there is a legally enforceable claim"; he did not make a distinction between the words "hire" and "reward", but both Du Parcq, L.J. and Uthwatt J. expressed the view that a distinction should be drawn between the words.

Uthwatt J. puts it this way: (page 432)

> "It appears to me that a distinction falls to be drawn between the word "hire" and the word "reward". The first word necessarily imports, I think, an obligation to pay. The inclusion of the second word is not, in my opinion, merely for the purpose of giving an alternative word to "hire" which means the same thing, but for the purpose of bringing in a subject matter which does not include hire and including (I do not say it is confined to that) cases where there is no obligation to pay".

In the case of Wyatt v. Gildhall Insurance Co. Ltd. [1937] ALL E.R. (Annotated) Vol.1. - page 792, Branson J.,

sitting in the King's Bench Division, held that a policy of insurance effected by the owner of a vehicle for use for social domestic and pleasure purposes, "does not cover the case of a car which is being used to convey people for payment from one place to another, even though the owner of the car might have been intending to take the same journey by himself, and having the opportunity of making a little money by carrying somebody else, he took it".

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.

The court was referred to a number of other authorities, which were supportive of the defendant's contention, and to a large extent they turned upon the interpretation of the policy in the circumstances of each case, and I need not refer to them seriatim. However, there is one case, Albert v. Motor Insurers' Bureau [1971] 2 ALL E.R. 1245, which turned on the question of whether or not the "liability was one which was required to be covered by a policy of insurance or security, in terms of the Road Traffic Acts in the United Kingdom. The relevant sections of the Road Traffic Acts in the United Kingdom which were considered are in similar terms to section 4 and 5 of the Motor Vehicles Insurance (Third-Party Risks) Act in Jamaica. S.5 (1) provides:

S.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:

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";

As I understand it the Act makes it compulsory for all persons who use a motor vehicle on a road to be covered by a policy of insurance against liability to third parties in respect of death or bodily injury caused by or arising out of the use of the vehicle on the road but liability to passengers or intended passengers need not be covered by such a policy unless such passengers were being carried for hire or reward, or are employed to the policy holder, where the death or injury arises out of and in the course of that employment. The facts of the case of Albert v Motor Insurers' Bureau do not appear to be on all fours with the instant case, and the terms that fell to be decided in that case are different to those in the instant case. Mr. Small in all frankness, did not rely on this case, nor did Mr. Rattray for the plaintiff. 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.

The Plaintiff did not call any evidence in the case. Counsel for the plaintiff submitted, in the main, that it was a question of fact as to whether Jonathan Daley was using the vehicle for hire or reward at the material time. He expressed the view that if the court was satisfied that what happened fell outside of the scope of the policy in that it was contrary to the terms of the limitations to use clause, then the third party could not recover from the insurers. He asked the court to interpret two clauses of the policy, firstly, clause 1. (b) (i) of the General Exceptions to the Policy which reads:

"The Association shall not be liable in respect of:

1. Any accident loss damage and 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";

and secondly the Limitations as to Use clause which reads:-

"Use for social domestic and pleasure purposes .

Use in connection with the Policy holder's business

Use for carriage of passengers (other than for hire or reward) in connection with the Policy holder's business.

The Policy does not cover:

(1) Use for hire or reward or for racing pace making 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".

Counsel for the plaintiff asked the court to draw the distinction between 'hire and reward' as was pointed out by the majority in Bonham v. Zurich (Supra). The instant case, he said, did not disclose a habitual usage of the vehicle to carry goods either for hire or reward, and in any event, the arrangement entered into by Jonathan Daley and the two men cannot be said to have been intended by the parties to have legal consequences. He said that the real question was whether it was an informal arrangement or one which the parties intended to have legal consequences, because only in the later case could the question of the use of the vehicle for hire or reward arise. He submitted that on the evidence, it was clearly established that the parties did not intend legal consequences.

He asked the court to bear in mind that clauses in a policy of insurance which excepts liability "are construed against the insurers with the utmost strictness; insurers have to prove that the loss falls within the exceptions", the standard of proof being on the balance of probabilities.

Generally speaking, by the provisions of S.18 of the Motor Vehicles Insurance (Third-Party Risks) Act a judgment creditor may claim the fruits of his judgment from the judgment debtor's insurers if the judgment debtor is insolvent, and the insurers will be obliged to pay if the liability is one which is covered by the terms of the policy. The policy of insurance embodies in writing the

contract that has been made between the insurers and the policy holder, and in the interpretation of it, the same general rules of interpretation are applied as in the case of any other written contract. Where the words used in the policy are quite clear and unambiguous, the court must give them their plain ordinary meaning. Of course, the court must look at the intention of the parties from an objective viewpoint, and I agreed with Counsel for the plaintiff that any ambiguity in the language must be construed in favour of the policy holder.

The law does not prescribe the form of the document to be used for any motor vehicle policy of insurance, but provides in a general way, the requirements in respect of those policies of insurance, and the parties are at liberty to include such terms and conditions that they agree on, provided they are not contrary to the minimum statutory requirements.

The policy issued in the instant case appears to follow the standard form of coverage afforded the owner of a vehicle of the class in question. The policy covers the policy holder when he is using the vehicle

(a) "for social domestic and pleasure purposes"

(b) "in connection with the Policy holder's business"

(c) "for the carriage of passengers (other than for hire or reward) in connection with the Policy holder's business".

At the time of the accident, the policy holder was not using his vehicle for any of the purposes stated above, and I hold that he was using the vehicle for "hire or reward," a use which is not covered by the policy. In my view, it will not be necessary in this case to make a distinction between the words "hire" and "reward", because in any event, the policy holder would not be covered.

Therefore, the policy holder would have no remedies under the policy against his insurers and so the insurers would be under no obligation to indemnify the policy holder.

A third party who is injured or killed by reason of the policy holder's negligence cannot, at common law, recover damages against the insurer. But the statutory provisions of S.18 of the Motor Vehicles (Third-Party Risks) Act, enables a third party to recover the fruits of his judgment obtained against a policy holder by bringing an action against the insurers, provided certain conditions are fulfilled, and provided that the liability of the policy holder is one that is covered by terms of the policy. The third party's remedies against the insurers are limited to the remedies that the policy holder has against his insurers. In other words, the insurers are not liable to the third party unless they would have been liable to the policy holder.

With those principles in mind, I concluded that the plaintiff could not succeed against the defendant in this action since the policy did not cover the policy holder at the material time, due to the use he was making of his vehicle then, and so the defendant would not be liable to the plaintiff. I accordingly gave judgment for the defendant with costs to be agreed or taxed