IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2007/ HCV 02316

BETWEEN	**ADVANTAGE GENERAL INSURANCE COMPANY LIMITED**	**CLAIMANT**
AND	**ANNETTE NELSON**	**DEFENDANT**

Manley Nicholson Instructed by Nicholson Phillips for the Claimant.
Simone Jarrett instructed by the Kingston Legal Aid Clinic for the Defendant.

Heard: April 20 and June 28, 2010

Declaratory Relief-Motor Vehicles Insurance (Third-Party Risks) Act sections 4, 5, and 18-Liability of Insurance Company to indemnify- Limitation as to user-Motor vehicle accident- Whether liability is a liability covered by the Policy- Meaning of the words "for hire and reward"- Whether necessary to prove habitual user.

COR: EDWARDS, J. (Ag.)

Introduction

This is a matter brought by way of fixed date claim form. In it, the claimant sought a declaration that it was not under any duty to indemnify the defendant, or satisfy any judgment obtained against the defendant, in relation to a motor vehicle accident involving motor vehicle licensed 0637 ER, which was insured by the claimant.

The claimant is an Insurance Company formerly known as United General Insurance Company Limited. It had provided insurance coverage to the defendant in respect of the motor vehicle registered 0637 ER, which was insured as a private motor vehicle. A certificate of insurance was issued to the defendant with an effective date, November 28, 2005 through to February 27, 2006. Clause 6 of the certificate of insurance carried a limitation as to use in the following terms:

> (a) **Use in connection with the insured's business**
> (b) **Use for social, domestic and pleasure purposes**
> **THE POLICY DOES NOT COVER:**
> **Use for hire or reward or for commercial travelling, racing, pace making, reliability trial, speed testing, the carriage of goods or samples in connection with any trade, or business or use in connection with the motor trade**

The defendant signed a motor proposal form, proposing the condition and use of the vehicle and the cover required. She was given a motor policy schedule for private motor vehicles, with the said limitation as to user, as contained in the certificate of insurance, as well as a motor vehicle policy.

There was a recital in the motor vehicle policy that the insured's proposal and declaration shall be the basis of the contract of insurance between the claimant company and the defendant and was deemed to be incorporated therein. It also stated that the policy and schedule should be read together as one contract.

It was, therefore, a condition of the policy of insurance between the claimant and the defendant that the policy did not cover the use of the vehicle for hire or reward.

On December 17, 2005, this motor vehicle met in a road accident. This claim arose because the claimant is contending that at the time of the accident, the motor vehicle in question was carrying passengers for hire or reward and that this activity was not a liability covered by the policy of Insurance.

The allegations appear in the affidavits of Isoline Daley who was a passenger in the car at the time of the accident and who was now a witness for the claimant and Donald Rhoomes, the driver of the car at the time of the accident, who was a witness for the defendant.

The claimant relied on the affidavits of Ruth Ann Morrison Anderson and Isoline Daley to ground its claim. On a preliminary point raised by counsel for the defendant, parts of paragraph 7 and paragraph 8 of the affidavit of Ruth Ann Morrison-Anderson was struck out as hearsay.

The defence relied on two (2) affidavits filed by Annette Nelson and one affidavit of the witness Donald Rhoomes. Ruth Ann Morrison-Anderson was not required for cross-examination.

The claim is anticipatory in nature, that is, there was no evidence in this case that a third party claim or any other claim had yet been made against the claimant in regard to this accident. However, in anticipation of any such claim, the

claimant sought this declaratory order, denying any obligation to indemnify the defendant, or to satisfy any judgment obtained against her.

The Issues to Be Determined

1. Whether the claimant is entitled to a declaratory order.
2. Whether the liability was one which was covered by the terms of the policy.
3. Whether the insured was operating the motor vehicle for hire or reward.
4. Whether the claimant insurance company was liable under the contract of Insurance to indemnify the defendant.

1. Can the Claimant Bring a Claim for a Declaratory Order?

A declaratory judgment is a formal statement by the court pronouncing upon the existence or non-existence of a legal state of affairs. It pronounces on the parties legal position. The effect of it is that the controversy between the parties is determined and becomes res judicata.

In this case the claimant contended that the court is empowered to grant a declaration in these circumstances and that this could be had prior to any judgment to a third party. In support of this contention it cited the case of **Barbados Fire and General Insurance Company v Pinder** (1993) 52 WIR 4.

The Motor Vehicles Insurance (Third Party Risks) Act (hereafter referred to as the Act), section 5 (8) provides that the insurer is liable to indemnify the insured being the person specified in the policy, in respect of any liability which the policy purports to cover.

Section 18 (1) of the said Act states:

> **If after a certificate of insurance has been issued under subsection (9) 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 subsections (1), (2) and (3) 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 the amount covered by the policy or the amount of the judgment, whichever is lower, 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.**

Subsection (3) of section 18 states:

> **No sum shall be payable by an insurer under the foregoing provisions of this section, if, in an action commenced before, or within three months after, the commencement of the proceedings in which the judgment was given he has obtained a declaration that, apart from any provision contained in the policy, he is entitled to avoid it on the ground that it was obtained by the non-disclosure of a material fact or by a representation of fact which was false in some material particular, or if he has avoided the policy on that ground,**

that he was entitled so to do apart from any provision contained in it.

There is a proviso to the subsection requiring the insurer to give notice specifying the non-disclosure or false representation on which he proposes to rely.

On the true construction of section 18(3), under that provision an insurer may obtain a declaration from the court that it is entitled to avoid a policy of motor insurance, on the ground of the non-disclosure of a material fact or the making of a false representation, before judgment has been obtained by any third party against the policy holder.

In **Barbados Fire and General Insurance Company**, the court considered the claimant's entitlement to a declaration prior to a judgment being given against the insured, in favour of a third party. The court considered section 43 (1) of the Barbadian Road Traffic Act, which was in its essentials, similar to section 18 (1) of the Act. The plaintiff in that case claimed that it was entitled to avoid the policy on the ground that it was obtained by the first defendant by the non-disclosure and/or misrepresentation of a material fact.

King J. in giving judgment for the insurance company, held that an action by an insurer under section 43(3) may proceed to determination before a judgment adverse to the insurer is obtained by a third party, against the insured. The learned judge went on to clarify the meaning of s. 43 (3).

Accepting that the section gives a right to an insurer to avoid a policy, if certain conditions are satisfied, he went on to determine that the imposition of time periods to do so was intended to bring certainty to the position of the parties. He cited the requirement, in the provision, to give notice, as supportive of this hypothesis. He found on the true construction of the words in the section, that an insurer may file his action and go on to obtain the declaration, independent of the outcome of any other action.

The basis of this claimant's claim for a declaratory order is that the liability is not covered by the terms of the policy. In other words the claimant is saying that, despite section 5(8), the extent of the claimant's liability to indemnify is limited to the extent of the cover offered by the policy. Therefore, the defendant cannot recover under the indemnity if the liability is not one covered by the policy. Since at the time of the accident, the defendant was in breach of the limitation as to user imposed on the policy, the liability was not one covered by the policy and the claimant is not liable to indemnify her.

If before this claim for declaration was brought, judgment had been obtained against the defendant by a third party and the claimant were to be sued by the defendant for indemnity, the breach of the policy by the defendant could have been pleaded by the claimant as a defence. The question for this court is whether this same breach can be pleaded in support

of a claim for declaratory orders under s. 18(3) or otherwise, prior to a third party action?

In **The Administrator General (Administrator of the estate Hopeton Samuel Mahoney deceased) v National Employers Mutual Association Limited** (1988) 25 JLR 459, CA Jamaica, Forte J.A. giving judgment in the court of appeal, differentiated between a policy of insurance which did not cover a particular risk, wherein, a vehicle which was being used for a particular purpose for which it was not covered under the policy of insurance, would not be considered to be so covered at the time of the happening of the event; and valid policies of insurance which the insurer may avoid or cancel.

It is the second category which Forte JA felt would be applicable to section 18(3). In the case of valid policies of insurance, the insurer may seek a declaration under section18 (3) that, he is entitled to avoid the policy for misrepresentation or non-disclosure. He may also seek to avoid or cancel for breaches of conditions stated in the policy, as opposed to limitation of user placed on the vehicle in respect of liability.

Forte JA took the view that third parties would still be protected under section 18 for those categories only. However, the clear implication is that third parties would not be protected under an indemnity where the liability is not one covered by the policy.

Indeed the wording to section 18(1) supports this. The relevant portions of the section states:

> **"If after a certificate of insurance has been issued under subsection 9 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 subsections (1), (2) and (3) of section (5) (being a liability covered by the terms of the policy) is obtained against any person insured by the policy,.." (Emphasis mine.)**

In my view, the section contemplates an indemnity only in circumstances where the liability is one which is covered by the policy and therefore a valid policy of insurance would have existed at the relevant time.

This present claim before me is not a claim that there is a misrepresentation or non-disclosure entitling it to avoid, neither is it a claim for breach of condition; this is a claim that the defendant was using the vehicle for a purpose not covered by the policy and therefore, at the time of the event giving rise to the claim, there was no contract of insurance between the parties to which the defendant is entitled to an indemnity. Therefore the declaration sought is outside the ambit of the declarations mentioned in section 18(3).

An examination of the decided cases indicate that insurers have used the defence that the liability is not covered by the terms of the policy, in claims for indemnity by third parties after judgment had been awarded to them and which

were not satisfied by the insured. See **Conrad McKnight v NEM Insurance Company and Others** Claim No. 2005 HCV 3040 and Administrator **General V NEM** as well as the several other local and English cases cited therein.

My own research has turned up no case where a declaration had been sought by the insurers, prior to judgment being granted to a third party, that they were not liable to indemnify because the liability was not one covered by the policy of insurance. Does this mean that the claimant cannot bring this claim? In my view it does not.

Whilst such a declaration would not be that which is prescribed in section 18(3), it is my view that the declaratory relief may still be granted. The court has an inherent jurisdiction to grant declaratory relief. This jurisdiction is now regulated by Part 8, Rule 8.6 of the Civil Procedure Rules 2002.

Part 8 Rule 8.6 provides for a party to seek a declaratory judgment and for the court to make a binding declaration of right whether or not any consequential relief is being sought.

It is the right of every litigant to approach the court for a declaration of rights or interest under any law, contract or rule. This right was recognized firstly by the courts of chancery as far back as 1837 in a case called **Taylor v Attorney General** (1837) Sim 413 and became, for the most part, fully recognized in 1915 in a case called **Guaranty Trust Co. of New York v Hannay &Co.**

(1915) 2 KB 536. The power to make such a declaration is a purely discretionary power.

In **Guaranty Trust** the claimants had no cause of action in the traditional sense but approached the court for a declaration that they had no obligation towards the defendants. The court gave a majority judgment in favour of the claimant. Pickford L.J. in his judgment referred to the English Rule Order. 25, r. 5 (later RSC Ord. 15, r. 16 and now CPR Rule 40.20), which though worded differently, is in its essentials similar to Rule 8.6 of the CPR.

Pickford L.J. declared that the rule gave a general power to make a declaration whether there is a cause of action or not. This, he said, may be done at the instance of any party who was interested in the subject matter of the declaration.

Since then it has generally been accepted in English common law that the courts are competent to grant declarations; including negative declarations, in any case falling within their jurisdiction. Currently there are no limitations in the grant of declarations by the court saving those it imposes upon itself or that which is imposed by statute.

It is my view that based on Rule 8.6 the present claimant may ask the court to exercise its discretionary power to determine whether or not he was under any liability to the defendant. This may be done prior to any third party judgment being obtained against the insured. I am therefore, satisfied

that the claimant is entitled to approach the court for the declaration sought.

2. Is the Liability Covered by the Terms of the Policy in Question?

The claimant filed an affidavit from Ruth Ann Morrison Anderson, Legal Officer of Advantage General Insurance Company Limited (formerly United General Insurance). To this affidavit was exhibited the contract of Insurance between the defendant Annette Nelson and the claimant company. The vehicle 0637 ER was insured as a private motor vehicle. The policy of Insurance excluded any user of the vehicle for hire or reward. Indeed, the nature of the policy of Insurance was not disputed.

The certificate of Insurance exhibited to the affidavit of Ruthann Morrison-Anderson and identified in cross-examination by the defendant Annette Nelson, had a valid date, November 28, 2005 through to February 27, 2006. The name of the policy holder was Annette Nelson. She was excluded from driving under the policy. Limitation as to use was confined to use in connection with the Insured's business and for social, domestic and pleasure purposes.

It was expressly stated that the policy did not cover use for hire or reward or for commercial travelling et cetera. The policy of Insurance was also exhibited and indicated that the

company would not be liable in respect of any accident, loss, damage or liability caused, sustained or incurred whilst any motor vehicle in respect of which indemnity is provided by the policy, is being used otherwise than in accordance with the limitation as to use.

Also exhibited to the said affidavit was the United General Insurance Motor Insurance proposal filled out by Annette Nelson, for third party insurance.

It was proposed that the vehicle would be driven by any licensed driver 21-70 years old with a Jamaican driver's licence for over 1 year. Use of the vehicle was declared in the motor vehicle policy schedule, to be for social and domestic pleasure.

The contract of insurance between the parties is evidenced by:

(a) A proposal form
(b) A motor policy schedule
(c) Motor vehicle policy.
(d) A certificate of Insurance

Section 5(9) of the Act states that a policy is of no effect unless and until the insurer issues a certificate of insurance in favour of the person by whom the policy is effected. A certificate of insurance was issued to and identified by the insured in this case.

By signing the proposal form the insured agreed to all the terms, conditions, exemptions and exceptions in the policy to be issued by the Insurer.

In section 18(5) of the Act, the expression "liability covered by the terms of the policy" is defined 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 insurance contract in this case specifically excluded the liability of the insurer if the vehicle was used other than in accordance with the limitations of use. The terms of the policy are clear and unambiguous.

Section 8 (2) nullifies (for the benefit of third parties) the effect of any restrictions placed on a policy of insurance by the insured on the use of the vehicle insured, which might otherwise defeat a third party claim. These restrictions are delineated in subsection 2 and do not include limitations as to permitted user.

The right of the insurer and the insured to freely enter into a contract containing terms agreeable to both, limiting the user of the vehicle, has long been recognized. See **Administrator General V NEM** (1988) 25 JLR 459 and as was so ably discussed in **Conrad McKnight v NEM Insurance Company Ltd.** So that if, indeed, the motor vehicle at the time was being used for hire or reward, it was not a liability covered by the

terms of the policy which was agreed by the insurers and the insured.

3. <u>Was the Defendant Operating the Motor Vehicle for Hire or Reward?</u>

The evidence relied on by the claimant

Isoline Daley in her affidavit indicated that she was a passenger in the motor vehicle licensed 0637 ER driven by Donald Rhoomes on 17th day of December 2005. She claimed she took the vehicle as a taxi with the intention to pay her usual fare at the end of her journey. She also claimed that she regularly took this said vehicle as a taxi and paid her fare. The accident however, occurred before she arrived at her destination and before she paid a fare. She indicated she knew it was a taxi because despite the fact that it did not have the red plates, it did have route taxi written on the sides of the vehicle.

She said she knew Mr. Rhoomes to be a taxi driver, she knew the car belonged to the defendant "Miss Annette" and she knew Mr. Rhoomes worked for "Miss Annette" and would pick the car up early in the mornings and return it in the evenings. "Miss Annette" was her immediate neighbour in Allison district.

She said she would take the car from Mandeville to her gate in Allison District. She paid $120 as her fare; the extra $20 was paid for her to be dropped directly at her gate in Allison.

The evidence relied on by the defendant

The defendant's affidavits indicated that she was the owner of the Toyota Corolla Motor Car, licensed number 0673 ER and that the car was insured with the claimant company.

The driver of the car at time of the accident was Donald Rhoomes. The car was purchased on or about the 22nd November 2005, with the intention to use it as a route taxi. Her affidavits indicated that between the 22nd November 2005 and 17th December 2005, the vehicle was only used for personal business. This she stated was due to the fact that the procedure to obtain the requisite licence to operate as a route taxi had not been completed.

Her affidavit went on to state that on the day of the accident the vehicle was given to Mr. Rhoomes, who sometimes operated as a mechanic, for servicing. She denied she was operating the vehicle as a taxi or that she had ever given anyone, including Mr. Rhoomes, permission to operate the vehicle as a taxi.

The affidavit of Donald Rhoomes in support, indicated that on 17th December 2005 he was leaving the Super Plus Supermarket in Manchester when he encountered 3 personal friends; Isoline Daley, Tomar Francis and his brother Wesley Francis, both of whom he had known for several years.

He had just finished working on the car, which he had taken from Miss Nelson at 10:00 a.m. that day to check the

power steering hose and to do general servicing on the vehicle. On the way from the supermarket, he saw the brothers and asked them if they were going home and they said yes.

Whilst he was walking to the car, Isoline Daley approached him and asked if he was going up and he told her he was going right up to her gate, as she lived next door to Annette Nelson.

On the journey to Allison district, the accident occurred. He denied he was operating as a taxi or that there was any mention of a fare. He however, admitted that the doors of the vehicle were written up with the words "route taxi". He admitted to having previously operated as a taxi driver. He drove a Toyota Corolla motor car as a taxi for a Mr. Patrick Lindsay. He contended that on the day in question he was only running errands and offered a free ride to friends. He claimed that the brothers have migrated since the accident.

Areas of Significance

The claimant contended that there was sufficient evidence that the vehicle was being operated as a taxi on December 17, 2005. The defendant refuted that claim. The claimant relied on the following pieces of evidence:

(a) The letters "route taxi" which was written on the side of the car.

(b) Isoline Daley's evidence that she knew that the car had been operating as a taxi; that she had taken that taxi before and paid her fare.

(c) That on the December 17, 2005, the car had been parked on the grounds of Mandeville Court House which at the time was regularly used as a taxi stand and was being so used on that day.

(d) That Isoline Daley did intend to pay her fare of $120 for her journey.

I will deal with each in turn.

(a) **The car being written up as Route Taxi**

Miss Annette Nelson gave evidence in her affidavit filed June 27, 2008 that she received permission from the Transport Authority to label the side of the vehicle as a route taxi, however, she had not yet received the further documentation which was necessary to upgrade the insurance.

In cross-examination she admitted to buying the car with the intention to use it as a taxi. It was her evidence that the plan was to have her husband drive the taxi on his return home from overseas in December.

However, in the meantime it was licensed and insured as a private motor vehicle. She claimed to have so licensed it on the advice of the insurance company that this was necessary until the route licence was secured. She insured it through United General Insurance. It was insured on November 28, 2005.

She said the insurance company gave her the go ahead to get the public passenger vehicle licence plate (red plate). She noted that when she attended the depot she was informed that she had to get the car written up as route taxi before she could get the red plate insurance. She claimed that there was a source right there at the depot who could write "route taxi" on the sides of the vehicle. She informed the court that the car was written up with route taxi on the side sometime in November to December.

However, it was her evidence and that of Mr. Rhoomes that they went to the depot once; that this was done before the insurance was obtained and that the car was written up by someone at the depot. Since the visit to the depot was for the car to be passed as fit and since this had to be done before the insurance was obtained on the car; by implication it meant the car was written up as a route taxi on or prior to the 28th November, 2005.

She admitted that her husband, the intended driver of the vehicle, was not named on the proposal form. She said she was not asked to name him and he was not there at the time. She herself had no licence to drive.

She said she was not told how long it would take to upgrade from a private insurance to a public passenger vehicle (PPV) insurance. She indicated that she had insured the car for private use for 1 year. Her husband was expected to

return in December and it was hoped that the car would be ready to drive as a taxi by the time he arrived.

She said by December 17, she was doing her check list and waiting to have the money to get the PPV licence. She said she had to do a check list before she could get the documents for the PPV licence.

It was her evidence that the vehicle was only taken out about 2-3 times by Donald Rhoomes. She did not travel with him all 3 times. She said in November 2005 Donald worked for her on the car, looking about the car, in order to get it ready.

It was also her evidence that December 17, 2005, Donald Rhoomes was working on power steering and servicing the vehicle. She said she was told at the depot that the power steering was too stiff.

Mr. Rhoomes evidence was that he had serviced it once before taking it to the depot and was, indeed, servicing it again on December 17th.

I accept therefore, that the car was bought November 22, 2005. It was passed as fit, written up as a route taxi and insured by November 28, 2005. Therefore between November 28, 2005 and December 17th 2005 the car, whenever it went on the road, went with the label "route taxi".

(b) **The car operating as a taxi**

The evidence of Isoline Daley is that on Saturday, December 17, 2005, in the night, whilst coming from the

Mandeville market she went to the taxi stand at the Mandeville court house to take a taxi home. She said she saw Donald Rhoomes whom she called Rat. Her evidence was that he was known to her as a taxi driver. She had taken his taxi previously. She said it was not the first time she was taking this particular taxi, that is, "Miss Annette's" taxi.

She said she had been travelling with him for weeks. In fact she went on to state that she could actually say it was months because he had been driving before and stopped.

She said that after that she saw him with this taxi. She informed the court that she did not see any red plate at the back of this taxi but it was marked "route taxi" at the side. She said that was the reason she took it.

She categorically denied that she went to Rat and asked if he was going up. She testified that it was he who came to up to her and told her, as a taxi man, that he was ready. She denied he was only giving her a ride. She said he was working for his money. She said she planned to pay him. She said it was not a free ride and she did not expect a free ride. She said she would take it from Mandeville to her gate in Allison.

She was unable to say how often she took this taxi but agreed it was more than 10 times. It was her evidence that if she saw him she would take his taxi. She said the fare was $100 but she paid $120 to her gate. She said she paid when she got off at her gate.

She testified that on December 17th, she sat in the front and other passengers were in the back. She said some came off at Bombay before the accident. She said she had her money to pay her fare but there was an accident before she reached to her home. She said at the time of the accident other passengers were in the vehicle at the back.

Her evidence is that she knew the car belonged to "Miss Annette" because it was always parked over there. She said she always saw Rat driving it; it was parked until Rat came for it early morning. She said Rat was "Miss Annette's" driver and he would come for the car to work it.

In cross-examination she indicated she had known Rat operating as a taxi driver for a long time. She said apart from "Miss Annette's" vehicle she did not want to talk about any other vehicle. She insisted she had seen him on the road with other vehicle, but it was "Miss Annette's" vehicle she was now talking about. She said she never stopped to check the other vehicles she saw him with.

Following upon persistent questioning in cross-examination as to how long she had been driving with Rhoomes in the defendant's car, she said she drove with him November 2005, October 2005 and September 2005, in "Miss Annette's" car.

She insisted that it was "Miss Annette's" vehicle she drove in but she claimed she did not know the dates and could not

keep going backwards in time. However, she insisted that she had been driving with him before the accident for a good while in the defendant's car. She said she could not go up to September because she did not remember if it was the defendant's car in September.

She denied she went up to Rat and asked him if he was going up. She said she could not do that because he was always looking passengers.

She agreed that they had not reached her destination for him to ask her for her fare. She said he always demanded his fare and she would have to pay it because it was a taxi. She said Mr. Rhoomes was in possession of the car because he was working with Mrs. Nelson. She said every morning he would go for the taxi and bring it back when he was supposed to.

(c) **Parking at the taxi stand**

Mrs. Daley insisted that she took the car as a taxi regularly. However, in contrast, Mr. Rhoomes evidence in cross-examination is that he drove the car only 3 times. The first time was when it was bought. He drove it that day when it was purchased by Mrs. Nelson. The second occasion was the day he took it to the depot and the insurance company and the third was the day of the accident.

He said the day he took it to the depot he had serviced it. On December 17, he had collected the car to service it again. He did this at this home in Kendall. He said he changed the oil

and fixed the power steering. He said he took the car with Mrs. Nelson's permission. He said he did not pay Mrs. Nelson any money for using the car and he did not collect any money for using the car.

He knew Isoline Daley; he said she traveled with him "nuff times". He said he was known to be a taxi driver. When he was operating as a taxi he did collect fares when persons arrived at their destination. He said on the day of the accident he was not running a taxi. He collected no fare. No one exited the vehicle before the accident. He took up 3 people from Mandeville after he had parked to go to the supermarket. He said it is close to the taxi stand. He said he did not go to the taxi stand. There were 3 taxi stands in Mandeville close to the Super Plus Supermarket. He testified that in the night when court was not in session he would go to the taxi stand by the court house. There was also one by the market gate.

His evidence was that he called the Francis's brothers and Mrs. Daley came to him. He did not tell them it was a free ride but he was in his mechanic clothing so they knew he was not working.

He said he picked up Mrs. Daley in the court house taxi park where he was parked. That was where taxis were parked when court was not in session.

(d) **Payment of fare**

Mrs. Daley said she intended to pay her fare at her gate but the accident intervened. Mr. Rhoomes evidence was that when he was operating as a taxi driver, he would normally collect the passenger's fare at the end of their journey.

Submissions

The claimant asked the court to accept that, on the evidence of Isolyn Daley, the motor vehicle was regularly being used as a taxi; that the terms of the policy of Insurance were clear and unambiguous and as such was applicable. In support the claimant cited the case of **Gamble v Accident Assurance Co**. (1869) 1.R 4 C.L. 204 at 214.

The claimant further submitted that there were no restrictions on the parties to agree to the user of the vehicle (or the limit to the user) that the policy of Insurance would cover, citing **Conrad McKnight v NEM Insurance Company** Claim no. 2005, HCV 3040.

The claimant further submitted that the restriction on the use of the insured vehicle is an express term limiting the liability of the Insurer and in essence is expressing that the Insurer will not undertake the risk if the vehicle is used for hire or reward, citing the **Administrator General v NEM**(1988) 25 JLR 459.

The claimant's attorney pointed to the evidence which he said showed that the insured vehicle was operating as a taxi in contravention of the permitted use. He cited the case of **Wyatt v Guidhall Insurance company Limited** (1937) 1 ALL ER 792 and

The Administrator General of Jamaica v Caledonia Insurance (1971) 12 JLR 572.

The Defendant on the other hand, submitted that it was the claimant who had the burden to prove that, contrary to the terms of the policy of insurance, the Toyota Corolla, licensed 0637 ER had been operating for hire or reward.

The defendant urged that on the basis of the affidavits the claimant had not discharged this burden; there being a substantial dispute as to the facts. She said that whilst Mrs. Nelson had voiced her intention to operate the car as a taxi, she is adamant that at the date of the accident it was not being so used.

The defendant noted that whilst Mr. Rhoomes also accepted that he had operated a taxi of a similar type and class he denied any knowledge of Mrs. Nelson's car being used as a taxi or of using it himself as a taxi.

The defendant further submitted that the evidence of Mrs. Daley was scanty; that her evidence was insufficient. She pointed out that no one told Mrs. Daley to pay her fare but she said it was her intention to do so. It was submitted that Mrs. Daley was mistaken; that knowing that Mr. Rhoomes was a taxi operator and because he was driving a car of a similar nature as the one he usually operated as a taxi, when he gave her a ride Mrs. Daley assumed that she would have to pay. She cited the case of the **Administrator General v NEM.**

The Law

Section 4 (1) of the Motor Vehicle Insurance (Third Party Risks) Law reads:

> **"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."**

By virtue of this Act it is mandatory for each and every vehicle which travels on a road to carry a policy of insurance issued by an insurer against third party risks. Such a policy of insurance must be in respect to the user of the vehicle.

By virtue of section 4 (2) it is a criminal offence to contravene section 4 (1).

Section 5 of the said Act indicates how section 4 is to be complied with. There is no requirement in the Act to insure passengers unless they are being carried in a motor vehicle duly licensed to carry passengers for hire or reward or if they are being carried by reason of or in pursuance of a contract of employment.

Section 5 (4) list the various liabilities which the policy of insurance is not required to cover. At subsection 4 it states inter alia:

(4) **The Policy shall not be required to cover-**

(f) **subject to subsection (5), until other provision is made pursuant to section 25, 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 out of which the claims arise.**

Section 5 (5) of the Act is in the following terms:

"Paragraph (f) of subsection (4) shall not apply in the case of a motor vehicle duly licensed for the purpose in which passengers are carried for hire or reward and 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 duly insured by the policy".

Under the Road Traffic Act section 61 (1), no person is allowed to use or to cause or permit the use of a motor vehicle on a road as a public passenger vehicle without a road licence to do so. A vehicle travelling on the road in contravention of the section commits an offence under the Road Traffic Act and is liable for prosecution. Such a vehicle is also mandated to have a policy of insurance specifically for public passenger vehicles, as required by section 4 and section 5 (5) of the Act.

Section 60 (1) of the Road Traffic Act contains provisions setting out the different class of public passenger vehicles allowed to operate on Jamaican roads with the requisite licence. All are classes of motor vehicles licensed to carry passengers for hire or reward.

Subsequently, the section was amended to include a new category called route taxis, as another class of vehicles which could obtain a road licence to operate on the Jamaican roads. These are motor vehicles adapted for carrying no more than ten passengers for hire or reward at separate fares along a route not exceeding 30 kilometers.

Under section 62 (2) as amended of the same Act, road licenses may be granted in respect of classes of vehicles to wit; stage carriages, express carriages, contract carriages, hackney carriages, route taxis.

There are regulations under the Road traffic Act and the Transport Authority Act requiring these classes of vehicles to have marks exhibited on the outside of the vehicle to include the class of licence which they hold. See for instance Regulation 16 under The Transport Authority Regulations, 1988 (as amended).

Section 60(3) of the Jamaican Road Traffic Act is the deeming provision and carries a proviso excepting a vehicle used on a special occasion for conveyance of a private party even if members of the party have made separate payments.

Subsection 4 of that Act sets out the conditions to be met for a journey to be deemed to be the conveyance of a private party on a special occasion.

In the resident magistrate's courts, magistrates hear cases daily in which it is alleged that a Motor vehicle had been

carrying passengers for hire or reward without having the requisite licence to do so. Concomitantly they also hear cases as to whether, at the time such a motor vehicle was so operating, it had a valid insurance covering such a user.

So in **R v Edwards** (1966), 9 JLR 396 (CA), the appellant was convicted in the traffic court on two separate informations, one charging him with using a motor vehicle as a public passenger vehicle without there being in force a road licence for the purpose contrary to section 53 (5) of Cap 346 and the other for using a motor vehicle without there being in force a policy of insurance for the said motor vehicle contrary to the Motor Vehicle Insurance (Third Party Risks) Law section 3 (1).

The evidence in that case was that passengers were taken from Bamboo to Kingston and fares were paid. The defence was a denial that any fares were paid and that the passengers were taken gratuitously to Kingston. The crown submitted and the court agreed, that on the evidence there was a legally binding contract but that in any event it was not necessary to prove the existence of a contract because of the deeming provisions

In section 52(3) (now section 60(3)). That section stated:

> "**it is hereby declared that where persons are carried in a motor vehicle for any journey for consideration of separate payments made by them whether to the owner of the vehicle or to any other person, the vehicle in which**

they are carried shall be deemed to be a vehicle carrying passengers for hire or reward at separate fares whether the payments are solely in respect of the journey, or not."

The Court of Appeal accepted that there was evidence on which the resident magistrate could correctly convict the appellant. The court also held that there being clear evidence that the vehicle was being used as a public passenger vehicle at the time alleged, it was incumbent on the appellant to satisfy the court that there was in force at that time a policy of insurance covering the user of the vehicle as a public passenger vehicle.

In **R v Russell** (1966), 9 JLR 458, the appellant was charged on two separate informations, both similar to those in **Edwards**. One of the grounds of appeal raised in **Russell** was that there was no evidence that the vehicle was habitually used as a vehicle for carrying passengers for hire or reward. Counsel in that case cited **Wyatt v Guidhall Insurance Co. Ltd** (1937) 1 All E.R. 792. With regard to **Wyatt**, Waddington, J.A. giving the judgment of the majority in **Russell**, had this to say:

"I would only make two comments here on this case: firstly, it was held that the policy did not cover the use which was made of the car on the journey in question-a single and isolated journey. That finding, with which this court agrees, was sufficient to dispose of the case. Branson J., however, in deference to the arguments which had been advanced in respect of the second question in the case, i.e., whether the owner of the car was obliged to have in force a policy of insurance covering liability in

respect of the death of, or bodily injury to, persons being carried in the vehicle, in accordance with the provisions of proviso (ii) of s. 36 (1) of the Road Traffic Act, 1930, expressed his opinion that the effect of the subsection was to require the owner to have such a policy in force only where the vehicle was habitually used for the carriage of passengers for hire or reward."

It was the view of Waddington JA, therefore, that a single user was sufficient; that any reference to habitual user was in reference to the legal obligation to have in force a policy of insurance to cover passengers. This obligation only existed in law where the vehicle was habitually used for hire or reward and which was its intended user.

Waddington JA held that where the user is stated to be for social, domestic and pleasure purposes and for the insured's own business but does not cover the use for hire or reward or any other limitation as to user, it is clear that the policy would not comply with the requirements of s. 4 (1) (b) of the law, if the vehicle was used for hire or reward, or for any other purposes mentioned in the limitation.

He went on to find that the evidence was that the vehicle was being used for hire or reward within the meaning of those words in the limitations as to user contained in the policy and that such a user was not covered by the policy of insurance; that that being so, the appellant at the relevant time, did not have in force in relation to the user of the vehicle, a policy of insurance in respect of third party risks as required by the Act.

The court also agreed that in order to show that a vehicle was used for hire or reward, it would be necessary to show that there was some agreement express or implied to carry the passenger in consideration of a payment. This agreement may be implied from the conduct of the parties.

In the **Administrator General v Caledonia Insurance** (1971) 12 JLR 572, a claim for indemnity under the Act, Justice Marsh (Ag.), as he then was, giving judgment in the Supreme Court of Jamaica, considered **Wyatt** and the case of **Bonham v Zurich General Accident and Liability Insurance Co. Ltd.** (1944) 2 ALL ER 573. The learned Judge extracted the following principles from these two cases:

I. Hire connotes some enforceable agreement between the parties.
II. Reward is not synonymous with hire; it has a wider connotation and includes a situation where there is no obligation to pay
III. Where there is an undertaking in the nature of a hiring the mere fact that payment is not exacted does not preclude a finding that the vehicle was being used for hire or reward
IV. The fact that a payment was made is, by itself, not conclusive.

The judge also accepted that the number of payments is not the sole criterion; that even one payment can be decisive.

The judge cited two cases from Guyana; **Mohamed v Edwards** (1960) 2 W.I.R. 206 and **Alleyne v Ricketts (1963)** 5 W.I.R. 312, in support of this contention. The former involved a police decoy who passed marked bills to the driver in return for a journey. The magistrate disbelieved his explanation that he was merely changing the money for the decoy.

In the latter the driver offered to take two police decoys that were standing on a public road, to their destination. At the end of the journey they each paid a fare. Police officers came up and accosted the driver who was held in possession of the marked fares.

The judge also referred to the case of **Russell.** In all cases the courts accepted the transactions were not mere free lifts. In **Caledonia,** the judge examined the factors tending to show a business transaction and those tending towards an innocent social interpretation. The learned judge found that the balance of scale tipped in favour of it being a social transaction and not a contract for hire or reward. The fact that it was a single user did not form part of the equation and was not considered as pertinent to the decision.

Wyatt's case concerned an application for indemnity under section 10 of the English Road Traffic Act, 1930, which is equivalent to section 18 of the Motor Vehicles Insurance (Third Party Risk) Act. Branson J determined that the owner of a private car is not statutorily bound to have in place a policy of

insurance to cover passengers carried in his vehicle but if such a person carries passengers for hire or reward, generally the policy of insurance for private motor vehicles would not cover such a journey.

He also decided that a policy of insurance to cover passengers is only statutorily necessary where the vehicle is habitually used to carry passengers for hire or reward. Branson J came to that conclusion by examining section 36 of the 1930 English Act, which is in para materia to section 5 of the Act. He came to the conclusion that the claimant could only sue the defendant under section 10, if under section 36 the insured was bound to have a policy of insurance to cover the journey.

In my deliberations in this case, I have found that the application of the law under the Road Traffic Act, as evidenced by the cases, may potentially come into direct conflict with the application of the law under the Motor Vehicles (Third Party Risk) Act, since the decision of the Court of Appeal in **Administrator General V NEM.** This is so despite the fact that the questions to be determined are the same. The potential conflict turns on the meaning of the words "hire or reward".

In the **Administrator General v NEM,** Forte JA rightly decided that the meaning of the words for "hire or reward" as used in the insurance policy determined whether or not the provisions of section 18(1) could avail the applicants. He then

went on to accept the meaning given to the words by the House of Lords in **Albert v Motor Insurers Bureau** (1971) 2 ALL ER, 1345.

Forte JA took the view that the dicta of the Law Lords in **Albert**, was of value in determining the meaning of the term "for hire or reward" in the Act. Justice Forte relied on the dictum of Lord Donovan in coming to his decision.

The case of **Albert V Motor Insurer's Bureau** concerned a claim against the Motor Insurer's Bureau which was set up under an agreement made by the bureau with the Ministry of Transport, whereby the bureau made itself liable to satisfy any judgment awarded in respect of any liability required to be covered by a policy of insurance under the English Road Traffic Act, where such judgment had not been satisfied. The claim was brought under the Law Reform (Miscellaneous Provisions) Act, by the widow of the third party. The insurance company which was liable to indemnify the insured had collapsed.

Lord Donovan in giving judgment in **Albert**, said that in his view the words "passengers being carried for hire or reward" (referring to the proviso to section 203 (4) of the English Road Traffic Act 1960 (s.5.5 of the Act), excepting the requirement for cover of insurance to passengers being carried for hire or reward or in pursuance of a contract of employment) did not refer to a:

"....fleeting use of the vehicle to carry passengers 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 vehicles normal functions".

On the basis of this statement and applying it to the case before them, Justice Forte and Justice Gordon both held that a motor vehicle could not be said to be used for hire or reward on a single isolated instance. Justice Forte held that the burden rested on the respondent to establish that the insured used the vehicle with such regularity and frequency from which it could be concluded that that was one of the vehicles normal functions.

There is however, a marked difference between the proviso in section 203 (4) and the equivalent exception in section 5 (5) under the Jamaican Act. Section 203 (4) states in part:

"Provided that paragraph (a) of this sub-section shall not have effect in the case of a vehicle in which passengers are carried for hire or reward.."

Section 5(5) however, states as far as is relevant:

"Paragraph (f) of subsection (4) shall not apply in the case of a motor vehicle <u>duly licensed</u> for the purpose in which passengers are carried for hire or reward..."(Emphasis mine)

The ramifications of the difference, in my humble view are significant. Under the English provisions it would be clearly necessary to determine what vehicles require compulsory insurance for passengers. Under the Jamaican provisions it is clearly stated. Therefore, to my mind it would be unnecessary in the Jamaican context to determine the meaning of the words "carried for hire or reward", in the statutory provision.

So under s. 5.5, a policy, in order to comply with the provisions of the Act, need not cover liability to passengers unless the vehicle is one licensed to carry passengers for hire or reward, in which case they are compelled by law to do so.

All the Lords in **Albert** gave judgments affirming that at the time of the accident the vehicle was being used for hire or reward, but each arrived at the decision by dint of differing reasoning. Only two of the Law Lords agreed on the meaning given to the words "for hire or reward" by Lord Donovan.

Lord Donovan, citing **Wyatt**, accepted that passengers were not required by law to be covered by a policy of insurance unless they were being carried in a vehicle for hire or reward.

Citing several cases, he defined hire and reward to mean the carrying for monetary reward, legally enforceable and recoverable, by the carrier under a contract expressed or implied. He came to the conclusion that a vehicle for hire or

reward is one in which passengers were normally or habitually carried for hire or reward; referring to section 203 (4) of the English Road Traffic Act, 1960, the effect of which was to make it compulsory to insure passengers against risk of injury if travelling in a vehicle in which passengers are carried for hire or reward.

Lord Donovan said:

> **"The relevant words are adjectival clause governing a vehicle and I construe them as pointing to the function or one of the functions the vehicle is used to accomplish, there is no difficulty in identifying a motor omnibus as such or taxi cab as such."**

Lord Donovan however, was at pains to note the significance of the failure of the legislature to single out those who were engaged in the carriage of passengers as a business, to impose liability on them in a separate provision. He put it thus:

> **"It would have been very understandable if the legislature had singled out those engaged in the passenger carrying business and imposed such a liability on them by some separate and independent provision. They are, after all, engaged in the business for profit; the passenger usually has no knowledge about the state of the vehicle in which he embarks, or the reliability of the driver. In these circumstances it is reasonable to require the operations of such vehicles to insure the passengers, the more so as the premiums will be reflected in the fare.**
>
> **Neither the 1930 Act nor the 1960 Act proceeds, however, in this direct way. The relevant part of each begins by compelling all users of motor vehicles to insure**

against liability to third parties in respect of death or bodily injury by or arising out of the use of a motor vehicle on the road. If each Act had stopped there it would have been compulsory to insure all passengers. But the next thing that each Act does is to provide that passengers need not be insured. It then enacts the opposite if the vehicle is one in which passengers are carried for hire or reward. The reasoning behind this legislative structure would seem to be this. Passengers, like the driver himself, can properly be left to look after themselves. After all, if the passenger elects to go by private transport he will usually know the driver, often have some idea as to the condition of the vehicle, and if he thinks that either presents a risk he need not run it. There is, therefore, no justification for imposing the additional burden on all private car owners to insure all potential passengers. But where public transport is concerned the position is different. The passenger must almost invariably take the vehicle and the driver as he finds them, and the same is true of the private hire vehicle if it is chauffeur driven: in these cases it is eminently reasonable that the operator of such vehicles should insure passengers, and this obligation is now expressed in this proviso."

But the Jamaican law makers, did in fact, single out those engaged in the business of carrying passengers and imposed such a liability on them in section 5(5), by referring to a motor vehicle duly licensed to carry passengers for hire or reward.

Lord Donovan, with whom Lord Pearson and Lord Diplock agreed, concluded that the words could not be construed as meaning any vehicle in which passengers were in fact being carried for hire or reward at the time of the occurrence of the event giving rise to the claim. They determined that the test

was whether there had been a systematic carrying of passengers which went beyond the bounds of mere social kindness.

The wording of the Act clearly makes it unnecessary to apply such a test in the Jamaican context. In my view too, there would also be a difficulty in applying this test to an interpretation of the words as used in the policy of insurance.

It would mean a person who began the first day of a business arrangement to use the vehicle for hire or reward escaped culpability because he had not yet become habitual; but in the mean time the insurance company is on risk for the user for which it had not contracted and in respect of which it had specifically limited its liability. It also would mean that the insured, in the meantime, would be able to contravene the law both as to his operation without a licence and the absence of insurance to cover the user, until his business became more systematic and habitual.

The approach of the House also begs the question, how frequent is frequent and who determines regularity? Does 4 times count, and is the man who does it 5 times more regular than the one who does it three times? Should liability be imposed on the insurance company for which it did not bargain because of an irregular and infrequent user, even though the risk was not covered by the policy of insurance? As

Goddard J said in **Jones v Welsh Insurance Co. Ltd** (1937) 4 All E R 149:

> **"No one can fairly expect insurers to pay on a risk additional to that for which they have received a premium."**

In my view Lord Donovan's definition is evidential rather than adjectival. Any evidence of systematic carrying of passengers for hire or reward, with respect, would point only to the inescapable inference that it goes beyond the bounds of mere social kindness.

He however, accepted that whatever the interpretation, adopted each case would still have to be decided on its own facts.

Lord Pearson in defining the words "are carried" in the statute felt that they referred to a course of conduct and not to what was done on a particular occasion. He however, agreeing with Lord Donovan only in part, went on to express his doubt as to whether the course of conduct had to be so extensive as to be habitual or normal.

Lord Diplock, in his judgment, reluctantly accepted the reasoning of Lord Donovan and the interpretation given to the words for "hire or reward". His decision was based solely on the wish to avoid conflict in the House. This reluctance may be seen in the words of Lord Diplock, to wit:

> **"Words in the Act of parliament mean what a majority of a judicial Committee of this House say that they mean.**

Three divergent views are held by your lordships as to the meaning of the words to be construed. Only one of these commands the support of even two of your lordship, Lord Donovan and Lord Pearson. The meaning which I myself was inclined to prefer is accepted in its entirety By Lord Cross of Chelsea. Viscount Dilhorne accepts it only as to a part."

In casting his lot with Lord Donovan and Lord Pearson, he lamented the adverse effect it would have on the administration of justice if the House was to remain divided on the meaning of the words.

However, Viscount Dilhorne, in his judgment in **Albert,** pointed to the weaknesses in an evidential definition of the words for "hire or reward".

He firstly noted, that the questions to be determined in the appeal, were the same as those which a magistrate would have to determine on a prosecution for using a car on a road without a policy covering passenger claims namely; was the vehicle carrying passengers and if so were they being carried for hire or reward.

I would go further and dare say, a magistrate would have to decide the same questions on a prosecution for operating a vehicle as a public passenger vehicle, without the requisite licence to do so.

Viscount Dilhorne in lamenting the defects in the drafting of the section which had led to uncertainties, said firstly:

"A car in which there are passengers being carried for hire or reward is at that time a vehicle in which passengers are carried for hire or reward. I can see no valid reason for coming to a contrary conclusion. The use of the car even on one isolated occasion for that purpose makes the car a vehicle in which passengers are carried for hire or reward."

Later on in his judgment his Lordship opined:

"If there is an arrangement that payment will be made for that, it matters not when the payment is in fact made."

I would venture to say that it matters not if it was in fact paid once it was agreed it was to be paid and payment could have been enforced at a later date.

Viscount Dilhorne, interestingly, also considered the meaning of the words, for "hire and reward", as they are used in the section of the English Road traffic Act dealing with public service vehicles. Those provisions are equivalent to the provisions in the Jamaican Road Traffic Act dealing with public passenger vehicles. He determined that the meaning of the words 'hire or reward" in the public service vehicles section of the Act is different from the meaning in the insurance section of the Act. He came to this conclusion because of the deeming provisions in the public services vehicle provisions in the Act.

It seems to me by virtue of the deeming provisions in section 60 (3), of the Jamaican Road Traffic Act, once a vehicle is used on the road for the payment of separate fares it

is considered by law to be used for hire or reward, the only exception being that afforded in the section itself for a single user on a special occasion.

In my view the law did consider the possibility of a single user and made provisions for such an eventuality in section 60(3) of the Road Traffic Act. Ipso facto if the single user did not fall within the proviso of the law it was deemed to be a carriage for hire or reward. Being so deemed such a carriage would be without the requisite insurance.

Lord Cross of Chelsea in disagreeing with the majority on the meaning of the words, noted in his judgment in **Albert** that:

> **"In my opinion a vehicle may well be one in which passengers are carried for hire or reward within the meaning of the proviso to section 203 (4) although it is not normally or habitually so used. If a new bus route is opened and a brand new bus sets out on the first trip it will be used as a stage carriage and its owner will commit an offence under s 127 if he does not hold the appropriate license. Equally, in my judgment, the bus will be one in which passengers are carried for hire or reward within the proviso to s. 203 (4) and the owner will commit an offence if he does not hold a policy covering liability in respect of the death or injury of passengers. Yet no one could say that that bus was normally or habitually used for the carriage of passengers."**

This statement of Lord Cross of Chelsea, in my view exposes the fallacy in Lord Donovan's definition. For if a motor vehicle owner decides to carry passengers for a fare in his

private motor vehicle without the requisite license and in order to carry out this settled plan, he goes to the taxi stand and solicits passengers, takes them on their journey and charges a fare; if he is caught on his first day out, would we then say he was not operating for hire or reward? It was clearly his settled intent to so do and he has carried out his intent. It should not matter whether it was his first day or his first year. In actual fact under the Road Traffic Act, section 60 (3), it would not matter.

Lord Cross, like Viscount Dilhorne, also contrasted the meaning of the words in the sections dealing with insurance and that part dealing with public service vehicles. However, Lord Cross came to the conclusion that whatever parliament meant in one it must have intended the same meaning in the other.

He examined the case of **East Midland Traffic Commissioners,** which had never been disapproved, where the court considered section 61(2) of the 1930 Act and applied the literal meaning, that whenever persons were carried in consideration of separate payments made by them the vehicle automatically became for the purposes of the Act a vehicle carrying passengers for hire or reward, at separate fares.

He pointed out that his decision in the case of **Albert** was considered against the statutory background of the sections concerning public service vehicles and the subsequent

amendments thereto in the 1960 Act, which in his view accepted and adopted the **East Midland v Tyler**'s decision.

It is my view therefore, that the House in **Albert** was required to answer a different question than that which arose in **Administrator General V NEM** and I venture to say the one in this case presently before me. In **Albert** the House was required to decide whether the liability was one which was required to be covered by a policy of insurance. In **NEM** and in this case before me, the question to be determined is whether the liability was one which was covered by the existing policy of insurance. In my humble view these are two separate questions.

On that basis, I believe the case of the **Administrator General v NEM** can be distinguished for the following reasons:

(a) The House of Lords decision relied on by Justice Forte in **Albert v Motor Insurers Bureau** did not consider deeming provisions similar to section 60(3) of the Road Traffic Act or the proviso thereto.

(b) **Administrator General v NEM** dealt with the contract for hire to transport goods and not the carriage of passengers for hire or reward.

(c) The deeming provisions of the Road Traffic Act were not considered. Neither were the Court of Appeal cases of **Russell** and **Edwards.**

(d) The carriage of passengers for hire or reward without the requisite licence to do so is a criminal offence under the Road Traffic Act.

(e) The Act refers to user of the vehicle and requires insurance to be in place for that user. If the vehicle is used for hire or reward, then it should be insured for that user. A failure to do so is also a criminal offence. Whether such a user is for one occasion or not should not be relevant to the issue of insurance coverage on that occasion.

(f) The claim in **Albert** was a claim against the Motor Insurance Bureau and the issue to be determined was whether the liability which gave rise to the claim for damages was a liability required to be covered by a policy of insurance, so as to make the bureau liable to pay.

(g) **Wyatt** and **Bonham** were decided on the construction of the words of the policy and not the statute. Under the Act only a vehicle licensed for the purpose of carrying passengers for hire or reward is compulsorily required to have insurance to cover those passengers. Therefore, in my view, it was not necessary to interpret the words, as used in the Act. In both cases the issue to be determined was whether the terms of the policy covered the user. Once it was determined

that the vehicle was being used for a purpose not covered by the policy at the time of the event giving rise to the claim, then it followed that the insurance company was not on risk.

Under section 5 (5) of the Act only vehicles licensed to carry passengers for hire or reward are required to insure those passengers. Unlike section 204 (4) of the 1960 English Act, the section needs no further refinement. The words in the section does not require defining, since in my view, borrowing the term used by Lord Donovan, they are adjectival and governs the words "a motor vehicle duly licensed for the purpose".

However, it does not prevent an insurance company from contracting out of the use of the vehicle for hire or reward whether licensed or not to do so. Branson J in **Gray v Blackmore** (1933) 1 K.B. 95 said:

> **"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).**

My conclusion therefore, is that **Albert,** which is a case interpreting the relevant section of the English Road Traffic Act,

is not applicable to a case involving the interpretation of the relevant clause in a policy of insurance. In such a case **Wyatt**, which in its interpretation of the clause in the insurance policy, was not over ruled by the House of Lords, is the applicable case and is more in line with the cases decided by the Court of Appeal on appeals from the resident magistrate's courts. In such a case a single user outside of the permitted use, is sufficient.

Analysis

The law is that the onus of proof is on the insurers to prove that the limitation applied. In support of its claim the claimant brought Mrs. Isoline Daley. Mrs. Daley was a passenger in the vehicle at the time of the accident. She gave evidence for the claimant, which it would appear to this court, that in light of the declaration being sought and she being a third party would necessarily be against her own interest.

Mrs. Daley is Mrs. Nelson immediate neighbour. She claimed to know the car as she had seen it parked at Mrs. Nelson's yard. She knew Mr. Rhoomes worked for Mrs. Nelson because she would see him come and pick up the car and take it back. She said it was a taxi. Although the car had PPV plates (red plates), it was marked "route taxi". Mr. Rhoomes is a taxi driver.

Now, Mrs. Daley claimed to have travelled with Mr. Rhoomes before in another taxi; when he stopped driving that taxi she drove with him in this car.

There are weaknesses in Miss Daley's evidence, most notably:

i. She failed to state how often she had seen Mr. Rhoomes collect the car and bring it back, in light of the defendant's claim that Mr. Rhoomes had only taken out the car three times.

ii. She had also claimed under persistent cross-examination that she had taken the defendant's car as early as September. This could not be true, in light of the uncontroverted fact that the defendant acquired the car in November.

iii. She was also unable to say how often she did in fact take the defendant's car as a taxi.

The strength of the Defendant's case is that:

i. He was a regular taxi driver who had driven a car previously, which was similar to that of the defendant's.

ii. He had not in fact collected any fares.

Mrs. Daley's assertion that she could have taken the defendant's car up to September could not be true when, as said before, it is juxtaposed against the undisputed evidence that the defendant acquired the car on November 22, 2005.

Mrs. Daley therefore could not have taken the car as a taxi in October or September. Was she mistaken or outright dishonest?

To the question "did you take Miss Annette's car in October?" Mrs. Daley answered in the affirmative but qualified that she did not recall when it was previously that she had taken the car as a taxi; but it was "Miss Annette's" car in which the accident occurred that she was speaking of now.

I do not find Mrs. Daley to be a dishonest witness. On the contrary she seemed to have tried to be perfectly honest. Is she mistaken? Certainly on the point of taking the car in October or September she was mistaken. Does this mean she never took the car in December or November? I do not accept that it means that. Mrs. Daley became quite confused and flustered under cross-examination when counsel attempted to get her to go back in time. It was clear she was not able to recall but under pressure by counsel to give an answer, she did so.

Mrs. Daley said that the car did not have red plates but it had route taxi marked on it. She knew it to be and accepted it was a taxi. She said that's why she took it. Mr. Rhoomes evidence was that he used to drive a taxi for Mr. Lindsay. It appears to me, from her evidence that Mrs. Daley was aware that Mr. Rhoomes used to drive for someone else.

Her evidence is that she used to take Mr. Rhoomes taxi from when he was driving before and then he stopped. She said he then started to drive this taxi for the defendant. It is

clear to me that Mrs. Daley knew the difference between the defendant's car marked "route taxi" but without the red plate and any other red plated taxi Mr. Rhoomes may have driven before.

I also took into consideration the fact that if it had been the first time she was taking the defendant's car and a lift was offered to her as indicated by Mr. Rhoomes, it was hardly likely that she would bother herself with whether or not it had on a red plate. It would just be a lift in a car.

I accept, on the preponderance of probabilities that she had taken this car before as a taxi. I also find on a balance of probability that the vehicle was being so used between November 28, 2005 and December 17, 2005.

Mrs. Nelson said that the car being written up with route taxi on the side was preparatory to getting the route taxi licence and PPV insurance. But the evidence is that it was written up in November and up to December 17, 2005 nothing had been done to change the insurance to PPV or to get the road licence. Her evidence is that she was waiting to get the money but there was no evidence given as to where this money was to come from.

Yet, here we have Mr. Rhoomes parking the car, so written up as a route taxi, at a known taxi stand. Can any inference be drawn from that? I think so. I reject his evidence that he parked there to go to the supermarket. I reject that he offered a lift to

the two brothers and that Mrs. Daley approached him. Nothing in his attitude suggested to Mrs. Daley that he was not indeed working as a taxi man that evening.

The combination of the writing on the side of the car and parking in the taxi park, with a known taxi driver at the wheel, was at the least an invitation to the public. The invitation was that "I am here operating as a taxi on this route, you are welcome to hire my vehicle for a fare." This invitation would be accepted by anyone who took the taxi. Such a person was then liable to pay the fare on demand. At most it was an offer of carriage to the people of Manchester plying that route. See **Wilkie v London Passenger Transport Board** (1947) 1 All ER 258, judgment of Lord Greene. I cannot see any other interpretation to be placed on this conduct.

On the evidence presented, I have no difficulty finding that the vehicle was in fact being used a taxi on the December 17, 2005.

4. <u>Is the Claimant Liable to Indemnify the Defendant?</u>

I conclude that when the motor vehicle registered 0637 left the taxi stand in Mandeville, with passengers, on December17th, 2005, it did so in the guise of a route taxi, with intention to collect separate fares from each passenger. Although this would be sufficient to dispose of the case, in my view, on the evidence presented, I also accept that on a balance of probabilities it had been so operating before that

day. The result of this action was to render the policy of insurance on the car invalid. The liability, having been expressly limited in the policy, was not a liability covered by the terms of the policy. The insurance company is therefore entitled to evade liability.

Order

The liability not being one covered by the policy, the claimant Company, Advantage General Insurance, is not liable to indemnify the defendant Annette Nelson for any claims which may arise as a result of the accident.