

INSURANCE - Non disclosure and misrepresentation

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA  
IN COMMON LAW

civil

SUIT NO. C252/1976

BETWEEN CENTRAL FIRE AND GENERAL INSURANCE COMPANY LIMITED PLAINTIFF  
A N D MAVIS WRIGHT DEFENDANT

W. K. Chin-See instructed by Dunn, Cox and Orrett for Plaintiff  
Alton Morgan and M. Poulle for Defendant

Heard on July 19, October 5 and December 20, 1979.

JUDGMENT

CAMPBELL J.

The plaintiff in this action seeks a declaration that it is entitled to repudiate or avoid a policy of motor insurance issued in favour of the defendant for the period November 12, 1975, and November 11, 1976, on the grounds of non-disclosure by the defendant of a material fact and of the representation of a fact which was false in some material particular.

Alternatively the plaintiff claims a declaration that the defendant is not entitled to be indemnified by it under the policy in respect of any liability she has or may incur arising out of a motor vehicle accident which occurred on February 22, 1976, on the ground that the motor vehicle, the subject of the policy, was then being used for a purpose other than that for which it was insured.

On or about November 12, 1975, the defendant completed a proposal form and declaration by way of request to the defendant to issue to her a C.M.C. motor vehicle policy of insurance to cover certain risks including third party risks. The proposal form and declaration contained the question whether the vehicle would be used for carrying passengers for hire or reward at any time. The answer of the defendant to that question was in the negative. Pursuant to the completed proposal form the plaintiff issued its policy to the

defendant to cover the use by the defendant of the motor vehicle as a commercial motor vehicle. This much has been admitted by the defendant in her pleadings.

The motor vehicle, during the currency of the policy, was involved in an accident. One Isaac Vassell who was in the motor vehicle died. His administratrix commenced proceedings claiming damages under the fatal accidents Act against the defendant and her driver one Clement Douglas. It is against this background with the looming contingent liability of the plaintiff under the policy of insurance that it seeks the declarations earlier mentioned.

The defendant denies that the motor vehicle at the time of the accident was being used contrary to the terms of the policy. She states affirmatively that at the time of the accident it was being used in a manner and in circumstances within the terms and conditions of the policy of insurance. She further asserts, that in making answer, as she did, to the question in the proposal form she said nothing which was false nor did she by her said answer fail to disclose material facts.

The defendant through her Attorney-at-Law openly admitted in court that she and the plaintiff were "Ad idem" as to there being a restriction on the use of the motor vehicle and that the fundamental issue for determination was therefore whether or not the motor vehicle was at the material time being used for hire or reward. Implicit in this agreement as to what the fundamental issue was, is the acceptance of the fact that if the vehicle was being used for hire or reward she would not be entitled to indemnity under the policy in respect of any liability she may incur through the accident on February 22, 1976.

The plaintiff called evidence to establish that the motor vehicle was on February 22, 1976, used to transport passengers for hire or reward.

Charles Bourne said he was a member of a party who travelled from Kingston to Devon in Manchester on February 22, 1976,

in the defendant's minibus driven by her driver Clement Douglas. The occasion was a tomb-laying ceremony. One Gladys Morris acquired the use of the bus. He expected to pay money for the trip to Gladys who would pay over the same to the driver. The party consisted of about 10 persons. On the return journey the bus stopped at Four Path and the driver Clement Douglas stated that he was making his collection there and that he would not proceed further until he got his collections. One Marshall who was also a passenger on the bus collected \$6.00 from him. Marshall also took collection from other passengers. Marshall ultimately told the driver that he had collected all the money so he the driver could now proceed. The driver resumed the return trip to Kingston and en route thereafter the accident occurred.

He said he saw about six persons give money to Marshall. He did not actually see Marshall hand over the money to the driver. He said he knew he had to pay for the trip to Devon and back as on a previous occasion when he was a party in the same bus driven by the same driver to attend the funeral of the mother of Gladys Morris he had to pay though he cannot recall how much he then had to pay. On that previous occasion he paid direct to the driver Clement Douglas. On the second occasion the driver asked Marshall to collect.

Danneth Sanderson a student said she travelled on the bus from Devon to Kingston in February, 1976. She said that at a stage in the journey the bus stopped and the driver came out quarrelling and saying that he would not drive any further until he collected his money. She saw Gladys Morris pay to the driver on her behalf. The fare for Danneth had previously been collected by Gladys Morris from one Mrs. Grey in Devon before she Danneth boarded the bus.

The defendant Mavis Wright gave evidence that in completing the proposal form and declaration she did answer in the negative the question whether the motor vehicle would be used for hire or reward. She understood the question, she answered it truthfully as she did not then nor at any time subsequently contemplate using the vehicle

other than for picking up clothes for cleaning in her dry-cleaning business and for transporting grapefruits and eggs from Ewarton to her shop which is beside her dry-cleaning establishment. She admits that she was issued with a certificate of insurance which excluded from coverage the use of the vehicle for hire or reward. She admits that Clement Douglas her son was the driver named in the certificate, she had him in mind as the person who would drive the vehicle when it was insured. She handed the key of the motor vehicle to her son Clement Douglas the day after the vehicle insured as she trusted him. She knows nothing of the vehicle having been driven to Manchester on February 22, 1976, nor of any previous trip thereto.

Clement Douglas in his evidence gave a different version from Charles Bourne as to the purpose for the trips to Manchester, he also gave a different destination in Manchester as the place to which he travelled. He however admitted that Charles Bourne and Marshall were on the bus from Devon to Kingston. He admitted that it was possible that Danneth Sanderson could have been also on the bus. He admitted that the said Charles Bourne had previously travelled on the bus to attend a funeral. What he emphatically denies is that he ever received directly or indirectly any money from any passenger by way of hire or reward or at all.

He further denies that he ever stopped the bus demanding to be paid that he asked any one to collect money from the passengers.

I have no hesitation in rejecting the evidence of Clement Douglas where it conflicts with that of Charles Bourne and Danneth Sanderson, whereas Douglas was evasive and shifty indicative of untruthfulness and showed considerable discomfort when his statement to one Mr. Ollivant was shown to him, the witnesses Bourne and Sanderson were calm and unruffled, in particular the latter. She said she saw Gladys Morris pay over her fare to Douglas. This I believe and accept as actually happened. Bourne says that on an occasion prior to 22nd February, 1976, he paid his fare direct to

Douglas. This also I believe and find as a fact that it really happened. I further find that Douglas did demand payment from the passengers when he said he would not drive further until he collected his money. I find as a fact that Marshall made collections of fares on his behalf.

Mavis Wright testified that she had no knowledge that the motor vehicle was being used by her son to transport passengers for hire or reward. This may well be so since she had warned her son the driver against doing so. She trusted him, so much so, that he appeared to have had relatively unrestricted use of the motor vehicle. He has betrayed her trust with probable disastrous financial consequences. Sad as it is, the irresistible inference to be drawn from her modus operandi is that she accepted the risk that her son, in the pursuit of secret gain for himself could place her in the embarrassing situation in which she now finds herself. She has, by allowing a situation to exist where the motor vehicle could be used contrary to its insured use, disabled herself from claiming indemnity following on the actual use of the vehicle for hire or reward.

In the circumstance the plaintiff is entitled to the declaration sought namely that the defendant Mavis Wright is not entitled to be indemnified in respect of any liability incurred or which may be incurred arising out of the accident involving her motor vehicle licensed 3106 on February 22, 1976.

There will be judgment for the plaintiff accordingly.  
Costs to the plaintiff to be agreed or taxed.