

IN THE COURT OF APPEAL

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U.W.I. MONA, JAMAICASUPREME COURT CIVIL APPEAL NO. 23/73

BEFORE: The Hon. Mr. Justice Edun - Presiding
The Hon. Mr. Justice Hercules
The Hon. Mr. Justice Zacca (Acting)

LIGENCES & GENERAL)
INSURANCE CO. LTD.) - Defendant/Appellant

v.

DONALD MARKLAND - Plaintiff/Respondent

NEGLIGENCE

Mr. D. Scharsmidt for the Defendant/Appellant
Mr. W. Bentley Brown for the Plaintiff/Respondent

16th December, 1974.

EDUN, J.A:

In this appeal, I am of the view that there was no proof that a notice to the insurers, defendant/appellant, in accordance with Section 16,2(b) of the Motor Vehicles Insurance (Third-Party Risks) Law, Cap. 257, was given.

The defendant/appellant pleaded in par. 4 of the defence, that no notice of bringing proceedings No. 2767/70 in the Resident Magistrate's Court was given to the defendant/appellant. Learned Attorney for the plaintiff/respondent submitted before the trial judge and before us that there was no burden of proof cast upon the plaintiff/respondent to show that a notice was served, because in his view there was a presumption in law that the notice required by law was in fact given.

In this case, judgment was given against the insured, Mr. C.D. Chin, by default. If the defendant/appellant had been given the notice required in law, the company would have been in a position to defend the action if it so desired. The company (defendant/appellant) was deprived of the right to defend the action by the plaintiff/respondent's failure to give such notice.

The learned trial judge in giving judgment against the defendant/appellant held that there was a presumption that a notice

was given by the Clerk of Courts pursuant to section 17 of the Motor Vehicles Insurance (Third-Party Risks) Law, Cap. 257. I have no doubt that there is a duty in the Clerk of Courts in the circumstances of this case, to give notice of the proceedings, No. 2767/70 to the insurers, but the plaintiff/respondent is not in my view absolved in law from complying with the condition precedent as to the giving of the required notice. In the instant case, there was and there is no proof that he had done so. In my view, that is a point sufficient to dispose of the appeal. I would allow the appeal.

HERCULES, J.A:

When the defendant pleaded his defence in Par. 4 that no notice was given to the insurers in this matter, the plaintiff became aware that this was going to be a live issue and that he was being put to proof of it by the defence.

The plaintiff called the Clerk of the Courts as a witness and it was entirely for the plaintiff to ask the Clerk of the Courts, 'did you serve a notice on the defendant company as required by law'? The answer no would have been an end of the matter; the answer yes would have put the defence to prove that they did not get the notice. Then and only then would the burden have shifted on the defence, but having called the Clerk of the Courts and having made no use whatever of the Clerk of the Courts, in my view, it is not open now to the plaintiff to say that the burden rested initially on the defence to prove that the notice was not served. That is the only point that I wish to emphasize, but I entirely agree with the judgment of my learned brother presiding.

ZACCA, J.A. (Ag):

whilst it is true that the Motor Vehicle Insurance(Third-Party Risks) Law places the duty on the Clerk of the Courts to

give notice to the insurer of the proceedings which took place in the Resident Magistrate's Court and therefore places no duty on the plaintiff to give such a notice, it is my view also that there is a burden of proof on the plaintiff to satisfy the Court that such notice had in fact been given to the insurer of those proceedings.

I also would allow the appeal and I entirely agree with the judgment delivered by my learned brother Edun presiding.

EDUN, J.A:

The formal order: the appeal is allowed, judgment entered by trial judge is set aside; judgment entered for the defendant/appellant with costs in the court below and in this appeal to be agreed or taxed.