NMLS

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN CIVIL DIVISION

CLAIM NO. 2005HCV3040

BETWEEN	**CONRAD McKNIGHT**	**CLAIMANT**
	(By next friend Conrad McKnight)	
AND	**N.E.M. INSURANCE COMPANY**	**DEFENDANT**
	(JA.) LIMITED	
	AND	
BETWEEN	**N.E.M. INSURANCE COMPANY**	**ANCILLARY CLAIMANT**
	(JA.) LIMITED	
AND	**WEBSTER BUCHANAN**	**ANCILLARY DEFENDANT**

IN CHAMBERS

Mr. Dennis Forsythe instructed by Forsythe & Forsythe for the claimant.

Ms. Camille Wignall instructed by Nunes, Scholefield, DeLeon & Co. for the defendant/ancillary claimant.

April 19, 2007 & July 13, 2007

McDONALD-BISHOP, J. (Ag.)

1. This action primarily concerns a question of law as to the construction of **section 18 (1)** of the **Motor Vehicles Insurance (Third Party Risks) Act** as it stood prior to its amendment by the **Motor Vehicles Insurance (Third Party Risks) (Amendment) Act, 2005.** The action had commenced before the amendment

came into effect and so the section in its original terms will have to be applied. The portion of the section under review in these proceedings, however, has not been affected by the amendment and so the resolution of the issue in this case will be as relevant now as it would have been prior to the amendment coming into effect. The resolution of the ancillary claim hinges on the determination of the dispute between the claimant and the defendant and so the hearing of the claim on a preliminary issue has proceeded first. Given the nature of the question in dispute, it was decided that the parties should make submissions on the construction of section 18 (1) for the court's ruling on a point of law.

FACTS

2. The facts in this case are not in dispute. The claimant is a minor and has sued by his father and next friend, Conrad McKnight. In February 2002, he sustained injuries in a motor vehicle accident while he was a passenger in a motor car that collided with a public passenger vehicle owned by Mr. Webster Buchanan, the ancillary defendant, and driven by one Mr. Milton Ellis. On May 20, 2005, the claimant obtained judgment in this Court against Mr. Webster Buchanan in the sum $850,000.00 with interest thereon at 6% per annum from December 9, 2002 to May 26, 2005. The judgment debt remains unsatisfied.

3. At the material time, the defendant was the insurer in respect of the motor vehicle owned by Mr. Webster Buchanan by virtue of a policy of insurance numbered 01PPV11 60868 issued on March 22, 2001to be in force until March 21, 2002. On the basis of this insurance contract between the defendant and the ancillary defendant (the insured), the claimant has brought this claim against the defendant to satisfy the judgment debt. The claimant in his Fixed Date Claim Form with accompanying Particulars of Claim contends that by reason of the provisions of section 18(1) of **the Motor Vehicles Insurance(Third Party Risks) Act**, (the Act)the defendant is liable to satisfy the judgment debt with concomitant costs and interest.

4. The defendant contends, however, that it is not liable to the claimant in respect of the judgment debt on the basis that the insured has breached the terms of the policy of insurance. It is the defendant's contention that the policy of insurance was a 'named driver policy' but at the time of the accident the vehicle was not being driven by the authorized driver named in the policy. Mr. Fred Wilson was the only authorized driver but at the material time, the motor vehicle was being driven by Mr. Milton Ellis. The gravamen of the defence is that the liability incurred is not a liability covered by the terms of the policy so as to render it liable to satisfy the judgment. The defendant, therefore, denies that it falls within the provisions of section 18(1) of the Act so as to render it liable to the claimant.

5. The defendant, in turn, has brought the ancillary claim against the insured to indemnify it in the event the court was to find that it is liable to the claimant to satisfy the judgment debt.

6. The question for my deliberation is purely one of law and it depends largely on the construction of some relevant provisions of the Act, namely, sections 5, 8 and, particularly, section 18(1) and, of course, on the interpretation of the relevant terms of the policy of insurance in question.

THE ISSUE

7. The central issue for determination may, conveniently, be summarized thus:

(i) Whether the defendant, as insurer, is liable to the claimant, as a third party, for damages caused while the insured motor vehicle was being driven at the material time by a person other than the driver authorized by the terms and conditions of the policy of insurance; or, to put it simpler;

(ii) Whether the liability incurred by the insured is a liability covered by the terms of the policy so as to render the defendant liable to the third party claimant under section 18(1) of the Act.

THE RELEVANT LAW

8. The right of the claimant to approach this court for redress against the defendant, who itself is not a tortfeasor and with whom the claimant has no contractual relationship, arises from statutory empowerment under the **Motor Vehicles Insurance (Third Party Risks) Act** (the Act). It begins with the mandatory provisions of section 4 of the Act, which provides:

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

9. It is clear from that provision that insurance against third party risks is mandatory before a motor vehicle may be lawfully used on a road. Third parties are, therefore, clothed with some measure of statutory protection in respect of the use of motor vehicles on our roads.

10. Section 5 of the Act then sets down the requirements to be fulfilled in respect of a policy of insurance to be issued for the operation of a motor vehicle on the road. In so far as provision for bodily injury is concerned, this section provides that such policy must be issued by a person who is an insurer. Also, the policy should be one that insures the person or class of persons specified in the policy against any liability incurred by them in respect of the bodily injury to any person caused by or arising out of the use of the motor vehicle on the road to the extent of not less than one million dollars ($1,000,000.00). There is no dispute that the provisions of the Act in relation to these matters have been complied with in the policy of insurance issued in this case.

11. 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. There is thus no issue that the defendant, as insurer, is duty bound to indemnify the insured against any liability incurred by him which the policy purports to cover.

12. Section 5(9) makes it clear that a policy is of no effect for the purposes of the Act unless and until the insurer has issued a certificate of insurance in favour of the person by whom the policy is effected. The certificate should contain the particulars of any condition to which the policy is issued and of any other matters as may be prescribed. The section provides that different forms and different particulars may be prescribed in relation to different cases or circumstances.

13. Again, there is no dispute that a certificate of insurance, setting out the terms and conditions of the policy, was issued in favour of the insured. There was thus, at the material time, a policy of insurance in favour of the insured in compliance with the law.

14. It is clear that it is open to the parties to set the terms and conditions of the policy and to agree the cover to be afforded by the policy. Like in any form of contract, the parties are free to negotiate the terms of their dealings subject of course to the requirements of the law and public policy. It is also patently clear that the extent of the indemnity is to the extent of the cover offered by the policy. So, before the claimant can recover on the indemnity, the liability must be one that the policy purports to cover. It is thus imperative that in any question concerning the insurer's liability within the ambit of the Act, the terms of the policy must be examined for the nature and extent of the indemnity to be determined.

15. It must be emphasized that while the parties are free to agree the terms and conditions of the policy of insurance, certain statutory restrictions exist to curtail such freedom. The Act provides that certain conditions or restrictions included by an insurer in a policy of insurance to limit the insurer's liability will be of no effect and therefore null and void against third party claims. In this regard, section 8(1) states, in part:

> "Any condition in a policy or security issued or given for the purposes of this Act, providing that no liability shall arise under the policy or security, or that any liability so arising shall cease, in the event of some specified thing being done or omitted to be done after the happening of the event giving rise to a claim under the policy or security, shall be of no effect in connection with such claims as are mentioned in subsections (1) (2) and (3) of section 5..."

Section 8(2) provides:

> "Where 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, so much of a policy as purports to restrict the insurance of the persons insured thereby by reference to any of the following matters-
>
> (a) the age or physical or mental condition of persons driving the vehicle; or
> (b) the condition of the vehicle; or
> (c) the number of persons that the vehicle carries; or
> (d) the weight or physical characteristics of the goods that the vehicle carries; or
> (e) the times at which or the areas within which the vehicle is used; or
> (f) the horse power or value of the vehicle; or
> (g) the carrying on the vehicle of any particular apparatus; or
> (h) the carrying on the vehicle of any particular means of identification other than any means of identification other than any means of identification other than any means of identification required to be carried by or under the law for the time being in force relating to motor vehicles,
>
> shall as respects such liabilities as are required to be covered by a policy under subsections (1) (2) and (3) of section 5, be of no effect..."

ANALYSIS AND FINDINGS

16. The defendant has refused to indemnify the claimant on the ground that the insured had breached the policy of insurance by permitting an unauthorized driver to operate the vehicle at the material time. It has been argued on behalf of the claimant, that notwithstanding this breach, the defendant is, nevertheless, liable by virtue of section 18(1) of the Act. The contention of the claimant is that although the defendant had sought to place a restriction on the driver of the motor vehicle, that is of no effect by virtue of section 8 of the Act and so it is a liability that is covered and for which the defendant is liable under section 18(1).

17. I find it difficult to agree with counsel for the claimant in this regard. None of the matters specified in section 8 arises in the circumstances of this case. It cannot be said, with all fairness, that the Act restricts the right of the defendant to make provisions in relation to an authorized driver. I accept Miss Wignall's submission that the prohibitions contained in sections 8(1) and 8(2) do not extend to the limitation imposed by the policy in this case. The parties were, therefore, free, in the ordinary course of contract, to make specific provisions for an authorized driver. Section 8 cannot avail the claimant.

18. However, the fact that section 8 does not avail the claimant in his claim does not mean that he might not be able to recover his damages by virtue of section 18(1). This section, prior to the 2005 amendment, read:

> "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 *any sum payable thereunder in respect of the liability* including 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."

19. As can be seen, with the 2005 amendment, the provision remains substantially the same except for the provision relating to the amount to be paid by the insurer on the judgment (portion indicated by asterisks). Now, with the amendment, it is made clear that the third party is entitled to recover from the insurer as the judgment sum, the policy limit or the judgment, whichever is lower. The question of the quantum to be paid is not an issue in this case and so the amendment really does not relate to or affect the question to be determined.

20. The basic question that remains for deliberation is whether the liability for which judgment has been obtained is covered by the terms of the policy. Counsel for the claimant, in relying on section 18(1), submitted that notwithstanding that the defence is relying on a breach of the policy to avoid liability, the defendant is still liable because the section provides that notwithstanding that the insurer may be entitled to avoid or cancel, or might have avoided or cancelled the policy, it shall, nevertheless, be liable.

21. In support of his contention, Mr. Forsythe relied on three cases with the first being, **Bryce v Caribbean Insurance Company Limited** (1992) 51 WIR, 20 (Barbados). In that case, like in the case at bar, the motor vehicle in question was at the material time being driven by someone other than the named driver under the policy. The insurer, like the defendant in this case, sought to rely on the restriction in the 'named driver policy' to defeat the third party's claim. The insurer was not permitted to rely on the restriction and was held liable to the third party.

22. Miss Wignall has, however, quite rightly, distinguished the circumstances prevailing in **Bryce v Caribbean Insurance** (supra) from those in the instant case. In that case, the provisions of the Barbadian statute, section 48(1)(f) of the **Road Traffic Act,** which is similar but not identical to our section 8(2), expressly stated that, " *so much of a policy as purports to restrict the insurance of the persons insured thereby by reference to... persons named in the policy who may or may*

not drive a vehicle is void as respects the liabilities required to be covered by a policy under section 38 (1)." In light of that provision, it was held that the restriction in the policy was void against the third party and the insurer was liable to satisfy the judgment.

23. Mr. Forsythe also prayed in aid **PUK W.G. Suttle v Eleanor Joyce Simmons,** (1989) 2 Lloyd's Rep. 227, a case on appeal from the Court of Appeal of Bermuda to the Judicial Committee of the Privy Council. Again, in that case the policy provided that the insurers were not to be liable in respect of any accident or liability that might have arisen when the motor vehicle was being driven other than by an authorized driver. At the time of the accident, the car was not being driven by an authorized driver. On this question as to whether it was a liability covered by the policy, it was held that the policy did cover the driving of the car by the unauthorized driver because the exclusion of liability in relation to non-authorized drivers was rendered ineffective by section 8 of the 1943 Act.

24. Miss Wignall has also correctly pointed out the distinction between that case and the instant case that makes it of no help to the claimant. I have duly noted, upon a perusal of the Bermudian statute, **The Motor Car Insurance (Third-Party Risks) Act, 1943,** that the position in Bermuda at the time of the decision differs from what obtains in this jurisdiction. Like in Barbados, Bermuda had rendered as ineffective "any condition in a policy of insurance *as purports to restrict the driving of the motor vehicle by the insured, or by another person with the knowledge and consent of the insured": s*ection 8(j).

25. Jamaica has not yet reached that position. There is no overall restriction on insurers in our jurisdiction to make stipulations as to the persons who may or may not drive an insured motor vehicle. The only restriction on insurers in this regard is as to the age, physical or mental condition of persons driving the vehicle. Given the dissimilarities between the Barbadian and Bermudian statutory provisions on the one hand, and ours on the other, the cases cited by

counsel for the claimant are not 'on all fours' with the case at bar and are of no assistance to the claimant as the restriction in this insurance policy under review is not rendered void by section 8.

26. Mr. Forsythe also sought refuge in the decision of the Judicial Committee of the Privy Council in **Motor & General Insurance Company Limited v Pavy** (1993) 43 WIR, 430, an appeal from the decision of the Court of Appeal of Trinidad and Tobago. In that case, the third party's vehicle was damaged in a collision involving the insured. The insured had failed to report the accident to the insurers and to serve on them documents served on him relative to court proceedings as required by the policy. The third party obtained judgment against the insured that was unsatisfied. An action was then brought against the insurers to recover the damages awarded on the judgment on the basis of section 10(1) of the statute which is on the same terms as section 18 (1) of our Act.

27. The insurers sought to avoid liability on the ground that the insured had breached a condition of the policy. The Board was not in agreement that the insurers were not liable because it found that the condition that was breached was after the event that had given rise to the claim and so would entitle the insurers, not to avoid or cancel the policy, but merely to repudiate liability in respect to that particular event. Their Lordships, therefore, concluded that the policy had provided for the cover to cease only after the event giving rise to the claim had already occurred and so at the time of the accident, the liability was covered by the policy.

28. Their Lordships also noted that section 10 of the Trinidad and Tobago statute (our section 18(1)) gave third parties a direct remedy against insurers, while section 12 (our section 8) nullified, for their benefit, the effect of some (although not of all) restrictions on the use of the vehicle which might have been in the policy and would otherwise have defeated the claim. As already been

noted, the stipulated restriction in this case is one that is not nullified by section 8. The Privy Council, itself, has noted that there are some restrictions placed on the use of the motor vehicle that could well defeat a third party's claim because they fall outside the net of protection afforded to the third party by section 8. It is evident that the restriction imposed on the insured by the defendant in this case is one that falls outside the net of protection afforded to the claimant.

29. The defence advanced in this case is that the liability which has given rise to the claim is not a liability covered by the terms of the policy. The claimant, however, in seeking to overcome such a defence is without the assistance of section 8. As such, he can only overcome this defence if it is ultimately found that the liability is one covered by the terms of the policy. The defendant bears the onus of proof that the liability was not covered. For the defendant to succeed, it must prove that it was not on risk when the vehicle was being driven by a person other than Fred Wilson.

What is a 'liability covered by the terms of the policy'?

30. Before proceeding to consider whether the defendant has discharged the burden placed on it, I consider it only appropriate to seek to promote a clearer understanding of the term *"liability covered by the terms of the policy"*. The Act in section 18(5) defines the term in this way:

> "The expression "liability covered by the terms of the policy" means 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."

31. C.N. Shawcross in **The Law of Motor Insurance,** page 304, suggested what he considered to be the better interpretation of the phrase. According to him:

> "Liability covered by the policy means a liability which comes within (or arises out of) a risk apparently insured by the express terms of the policy, whether or not it is a liability in respect of which the insurers are entitled to refuse an indemnity on the ground that the assured has committed some breach of the terms of the policy."

The Judicial Committee of the Privy Council in **Motor and General Insurance v Pavy** (supra) approved this definition as *'one which produces the same result as that which is yielded by their lordship's reasoning.'* I will, therefore, adopt this definition as an acceptable working definition of the term.

32. Gordon J.A (Ag.)(as he then was) in **The Administrator General (Administrator Estate Hopeton Samuel Mahoney deceased) v National Employers Mutual Association Limited** (hereinafter **Administrator General v N.E.M**) (1988) 25 JLR, 459 at 477, in speaking of the inclusion of the phrase in the Act, observed:

> "The frequent use of the words *"liability covered by the terms of the policy"* recognizes that the policy of insurance embodies a contract between the insured and the insurers and this policy can contain terms limiting the user of the vehicle and providing for avoidance of liability if the user does not conform to the terms stipulated in the contract."

It is recognized, therefore, that a policy of insurance may contain terms limiting the user of the vehicle and making provisions for the insurer to avoid liability if the user is not in conformity with the terms expressly set out in the contract. With this in mind, I will now turn to an examination of the policy to see whether the liability in question is covered by the terms of the policy as defined.

The terms of the policy

33. The relationship between the insured and the defendant commenced with a form headed "**Proposal for Motor (Commercial Vehicles) Insurance**" completed by the insured. In this proposal, the insured specifically indicated that he would not be driving the vehicle. In a form headed "**Other Driver's Declaration**" attached to the said proposal, Webster Buchanan was named as 'the insured' and Fred Wilson named as the 'driver.' Fred Wilson also signed this form.

34. Mr. Joseph Murray, Claims Consultant employed to the defendant, in his affidavit sworn to in these proceedings, deposed that it was on the request and instructions of the insured that a policy called 'a named driver policy' was issued in respect of the motor vehicle. His evidence is that this type of policy attracted a lower premium than that charged on an 'open driver policy'. The relevant provision of the policy that was issued consequent on the proposal reads:

> "It is agreed that notwithstanding anything contained herein to the contrary, this Policy shall be inoperative whilst the Motor Vehicle described in the schedule is being driven by or is for the purpose of being driven by him in the charge of any person other than Fred Wilson."

35. In the schedule to the said policy under the heading '***Limits of Liability'***, there appears the following:

> "Authorized Driver: Any of the following
>
> (a) Fred Wilson
>
> Provided that the person driving holds a driving licence to drive the Motor vehicle or has held and is not disqualified by order of a Court of Law or by reason of any enactment or regulation in that behalf for holding or obtaining such a licence..."

It then goes on to provide for other limitations as to use imposed by the defendant as to its liability.

36. The certificate of insurance subsequently issued expressly provided that the insured was excluded from driving. The person entitled to drive was expressly stated to be Fred Wilson only. The policy was closed to the driving of the vehicle by any other driver.

37. An examination of the terms of the policy clearly shows that the policy made express provisions as to the limits of liability by expressly stating that its cover extends when the vehicle is being driven by Fred Wilson only and so would be inoperative if driven by any one else. This was clear and unequivocal. The defendant had placed a restriction on the person who should drive which

was something in its power to do given that such a restriction was not prohibited by the legislation. It went further and spelt out expressly the effect on the policy if a person other than Fred Wilson was to drive the vehicle.

38. The liability giving rise to this claim was incurred when the car was being driven by someone other than Fred Wilson, the named driver in the policy. A similar situation occurred in **Herbert v Railway Passengers Assurance Co.** (1938) KBD, 650, a case cited in **Administrator-General v N.E.M.** (supra). In that case, the defendants were insurers in respect of a side car that collided with a lorry in which the plaintiff was travelling. The insured while driving with a friend fell ill and allowed the friend to drive. While the friend was driving the vehicle, a collision occurred that caused injuries to the plaintiff. The policy in that case provided that the defendant company should not be liable in respect of any accident incurred while the motor vehicle was being driven by anyone other than the insured. The plaintiff, in an action against the insured, obtained judgment against the insured but the judgment was not satisfied. The plaintiff then sought to recover the judgment debt from the defendant.

39. It was held that upon a construction of the policy, the exception applied and the insured would not have been able to recover under it, and, therefore, the plaintiff could not recover under section 10 (1) **of the Road Traffic Act**, identical provisions to our section 18(1). Porter, J. said at page 653:

> "But section 10 does not, I think, impose any such liability in a case where the insurers have limited their liability by the wording of the policy, but only in a case where there is an apparently valid policy covering the liability, which yet they could have avoided or cancelled because of some misrepresentation or concealment on the part of the assured."

40. Forte, J.A. (as he then was) in **Administrator- General v N.E.M.** agreed with the views expressed by Porter, J in **Herbert v Railway Passengers.** In **Administrator General v N.E.M.,** the respondents were the insurers of a truck owned by one Mr. Daley that collided with another motor vehicle causing the death of Mr. Hopeton Mahoney. The policy of insurance issued by the respondent contained

a clause which limited liability of the respondent to indemnify Mr. Daley only where the vehicle was being used for specified purposes. It expressly excluded liability if the vehicle was being used for hire or reward. The administrator of the estate recovered damages in an action brought against Mr. Daley but Mr. Daley was unable to satisfy the judgment. The appellants brought an action against the respondent for satisfaction of the judgment debt pursuant to section 18(1) of the Act.

41. At first instance, the court gave judgment to the respondents on the basis that the vehicle was being used for hire or reward. The appellants appealed. On appeal, the appellants succeeded on the ground that in the face of the inconsistencies in the evidence, it was unreasonable for the trial judge to have concluded that the insured had used the vehicle for transporting goods for reward on occasions prior to the accident. It was, however, established, as a matter of general principle, that a third party in an action brought under section 18 (1) of the Act cannot recover the sums payable by virtue of the judgment obtained against an insured unless the insurer's liability is covered by a policy of insurance. Therefore, if it can be established that the vehicle was being used for a purpose outside of the scope of the existing policy of insurance, then no liability would exist under that policy and the third party cannot recover.

42. Forte, J.A. stated at page 463:

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

He then continued:

> "With this dicta of Porter, J., I agree. If the use to which the vehicle is put is contrary to the contract of insurance between the insured and insurer, then it is my view that its user is outside the scope of the policy, and the vehicle is therefore not insured for that particular user. Any liability arising out of such user would therefore not be covered by the terms of the policy. Indeed, any such user would be subject to criminal prosecution by

> virtue of section 4 of the Act - in that it is an offense to use or permit to be used a motor vehicle on the roads "unless there is in force in relation to the USER of the vehicle... such a policy of insurance."

I endorse this view as one that has withstood the test of time and as one constituting a sound application of the law that I have used to guide my deliberations in these proceedings.

43. In **Administrator General v N.E.M.**, the same argument like that of Mr. Forsythe was advanced by counsel for the appellant that the type of breach was such as would entitle the insurer to avoid or cancel the policy or for which they might have already avoided or cancelled but that the third party would still be protected under section 18(1). Forte J.A., from whom I am inclined to take guidance, responded thus:

> "In my view this argument is untenable. If the vehicle was being used for a purpose not permitted by the policy of insurance then it was not insured, and consequently there would be no valid policy of insurance. To my mind, instances to which the reference of avoidance and cancellation may be found are:
>
> (i) In the provisions of section 18(3) where an insurer may seek a declaration that he is entitled to avoid the policy for misrepresentation or non-disclosure; and
>
> (ii) For breaches of conditions stated in the policy, as opposed to limitation of user placed on the vehicle in respect of liability.
>
> It is to circumstances such as these that section 18 refers."

44. Following on the guidance of Forte, J.A., I would hold that the situation in this case does not arise from a mere misrepresentation or non-disclosure and so any question of avoiding the policy on that ground would not arise to fit the case within section 18(1). Further, based on the terms of the policy, the act giving rise to the liability does not constitute a breach of condition so as to give rise to the entitlement of the defendant to cancel. Had it been so, this would have allowed the claimant the benefit of section 18(1) because, according to Forte, J.A., these are the situations to which the section applies.

45. The policy expressly states, in clear and unambiguous terms, that the policy is inoperative when the vehicle is being driven otherwise than by the named driver (for emphasis). This does not constitute a mere condition of the policy, without more, which would entitle the defendant to cancel or otherwise evade liability for its breach. The restriction in question was woven into the policy as part of the insurer's express limitation of its liability as to the user of the vehicle on the road, as opposed to it being just a mere condition. In light of the wording of the policy, Mr. Forsythe's argument, that section 18 (1) would still apply despite the breach, is untenable.

46. In determining the question as whether a liability is covered or not for the purposes of section 18 (1), the primary consideration must be whether, on a proper construction of the terms of the policy, the liability in question can be said to have arisen from a risk that was apparently covered by the express terms of the policy at the time of the incident giving rise to the claim or whether the liability emanated from a risk that falls outside the cover afforded by the express terms of the policy at the material time.

47. In this case, an examination of the terms of the policy shows that prior to the accident giving rise to the claim, the defendant had done enough to expressly indicate that its liability was extended only to the operation of the vehicle by the authorized driver named in the policy. It expressly stated, in clear and no uncertain terms, that the policy was inoperative when the vehicle was being driven by someone other than that particular driver. This is the same as saying that the defendant was not liable for any liability that might have arisen when the car was not being driven by Mr. Fred Wilson. The driving of the car by Mr. Milton Ellis rendered the policy inoperative at the material time. The liability would, therefore, fall outside the terms of the policy contracted for and in force at the material time. In adopting the conclusion of Forte, J. A. in **Administrator-General v N.E.M.**, I would hold that there would have been no valid policy of

insurance in place at the time the accident occurred giving rise to the liability of the insured.

48. In **Jones v Welsh Insurance Co. Ltd.** (1937) 4 All E.R. 149, a case cited by our Court of Appeal in **Administrator- General v N.E.M.** and relied on by the defendant in this case, the plaintiff sought to recover an unsatisfied judgment debt from the defendants under section 10 (1) of the 1934 Act (identical to our section 18(1)). The defendants had insured a motor vehicle that was involved in an accident in which the plaintiff sustained injuries. The insurance policy covered the use of the car *'for social domestic and pleasure purposes, and for and in connection with his business or profession'*. At the time of the accident that caused the injuries, the car was being driven to convey sheep.

49. It was held that at the time of the accident, the insured must be regarded as carrying on business of sheep farming as a side line. Accordingly, at the time of the accident, the car was not being used by the insured in connection with his business of a motor engineer which he had declared to be his business for the purposes of the policy but for the carriage of goods in connection with the business of sheep farming. The defendants were not liable under section 10(1). Goddard, J. noted:

> "The result is that the action falls and must be dismissed, though I come to the conclusion with much regret as a judge may properly feel when he gives effect to what he decides are the legal rights of the parties. For this adds another to the growing lists of cases which show that in spite of the statutory provisions for compulsory insurance, persons injured by motor cars through no fault of their own may be left with no prospect of obtaining compensation... No one can fairly expect insurers to pay on a risk additional to that for which they have received a premium... No legislation can guard against the criminal who willfully drives an uninsured car, but it is just as well that it should be realized that, although there may be a policy in force, and an authorize person is driving the car which causes injury, there is no certainty that a liability will attach to the insurers."

50. Forte, J.A. declared in **Administrator-General v N.E.M.** that the observations of Goddard, J. (in 1937) were applicable to the state of the law in

Jamaica then (1988). I would extend this and say that today, being almost two decades since the pronouncement of Forte, J.A., the state of the law in Jamaica, in this regard, remains the same. Therefore, section 18(1) might not avail a third party in all cases where the judgment against an insured person remains unsatisfied. As such, there is no certainty that liability will always attach to an insurer. It is clear on a proper construction of the law that one of the critical conditions that must be satisfied for the statutory protection to be successfully invoked is that the liability must be a liability covered by the policy.

51. I am fortified in this view by the decision of the Privy Council in the case relied on by the defence, **Bankers & Traders Insurance Co. Ltd v National Insurance Co. Ltd.**, an appeal from the Federal Court of Malaysia. The Malaysian statutory provision, s. 80(1) of the **Road Traffic Ordinance** (same as our section 18(1)), was in issue. In that case, third parties were involved in an accident involving a car insured by the appellants. At the time of the accident, the car was being driven with the owner's authority. The driver of that car had a policy of his own with the respondents which covered him *"whilst personally driving a private motor car not belonging to him and not hired to him under a hire purchase agreement."* The owner's insurance, issued by the appellants, provided that the indemnity would be granted to any authorized driver provided that such authorized driver was not entitled to an indemnity under any other policy. The authorized driver was actually driving the car when the accident occurred but he had his own indemnity under his policy. The third parties obtained judgment against the driver which was unsatisfied and so they brought an action against the two insurers, the owner's and the driver's. The ultimate question before their Lordships was whether the owner's insurers should be held liable to the third parties.

52. Their Lordships held that the driver's insurers were on risk at the time of the accident, and not the owner's insurers, and so were the ones liable to the third parties. Lord Scarman stated at page 296:

> "It is plain from the terms of the owner's policy that the owner's insurers were not on risk when the car was being driven by another who had a policy of his own which covered him. Once it is recognised that only one of the two policies, namely, the driver's policy, was on risk when Ko was driving it becomes plain upon the wording of section 80(1) of the Ordinance that the driver's insurers must satisfy the third parties' judgment."

53. Applying the principles in **Bankers v Traders** to the facts before me, I consider it safe to conclude, given the terms of the policy of insurance, that at the time of the accident when the car was being driven by a person other than Fred Wilson, the defendant was not on risk. The policy was rendered inoperative by its unequivocal words of limitation of liability concerning an unauthorized driver. The defendant had clearly not assumed the risk of an unauthorized driver operating the vehicle on the road at any time. The defendant was, therefore, not on risk when the accident occurred.

54. The liability that has arisen in this case does not come within or arises out of a risk insured by the express terms of the policy. The policy did not extend to provide coverage when the vehicle was being used on the road under the control and at the hands of anyone other than Fred Wilson. This was expressly stated as limitation on liability. The premiums were paid on the basis of such limitation. To borrow the words of Goddard, J. in **Jones v Welsh** and apply them to this case, I would say that no one can fairly expect the defendant, as insurer, to pay on a risk additional to what it has received as premium from the insured. It is my view that to ask the defendant to satisfy the judgment would be asking it to compensate the insured on a policy that was not contracted by them and which, in fact, does not exist between them.

55. For this reason, I find it useful to repeat the sentiments expressed by Branson, J. in **Gray v Blackmore** (1933) 1 K.B. 95 (which has been preserved in the dicta of Forte, J.A. in **Administrator -General v N.E.M.)** when he stated:

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

CONCLUSION

56. I would conclude by saying that the result of the insured's action in allowing a driver other than Mr. Fred Wilson to operate the motor vehicle on the road was to render the policy inoperative. I would adopt the views expressed by Branson, J. in **Gray v Blackmore** (supra) and say that, in effect, the insured was permitting a car to be used on the road without a policy that insured him. That is the effect of his action and so an extra burden cannot be placed on the defendant to pay for what they did not agree to undertake and for what they were not paid a premium to undertake. The liability was not a liability covered by the expressed terms of the policy.

57. As sad as it may seem for the claimant, and I do empathize with his position as an innocent third party, the weight of the law, as gleaned from the authorities illustrating its application, has managed to tilt the scale of justice in favour of the conclusion that the defendant cannot be held liable to compensate the claimant for the damages left unsatisfied by the insured.

ORDER

58. The claimant cannot succeed on the Fixed Date Claim Form. Accordingly judgment is hereby entered on the claim for the defendant with costs to be agreed or taxed.