



*General Damages in the sum of \$1,500,000.00 with interest at 3% per annum from 13<sup>th</sup> of November 2012 to 12<sup>th</sup> of June 2014;*

*Special Damages in the sum of \$16,500.00 with interest at 3% per annum from 26<sup>th</sup> February 2009 to 12<sup>th</sup> of June 2014;*

*Cost summarily assessed at \$80,000.00.*

To date the judgment debt has remained unsatisfied. As such, Mr. Burford now seeks to be compensated by Advantage General Insurance Company pursuant to the Motor Vehicles Insurance (Third-Party Risks) Act.

- [2] On the 22<sup>nd</sup> February, 2017 when the matter came up for hearing, the parties agreed to proceed via submissions. As such, the court ordered that:

*Claimant's Attorney at Law to file and serve written submissions on or before the 24<sup>th</sup> March, 2017;*

*Defendant is permitted to file its submission in response on or before the 19<sup>th</sup> April, 2017;*

*Judgment to be delivered on the 1<sup>st</sup> June 2017;*

*Parties agree to proceed based on written submissions.*

- [3] A search of the registry revealed that no submissions were filed by either party on the dates stipulated by the Court's order. To date, submissions have been outstanding and contact with the parties have proved futile. As such, the court has endeavoured to fulfil its promise through reliance on affidavit evidence which was filed from the inception of the matter.

## **THE CLAIM**

- [4] By way of Fixed Date Claim Form, the claimant has asked the court for a declaration that the defendant is obligated to pay the judgment debt as above mentioned by virtue of the Motor Vehicles Insurance (Third-Party Risks) Act as well; that an order that the defendant pays the said amount within seven days of the date of the declaration be granted.

[5] The Claimant's contention is that he has a right to be compensated based on the fact that the motor vehicle owned and operated by Tina and Derval McKain at the time of the accident was insured by Advantage General. As such, the judgment order handed down by the court in the action Claim No 2012 HCV 05250 has been served on them.

[6] However, to date, the defendant has neither sought to be excluded from liability nor has the debt been satisfied.

### **THE RESPONSE**

[7] By way of an affidavit in response, the defendant has indicated the following for the court's consideration:

(a) The vehicle in question was in fact insured by the them;

(b) No report was made to them until *"2 years after the accident and after a Claim had been filed in the Supreme Court."*

(c) They were not able to verify the circumstances surrounding the accident and in particular express a difficulty because:

i. They were not able to inspect the vehicle to confirm the damages done to it and cross reference these with the injuries the claimant claims to have suffered;

ii. The accident is said to have taken place on Cavalier's Main Road however checks made revealed that no report was made to the Above Rocks Police Station, Stony Hill Police Station or Constant Spring Police Station;

iii. The Police report relied on in the previous matter sites the accident in Spanish Town, Saint Catherine; and

- iv. Checks made with the Andrews Memorial Hospital reveal that there is no record of the Claimant's treatment. Furthermore, the defendant has not been able to peruse the medical report relied on by the Claimant.

**[8]** It is upon this basis that the Defendant has asked the court to allow them to defend their claim for a declaration as the Claimant is not entitled to any compensation.

## **THE ISSUE**

**[9]** The issues for consideration are:

- (a) In what circumstances can an insurance company refuse to pay the judgment debt of a third party who has been injured by the motor vehicle of their insured; and
- (b) Whether the defendant will be exempted from paying the judgment sum based on the difficulties they have highlighted in Claim No. 2012 HCV 05250; or simply put, whether the defendant can be exempted from liability given that:
  - i. The accident was not reported to them until 2 years after the incident occurred;
  - ii. They were unable to conduct proper investigation;
  - iii. They had no opportunity to inspect the car in question; and
  - iv. There are discrepancies with the traffic report and medical information as presented on the previous claim.

## **LAW AND ANALYSIS**

A. *CONFINES OF THE MOTOR VEHICLES INSURANCE (THIRD-PARTY RISKS) ACT*

- [10] The outcome of this case turns on whether policy issues arising between the insured and the insurance company can invalidate a third party's claim and what if anything can be done in relation to the previous action between the claimant and the McKain's.
- [11] Generally, a contract is only enforceable as against persons who are party to it. A contract of insurance is no different. However, the Motor Vehicles Insurance (Third-Party Risks) Act provides for a third party to claim against an insurance company for damage or loss suffered in an accident which involves a motor vehicle insured by that particular company irrespective of the fact that the third party would not be privy to the contract of insurance.
- [12] In particular section 18 (1) of the Motor Vehicles Insurance (Third-Party Risks) Act provides that:

*"18.-(1) 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 the 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."*

It is to be noted that this section clearly provides that the liability must be one covered by the terms of the insurance policy. The issue which now arises is whether the circumstances which brought about the judgment debt is one which is covered under the insurance policy between the judgment debtors and the defendant.

- [13] In the case of **Conrad McKnight v NEM Insurance Co Ja Ltd etal Claim No 2005 HCV 03040** delivered July 13, 2007 McDonald-Bishop J (as she then was) said 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....”*

Based on McDonald-Bishop’s J analysis, though the act provides specifically that a third party is entitled to be compensated notwithstanding the insurance company’s ability to avoid the policy, this safety net is only afforded to those circumstances which are covered under the policy. Thus, in **McKnight**, the insurance company was not liable to compensate the third party because at the time of the accident, the motor vehicle was being driven by an unauthorised driver. As such, much consideration must be given to the meaning of the phrase *“a liability covered by the terms of the policy.”* Needless to say, I agree with McDonald-Bishop J that this *‘net of protection’* does not provided absolute protection to a third party in claims of this nature. Much will turn on the core liability covered by the policy of insurance.

**[14]** It is to be noted that section 8 (1) of the Motor Vehicles Insurance (Third-Party Risks) Act provides that:

*8. (1) 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:*

*Provided that nothing in this subsection shall be taken to render void any provision in a policy or security requiring the person insured or secured to repay to the insurer any sums which the latter may have become liable to pay under the policy or security and which have been applied to the satisfaction of the claims of third-parties.*

Therefore, the fact of a specified event occurring or not occurring after the accident has no bearing on the third party’s claim.

**[15]** In the case of **Motor & General Insurance Company Limited v Pavy** (1993) 43 WIR 430, the insurance sought to avoid liability of a third party because the matter was not reported to the company by the insured. The Privy Council considered the ramifications of sections 10(1) and 8 of the Trinidadian Motor Vehicles Insurance

(Third-Party Risks) Act; the equivalent of sections 18(1) and 8 in our act. In approving the Trinidadian Court of Appeal's decision, particular note was made of McMillan JA decision where he said:

*"I am unable to accept that submission since: (a) the liability was covered by the policy; (b) the breach did not entitle the insurer to avoid or cancel the policy but only to evade liability, thereunder; (c) in the High Court action which gave rise to this appeal the third party claim was founded on section 10(1) of the Act and the third party's rights in that action were not subrogated to those of the insured as they would have been if the action was brought in pursuance of section 17;(d) even if it can be said that the breach of the condition entitled the insurers to avoid as distinct from evade, the policy, there has been no misrepresentation or non disclosure of a material fact such as would have entitled the insurers to [a] declaration in an action brought under section 10(3); (e) in any event no such declaration has ever been sought; (f) the insurers have suffered no prejudice since they have had due notice of the issue of the writ as required..."*

**[16]** Based on an analysis of the above information from the act and the authorities, it is trite that:

- (a) An insurance company can seek to avoid third party liability where at the time of entering the insurance contract there was material non-disclosure of relevant information or misrepresentation by the insured which would have caused an inability to properly assess their risk: see section 18(3) of Motor Vehicles Insurance (Third-Party Risks) Act;
- (b) An insurance company can also avoid liability where after an accident it can be shown that the liability is not one covered under the policy of insurance notwithstanding section 18(1) of the act; and
- (c) An Insurance company may not avoid third party liability by relying on the fact that their insured breached a condition of the insurance policy after the accident e.g. failing to report the matter to them.

**[17]** In the case as bar, the defendant has not:

- (a) Sought a declaration to avoid the insurance policy. There is no evidence presented before this court of any material non-disclosure or misrepresentation made by their insured which would have affected the

insurance contract. Based on the act, evidence of this nature would entitle to court to at least consider whether the contract of insurance is void notwithstanding the fact that the time limit of three months would have expired; nor

- (b) Presented evidence to even suggest that the liability is one that is not covered under the policy. Unfortunately, the Court was not provided with a copy of the insurance documents and as such, it cannot make a finding as to whether Mr. Burford's liability is one that is covered or not. What can be said is that the defendant has acknowledged that at the time of the incident, the judgment debtor had a valid insurance policy with them. Particularly, it is said in the affidavit of Mrs. Odia Reid Clarke filed 9<sup>th</sup> December 2015 at paragraph 3 that:

*That from the records to which I have access, I am able to state that motor vehicle registered 3799 FF was owned by Derval Anthony McKain ("our insured") and was insured with AGIC during the month of February 2009.*

Instead, the defendant has said that the matter was not promptly reported to them. This condition cannot be relied upon to avoid liability and I so find. Further, the delay in reporting the matter has caused no prejudice to them since the claimant did serve notice of proceedings on the defendant when he instituted a claim against Tina and Derval McKain. As such, they would have had ample time to consult with their insured and make arrangements for all checks and investigations to be done.

- [18]** I therefore find that the issue of delay in reporting the accident is not a material issue which would remove the defendant's liability to compensate Mr. Burford.

**B. ADDRESSING THE EXPRESSED DIFFICULTIES**

- [19]** There is another matter which the court is constrained to comment on. The issues which the defendant has pointed to, as it relates to the discrepancies in the previous matter are such that their considerations are best suited to be heard on

an appeal. To consider those matters now would almost operate as a re trial of the Claim No. 2012 HCV 05250 and this cannot be done by this tribunal.

**[20]** The court has noted that at the time of Assessment of Damages in the previous action, Tina and Derval McKain were unrepresented and absent. The circumstances which would have led to that occurrence cannot be the subject of discussion in this case.

**[21]** Further, the discrepancies as it relates to the police report, the claimant's medical history and injuries as well as the damage to the car are all matters which would have been dealt with in the previous matter in which judgment was granted in the claimant's favour. It is not for this court to re-examine the evidence placed before the court in the previous matter and even so, there is not enough information presented for any tribunal of fact to find that these discrepancies are legitimate in nature and are material enough to ground a finding adverse to the law.

**[22]** The court's consideration is restricted to the interpretation of the Motor Vehicles Insurance (Third-Party Risk) Act and the authorities which prescribe the ways in which an insurance company can avoid liability to a third party. There is nothing on the defendant's case to suggest that liability can be avoided and I find that it must compensate Mr. Burford.

## **DISPOSITIONS**

**[23]** The Court hereby declares that the defendant is liable to pay to the claimant:

- I. The judgment debt as outlined in the formal order in Claim No 2012 HCV 05250.
- II. Interest on the judgment debt at a rate of 6% per annum from 12<sup>th</sup> June, 2014.

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**S. Bertram Linton**  
**Puisne Judge.**