



[2012] JMSC Civ. No. 68

JUDGMENT-DELIVERED AS ORAL JUDGMENT

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2011 HCV05538

BETWEEN MECHECK WILLIS CLAIMANT

AND GLOBE INSURANCE DEFENDANT
COMPANY LIMITED

Mrs. Marvalyn Taylor-Wright instructed by Taylor-Wright & Co. for the Claimant.

Mr. David Johnson instructed by Samuda & Johnson for the Defendant.

Heard: 22nd May and 8th June 2012.

Insurance Law

Mangatal J:

[1] This is a claim in which the Claimant “Mr. Willis” seeks answers to a number of questions and asks for declarations in respect of certain issues arising between himself and the Defendant “Globe Insurance”. The first and integral question is this:

Whether Globe Insurance is liable to Mr. Willis under the Motor Vehicle Insurance (Third Party Risks) Act in respect of a judgment of the Supreme Court

in Claim No. 2007 HCV 00460 against Globe Insurance's insured Yvonne Flynn and Patrick Flynn.

[2] I shall for the most part, from this point on, refer to the Motor Vehicle Insurance (Third Party Risks) Act as "the Act."

[3] Mr. Willis unfortunately received some very serious injuries in a motor vehicle accident on the 27th of January 2001. At paragraph 3 of his Affidavit in Support of Fixed Date Claim Form, filed 6th September 2011, Mr. Willis states that the motor vehicle accident was caused by the negligence of Devar McFarlane who was the driver and servant and/or agent of the owners of a motor vehicle registration number 8880BW, that is, Yvonne and Patrick Flynn, at the time of the accident. The accident occurred along the Phoenix Main Road, in the Parish of Saint Ann. According to paragraph 6 of Mr. Willis Affidavit of 6th September 2011, the judgment that was awarded in the 2007 Suit was awarded against Yvonne Flynn and Patrick Flynn for damages and interest and costs amounting to in excess of \$34 Million. Globe was at the material time the insurer of the motor vehicle belonging to Yvonne and Patrick Flynn.

[4] After being served with Notice of the Proceedings in the 2007 Claim, Globe's Attorneys-at-Law wrote to Mr. Willis' Attorneys-at-Law who had filed that Suit indicating that they were denying liability to indemnify Yvonne and Patrick Flynn. The reason stated was that it was because the vehicle in question was at the material time being operated in breach of the terms and conditions of the policy of insurance. In response to Mrs. Taylor-Wright's letter to Globe dated 20th July 2011 enclosing a copy of the Judgment obtained in the 2007 Suit, Globe, by letter dated 25th July 2011, responded saying that "at the time of the accident, the driver of the policyholders' vehicle did not have a driver's licence, and was not authorized/ permitted to drive the vehicle." They indicated that they had on that basis denied indemnity to the policyholders. I note that an application for declaratory orders was prior to the filing of this law suit, filed by Globe, in Claim

No. 2010 HCV 00942, **Globe Insurance Company of Jamaica Limited v. Yvonne and Patrick Flynn.** In that Suit Globe sought a declaration that it was not obliged to indemnify the Defendants under the policy against any claims arising out of the accident while the motor vehicle was being driven by Mr. McFarlane, (erroneously referred to as Denver and not Devar McFarlane).

[5] The defence to these proceedings is that the driver of the Flynn's motor vehicle, Devar McFarlane, who is deceased, was 16 years of age at the time of the accident, he was not the holder of a valid driver's licence and was therefore not permitted under the law to drive or operate the motor vehicle at the time. This denial of liability to settle the judgment, interest and costs awarded in the 2007 claim is what has led to the filing of the present claim.

[6] When this matter first came up for hearing on the 19th April 2012, I had not had the benefit of reading any written submissions or viewing any of the authorities that were being relied upon beforehand. As a result, I adjourned the matter to the 24th of April 2012 for 3 hours. I ordered the parties to file and serve written submissions by 10 a.m. on the 23rd of April 2012. The parties complied, and filed written submissions and provided legal authorities.

[7] Unfortunately, when the matter came up on the 23rd Mr. Johnson, Counsel for Globe, had a personal emergency so the matter was not proceeded with. The matter was then adjourned to the 22nd of May at 10 a.m. for 3 hours.

[8] In the interim, Counsel Mr. Johnson did a number of things on behalf of Globe. Firstly, he obtained orders ex parte from Gayle J., to issue Witness Summonses for 2 persons. Ex parte, meaning without notice, is a method permissible under rule 33.3 of the Civil Procedure Rules, "the CPR". Amongst the orders made were that witness summonses be issued requiring the attendance of Gertrude McFarlane, and David McFarlane at the hearing on the 22nd of May.

Mr. Johnson had also filed an Affidavit on May 14 2012, that Affidavit being the "Affidavit of David Arthur Johnson".

[9] Mrs. Taylor-Wright, on the 21st of May 2012, filed Further Written Submissions, objecting to this late filing of the Affidavit of Mr. Johnson and the calling of the witnesses. At first, Counsel Mrs. Taylor-Wright had made her objections on the basis that the matter was part-heard before me. Mr. Johnson did not share Mrs. Taylor-Wright's view. However, when both Counsel appeared before me, I indicated that it was not at all my understanding that because I had ordered written submissions and they were filed, that this made the matter part-heard. All I had been doing was using my case management powers to better organize the matter and render it capable of being completed in the time allotted, and facilitating a decision being made in the most efficient and timely way. Mrs. Taylor-Wright graciously, (and correctly, in my view), revised her submission, and conceded that the matter was not part-heard. She nevertheless was insistent that it would be unfair to allow the evidence proposed to be admitted at this late stage. I asked Mrs. Taylor-Wright whether, if I acceded to Mr. Johnson's application, she would need more time or need me to adjourn the matter in order to prepare herself. In response, Mrs. Taylor-Wright indicated that she would not require more time. Indeed, just as she had intimated on the 24th of April 2012, she was prepared to rest upon her written submissions.

[10] Mr. Johnson submitted that, for a number of reasons, the overriding objective of dealing with cases justly would be met if the court were to allow the evidence in.

[11] I agreed to allow Mr. Johnson to rely upon his Affidavit albeit it was filed late, and I also agreed to allow the witnesses summoned to give viva voce evidence in chambers. In my view Mr. Johnson's Affidavit was not really dealing with any new matters, as it dealt with one of the same points being raised by Globe all along. This was that Devar McFarlane was not the holder of a driver's

licence. Therefore Mr. Willis and his Counsel were not taken by surprise based on the material in the affidavit. Also, it appeared to me that the purpose of receiving the evidence from the witnesses summoned was important in order to deal with some of the real issues in controversy between the parties, i.e. as to the age of Devar McFarlane at the time of the accident. In my view, things have to be put in perspective and dealt with proportionately. To my mind, the relative importance of the evidence to Globe's case, exceeded any inconvenience which the Claimant might suffer. In my view, the inconvenience could be compensated for in costs or by allowing Mr. Willis' Counsel further time, if needed. Mr. Willis would not therefore suffer any undue prejudice. After I made my ruling, I again asked Mrs. Taylor-Wright whether she would need time to respond to the new evidence or to seek further instructions or information, but she again indicated that she would rest on her earlier written submissions.

[12] Mrs. Taylor-Wright has made a wide-ranging series of objections to the use of the Affidavits filed on behalf of Globe, this even before the Affidavit of Mr. Johnson filed May 14 2012. She submitted that in all the Affidavits there has been non-compliance with Rule 30 of the Civil Procedure Rules 2002. She submits that the form renders them defective and inadmissible in that they contain hearsay and do not state the sources of information and belief. Mrs. Taylor-Wright also labelled as a defect the fact that the name of the Justice of the Peace on some of Globe's Affidavits "remains a mystery". However, Mr. Johnson countered by pointing to the fact that in Mr. Willis' First Affidavit, i.e. the very first Affidavit in support of the Claim, filed 6th September 2011, the name of the Justice of the Peace also cannot be made out. I really do not intend to get into those types of issues as I think that there are points of greater substance that need to be dealt with.

[13] In so far as these are substantive proceedings, it would appear that Part 30 .3(2)(b) would not apply. Rule 30.3(1) states the general Rule, which is that an Affidavit should only contain such facts as the deponent is able to prove from his

or her own knowledge. Rule 30.3(2) allows an Affidavit to attest to matters other than facts that the deponent can prove from his or her own knowledge and to state sources of information and belief, where the affidavit is for use in a procedural or interlocutory application. In an interlocutory application the Court would in any event in my view retain a discretion whether to allow the evidence to be used even if the source is not stated, and to decide what weight to attach to it. I agree with Mrs. Taylor-Wright that, in particular, some portions of the Affidavits of Ms. Tammara Glaves, Globe's Claims Manager, for example paragraph 14 of the Affidavit filed 15th December 2011, do not comply with Rule 30.3(2)(b), in that she has not stated the source of her information or belief. However, since this is the substantive hearing and not a procedural or interlocutory application, Ms. Glaves should only have attested to matters of fact which she could state from her own personal knowledge.

[14] Initially, in her written submissions filed on April 20 2012, Mrs. Taylor-Wright had also stated that "the birth certificate of Devar Geovannie McFarlane affords no evidentiary basis upon which this court can conclude that the person named therein is one and the same as the deceased driver and is of no probative value since no nexus is established." Counsel also submitted that neither the deponent of the affidavit Ms. Glaves nor Globe is in any position to say that the person named in the certificate is the same as the deceased driver.

[15] Mrs. Taylor-Wright pointed to the fact that in paragraph 4 of her Affidavit filed on December 15, 2011, Ms Glaves stated that "The defendant does not have personal knowledge of the circumstances of the accident". However, I agree with Mr. Johnson that Ms. Glaves' Affidavit was not limited to the specific issue of the circumstances of the accident. Therefore, where at paragraph 9 Ms. Glaves speaks to the terms of the relevant insurance policy upon the basis of which Globe denies liability, and exhibits the relevant Certificate of Insurance, I really cannot see how any justifiable complaint could be made about that. Ms. Glaves in her capacity as Claims Manager is able to speak to and present the

Insurance Policy from her own knowledge and the records of Globe. In any event, Mrs. Taylor-Wright has herself referred to the terms of the policy exhibited and made substantial legal arguments in respect of those terms.

[16] It was common to both parties that at the time of the accident the Flynn's motor vehicle was being driven by Devar McFarlane. Mr. Johnson's Affidavit of May 14 2012 also exhibits the relevant policy of insurance. Mr. Johnson exhibits information downloaded from Fiscal Services Ltd.'s website, which indicates that the Tax Registration Number "TRN" system, was implemented from 1996. I accept that evidence, which was not challenged. Also exhibited to Mr. Johnson's Affidavit was a letter from the Tax Administration Department dated May 10, 2012 in which Ms. Lorraine Graham, on behalf of the Commissioner General states the following:

"Mr. Johnson thank you for sending a copy of Devar McFarlane('s) Birth Certificate(.) in your previous letter d/d February 14, 2012 the name quoted in the letter was "Denver McFarlane". The additional information that the Birth Certificate provided such as date of birth and mothers name, I am now able to state that Mr. Devar McFarlane is not a holder of a Jamaican Driver's Licence (.) I am able to reach this conclusion because he is not on the TRN system and in order to be the holder of a driver's licence you must first obtain a TRN number. "

[17] The Road Traffic Act indicates that to drive on a road a person must be the holder of a driver's licence and the licensing authority cannot grant a driver's licence to someone unless they are at least 17 years old-see sections 16 and 18(1) (iii) of the Road Traffic Act.

[18] Mrs. Gertrude McFarlane gave evidence. She stated that she is a divorcee. She was married to David McFarlane and as a result of that union they had 2 children. One of those 2 children was Devar Giovanni McFarlane. Mrs. McFarlane stated that Devar was born on the 10th of February 1984. She stated that Devar is deceased. He died on the 27th of January 2001 in a motor vehicle

accident. Her brother Patrick Flynn and his wife owned the motor vehicle that Devar was driving at the time. McFarlane is her married name and Flynn is her maiden name. Mrs. McFarlane was shown the Birth Certificate which was exhibited to Ms. Graves' Affidavit of April 20 2012, and confirmed that that is her son's birth certificate. The name Gertrude Flynn is stated on the birth certificate as mother.

[19] Mrs. Taylor-Wright cross-examined Mrs. McFarlane briefly. In response to Counsel's questions, Mrs. McFarlane indicated that she does not know the present address of Patrick and Yvonne Flynn, and she said that the relationship between herself and the said Flynn's broke down after the accident.

[20] I will now move on to make my findings of fact.

The best evidence, first hand evidence, in proof of a person's date of birth, obviously superior to a certified copy of a birth certificate which is based upon information provided, is that of the person's mother. Mrs. McFarlane was not challenged on this issue and I accept that Devar Giovanni McFarlane was her son, and was born on the 10th of February 1984. I also accept and find as a fact that Mrs. McFarlane's son Devar Giovanni McFarlane, is one and the same person as the Devar McFarlane who was driving the Flynn's motor vehicle on that day of misfortune, January 27 2001. I accept that Devar Giovanni McFarlane is the person who was driving the Flynn's motor vehicle at the time of the accident as a result of which Mr. Willis, sadly, suffered these serious personal injuries. The fact therefore, that, (and I agree with Mrs. Taylor-Wright on this point), Ms. Graves' affidavits contained quite an amount of hearsay in relation to Devar McFarlane and his age, is now of no moment.

[21] All told, I accept that at the time of the subject motor vehicle accident on the 27th January 2001, Devar McFarlane, the driver of the motor vehicle in respect of which Globe issued a policy of insurance to Patrick and Yvonne Flynn, was 16 years of age, in fact 2 weeks shy of his 17th birthday. I accept that he did

not have a TRN Number and did not have a driver's licence. I also accept that he was not a person that the laws of Jamaica permitted to drive on the roads of Jamaica at the material time.

[22] I now therefore intend to pass on to construe the relevant terms and conditions of the policy, and to address the legal arguments mounted in respect of these terms and conditions.

[23] The Certificate of Insurance issued to the Flynns in respect of the motor vehicle for the period 1st July 2000 to 30th June 2001, Clause/Item 5, states as follows:

“Persons or Classes of Persons entitled to drive*

(a) The Policyholders ...

(b) Any other person who is driving on the Policyholders' order or with their permission

* Provided that the person driving is permitted in accordance with the licensing or other laws or regulations to drive the Motor Vehicle or has been so permitted and is not disqualified by order of a Court of Law or by reason of any enactment or regulation in that behalf from driving the Motor Vehicle.”

[24] The Policy Schedule exhibited to the Affidavit of Ms. Graves sworn to on the 17th April 2012, indicates that the Authorized Drivers are to be in accordance with Item 5 of the Certificate of Insurance.

[25] In order for Mr. Willis to recover on the indemnity provided under the Policy, the liability must first be one that the policy purports to cover. Section 5(1)(b) of the Act recognizes that insurance coverage may be restricted by the insurer to persons specified in the Policy of Insurance. The right to indemnity does not therefore arise unless the loss occurred at a time when the motor vehicle was being operated by persons under cover by virtue of the Policy.

[26] In determining whether liability is or is not covered for the purposes of section 18(1) of the Act, the paramount consideration must be whether on a proper construction of the policy's terms and conditions the liability concerned has arisen from a risk that was covered by the express terms of the policy, and in respect of persons entitled to indemnity at the time of the incident and in the circumstances giving rise to the claim.

[27] The relevant Policy of Insurance provided coverage for the policy holders or persons driving motor vehicle registration Number 8880 BW on the Policyholders' order or with their permission. But there was the very important caveat:- PROVIDED THAT THE PERSON DRIVING IS PERMITTED IN ACCORDANCE WITH THE LICENSING OR OTHER LAWS OR REGULATIONS TO DRIVE THE MOTOR VEHICLE. “

[28] At the time of the accident in which Mr. Willis was injured on January 27 2001 Devar McFarlane was driving and he was not a person permitted in accordance with the licensing or any other laws to drive a motor vehicle, he not being the holder of a valid driver's licence.

[29] Devar McFarlane was not therefore a person specified in the policy insured against “any liability incurred by him in respect of the death of, or bodily injury to any person; and...any damage to property” –section 5(1) of the Motor Vehicle Insurance (Third Party Risks) Act.

[30] In this case the judgment is not in respect of a liability as is required to be covered under subsections(1),(2) and (3) of section 5(being a liability covered by the terms of the policy), which is what section 18 addresses. The sidenote to section 18 is “Duty of insurers to satisfy judgments against persons insured in respect of third party risks”. Devar McFarlane was not a person so insured and Globe is not obliged to provide indemnity in respect of the judgment against the

Flynns. The law does not require an insurer to provide insurance coverage in respect of third parties' claims arising in respect of the driving of a motor vehicle by a person not licenced, permitted or authorized to drive under the licencing or other laws of Jamaica.

[31] It should be noted that where a policy extends to cover persons driving other than the insured, the purpose of such a clause is to indemnify such persons for sums which they become liable to pay and not merely to indemnify the insured for sums which they become liable to pay by reason of such a person being the driver. Indeed, sub-section 5(8) of the Act is designed to ensure that this is made clear.-see **MacGillivray on Insurance Law**, 10th Edition, - paragraphs 29-60, and 29-16-29-20. Sub-section 5(8) reads:

“Notwithstanding any rule of law or anything in this or any other enactment to the contrary, a person issuing a policy of insurance under this section shall be liable to indemnify the persons, or classes of persons, specified in the policy, in respect of any liability which the policy purports to cover, in the case of those persons or classes of persons.”

[32] The significance of this is that in the instant case, it is not simply a matter of the insured having breached the condition in clause 5. They have, and are therefore not entitled to be indemnified. It goes beyond this, and here there is no cover at all, since Devar McFarlane was not a person insured and Globe had incurred no responsibility to indemnify him. This is because cover under the policy does not attach where the person driving is not licensed to drive.

[33] In **MacGillivray on Insurance Law**, 10th Edition, paragraph 29-83, headed “**Conditions relating to the driver**”, it is stated:

“It is common to find exceptions to the effect that the insurers are not to be liable unless the person driving holds a licence to drive or has held and is not disqualified from holding or obtaining such a licence. In such a case, if the driver

has no licence, the insurance will afford no cover". That is the situation that applies in this case as the policy was not in force at the material time.

[34] Sub-section 8(1) of the Act renders certain conditions in insurance policies to be of no effect. However, this is of no relevance whatsoever in relation to the circumstances of this case, as these relate to conditions dealing with specified things being done or omitted to be done after the event giving rise to a claim under the policy. In other words, these conditions refer to things to be done or not done after the accident. The condition in this case is of a completely different nature.

[35] It was submitted by Mrs. Taylor-Wright that by introducing the age of the driver as part of its defence, Globe runs afoul of section 8 of the Act. Sub-section 8(2) (a) of the Act indicates that provisions contained in a policy which purport to restrict the insurance of the person by reference to "the age or physical or mental condition of persons driving the vehicle" will be of no effect. I agree with Mr. Johnson that the reference to age and restrictions on age must necessarily be construed to mean an age above the age stipulated in the Road Traffic Act for persons to be eligible to hold a driver's licence. To put any other interpretation on the sub-section would be to create a conflict between the Road Traffic Act and the Motor Vehicle Insurance (Third Party Risks) Act. However, more importantly, the sub-section is inapplicable because, by virtue of the terms and conditions of the Policy, someone who is not under the law permitted to drive, would not be a person insured at all. There is therefore no part of the insurance policy that purports to restrict the insurance of a person insured thereby by reference to age.

[36] The loss suffered by Mr. Willis was not one that was contemplated/considered/covered under the policy and therefore Globe is not liable to provide indemnity or to satisfy Mr. Willis' judgment in the 2007 Claim. I also adopt the reasoning of McDonald-Bishop J. in her decision in Claim No.

2005 HCV3040 **Conrad McKnight v. NEM Insurance Co.** , delivered July 13, 2007.

[37] This is a most unfortunate case. The Claimant Mr. Willis has been injured and has been the recipient of a substantial judgment against the Flynnns in his favour. However, in all the circumstances I am of the view that the loss suffered by the Claimant was not one that was contemplated/ covered by the Policy and therefore Globe is not obliged to satisfy the judgment or to provide indemnity.

[38] The orders sought in the Fixed Date Claim Form are therefore refused. I will hear from the parties as to costs.