



[2022] JMSC Civ. 216

**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA**

**CIVIL DIVISION**

**CLAIM NO. SU2021CV00219**

<b>BETWEEN</b>	<b>ORVILLE ANDERSON</b>	<b>CLAIMANT</b>
<b>AND</b>	<b>ADVANTAGE GENERAL INSURANCE COMPANY LIMITED</b>	<b>DEFENDANT</b>

**IN CHAMBERS**

**Mr Ahkeme Harris instructed by Kinghorn & Kinghorn for the Claimant**

**Ms Raquel Dunbar instructed by Dunbar and Co. for the Defendant**

**Heard: June 16, July 6, September 27, and October 7, 2022**

**Civil Procedure – Motor Vehicle Insurance Third- Party (Risks) Act, Execution of Judgment, Rule 30 (2) of the CPR.**

**M. JACKSON, J (AG)**

**INTRODUCTION**

[1] Mr Orville Anderson (“the Claimant”), by these proceedings seeks a declaration that the Defendant, Advantage General Insurance Company Limited (“AGIC”), is obliged under the Motor Vehicles Insurance (Third-Party Risks) Act (“the MVIA”) to honour a final judgment granted in his favour against Nally Beckford and Andrea Beckford (“the insureds”), and their driver, Wayne Beyliss (“the Final Judgment”).

- [2] AGIC has challenged the declaration sought on the basis that the driver at the time the accident occurred did not possess a valid driver's licence, and, therefore, AGIC is not entitled to indemnify the claim.
- [3] Before embarking on the substantive application, which I am asked to determine, I deem it necessary to provide an outline of the circumstances that gave rise to the application.

## BACKGROUND

- [4] In brief, the claim emanated from an accident on January 18, 2011, involving the driver of the insureds and in which the Claimant suffered personal injuries.
- [5] On November 16, 2011, the Claimant instituted proceedings against all three defendants in the Supreme Court for negligence and on November 24, 2011, his attorneys-at-law served a Notice of Proceedings on AGIC.
- [6] In a letter dated November 26, 2011, AGIC provided the following response to the Notice of Proceedings:

*"We refer to the captioned matter and your Notice of Proceedings herein. Please be advised that our investigations have revealed that the Inland Revenue Department has no record of **Wayne Bayles** [the driver of our Insured's vehicle at the material time] ever being issued with a driver's licence. Consequent upon the foregoing, we have no alternative but to repudiate liability on any claim or claims which may arise from this accident. We further advise that all further correspondence in this matter should be addressed directly to the Insured." (My emphasis).*

- [7] Following further correspondences, AGIC sent two other similarly worded letters to the Claimant's attorneys-at-law, the last being on January 18, 2018.
- [8] AGIC, the insureds and their driver took no further active step to defend or participate in the proceedings. The Claimant obtained a default judgment against the insured and their driver, Wayne Beylis.
- [9] On July 27, 2020, damages were assessed by Thomas J, and the following orders were made:

- “1. *General Damages awarded in the sum of \$1,000,000.00 with interest at a rate of 3% from the 25<sup>th</sup> day of April 2012, to the 27<sup>th</sup> day of July 2020.*
2. *Special Damages awarded in the sum of \$41,850.00 with interest at a rate of 3% from January 18, 2011, to July 27, 2020.*
3. *Costs to the Claimant to be taxed if not agreed.”*

[10] A copy of the Order of Thomas J, was served on AGIC on August 20, 2020, and AGIC refused to honour the judgment.

[11] It is that refusal that led to this application, now before me.

## THE LAW

[12] The applicable statutory regime in relation to these proceedings is section 18(1) of the **MVIA**. Section 18(1) states 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, judgement 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 of 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.”*

[13] Numerous cases have interpreted the MVIA within this jurisdiction, and the law, in this regard, is now settled and well-established. Therefore, this court does not see the need for any extensive elucidation of the relevant law.

[14] In **Mecheck Willis v Globe Insurance Company of Jamaica Limited** [2015] JMCA Civ. 36 (“**Mecheck Willis v Globe Insurance**”), a case of similar factual circumstances as the instant case, Phillips JA highlighted the obligations arising under the Act. At paragraph [56] of the judgment, she opined that:

*“[56] It is trite law that an insurance policy is in essence, a contract between the parties and is subject to general contractual principles. Parties can agree to whatever terms they wish, provided that these terms are not in contravention of any law. Consequently, an insurance policy may contain terms limiting the user of the motor vehicle and making provisions for the insurer to avoid liability, if the user of the vehicle does not conform to the terms expressly set out in the insurance policy. This view is enunciated by Gordon JA (Ag) in **The Administrator General v National Employers Mutual Association Limited**, where he said at page 477:*

*‘...the policy of insurance embodies a contract between the insured and the insurers and this policy can contain certain terms limiting the user of the vehicle and providing for the avoidance of the policy and the avoidance of liability if the user of the vehicle does not conform with terms stipulated in the contract.’”*

**[15]** Further, at paragraph [63], the learned Judge of Appeal went on to list three conditions that must be met under section 18(1) of the MVIA to activate a third party’s right to recover from the insurer. From here on, I will refer to them as the three limbs. These, Phillips JA declared to be:

- (i) a certificate of insurance must have been issued by virtue of section 5(1) of the MVIA;
- (ii) the judgment must be in respect of a liability which is required to be covered by a policy under section 5(1), (2) and (3) and which has been obtained by the insured; and
- (iii) the liability must be a liability covered by the terms of the policy.

**[16]** At this juncture, it is useful to state that to avoid liability in these proceedings, the burden of proof rests with AGIC. Forte JA, as he then was, in **Administrator General v National Employers Mutual Association Limited**, (1988) 25 JLR 459, in highlighting this position, stated as follows:

*“I now turn to the second question, the answer to which determines the fate of this appeal. The matter being put in issue in the pleadings, it was conceded at the trial that the respondent had the burden of proving that the policy of insurance did not include a liability in respect of which the respondent could recover from the appellants, the fruits of his judgement against the insured.”*

## **The Issues**

**[17]** From the submissions and the pleadings, I conclude that the final determination of this application surrounds two critical issues:

- (a) whether the evidence provided by AGIC is sufficient to prove that the person referred to as “Wayne Christopher Bayles”, “Wayne Christopher Baylis”, and “Wayne Christopher Bayliss” are one and the same person as Wayne Beyliss, against whom the Final Judgment was entered; and
- (b) whether the evidence provided by AGIC is sufficient to prove that at the time of the accident, the driver was driving without a valid driver’s licence.

## **The Evidence**

**[18]** Both of the parties have relied on the affidavit evidence, which came from their respective in-house counsel. For the Claimant, it was Mrs Judy Ann Kinghorn, and for AGIC, it was Miss Vanessa Nesbeth. None of the two affiants was cross-examined, and neither was any application made for either of them to be called for the purposes of cross-examination.

**[19]** For brevity's sake and considering the issues to be decided, the court will focus primarily on the evidence relied on by AGIC. This is not only because, as previously mentioned, the burden of proof lies with AGIC but also because the substratum of Mrs Kinghorn’s evidence was outlined in paragraphs 4-11 of this judgment.

**[20]** Miss Nesbeth swore to two affidavits, which were filed on November 19, 2021, and February 15, 2022, respectively. I considered a summary of the salient aspects of each of the affidavits to be imperative.

**[21]** In relation to the affidavit dated November 19, 2021, the pertinent paragraphs are:

- “5. That the Defendant company insured Nally and Andrea Beckford’s vehicle licenced PD 5001 as of January 18, 2010, when it received a report that the said vehicle was involved in a collision while travelling along Highway 2000 in the vicinity of McCook’s Pen, in the parish of Saint Catherine. Further, it was reported by the insureds that a “**Wayne Christopher Baylis**” was the driver of their vehicle at the time.
6. That the Defendant Company carried out its internal checks and processing of the matter once it received the report. In doing so, it was advised by Andre Walker, of the Constant Spring Collector of Taxes, on or about March 19, 2010, that the driver’s licence presented by “**Wayne Christopher Bayliss**” was never issued by the Collector of taxes.
7. That the Defendant company hired the services of Precision Adjusters Limited to investigate further the issue of whether the driver, “**Wayne Christopher Bayliss**”, had a driver’s licence.
8. That Precision Loss Adjusters forwarded their report dated May 28, 2010, and the notifications from the Spanish Town Tax Office dated May 31, 2010, and the Saint Andrew Tax Office dated April 17, 2010, to the Defendant Company. I exhibit hereto copies of the letter from Precision Loss Adjusters dated May 28, 2010, a notification from the Spanish Town Tax Office dated May 31, 2010, and notification from Saint Andrew Tax Office dated April 27, 2010, and a notification from St. Andrew Tax Office dated April 27, 2010, marked “VN1” for identification.
9. That based on the information received from the Collector of Taxes, the Defendant company could offer no indemnity as the accident was not covered due to the driver being an unlicensed driver as required by the laws of Jamaica. I exhibit hereto a copy of the relevant Certificate of Insurance and Cover note # 2444077 marked VN2 for identification.
- ...
13. That the Defendant Company wrote to the said Kinghorn & Kinghorn Attorney’s at law on three occasions informing them that no indemnity would be offered because of the non-coverage of the accident due to the driver, “**Wayne Christopher Baylis**,” not being a holder of a valid driver’s licence. I exhibit hereto copies of the letters dated July 19, 2010, November 26, 2013, and January 8, 2018, to Kinghorn & Kinghorn Attorneys-at-Law marked **VN3** for identification.
- ...

15. *That the Defendant Company is not entitled to indemnify the insureds, Nally and Andrea Beckford, and as such is under no obligation to pay the said judgment since the accident was not covered by the policy of insurance.” (My Emphasis)*

[22] Regarding the affidavit dated February 15, 2022, the relevant paragraphs are:

- “6. *That I have since personally made checks on the cardatasystem.com, which is a system database that allows you to make searches and to provide information on both vehicles and drivers.*
7. *That a search conducted by me on February 2, 2022, indicated that there was no licence for **Wayne Christopher Bayles**. I hereby exhibit pages from the database search hereto, marked **VN -1** for reference.*
8. *That based on the policy of insurance issued, the coverage is extended only to persons permitted to drive in accordance with the licensing laws or regulations to drive the motor vehicle. I hereby exhibit a copy of the Policy Schedule in relation to this matter, marked VN-2, for ease of reference.*
9. *That based on the foregoing, that the Defendant Company submits that is not entitled to indemnify the insureds, Nally & Andrea Beckford, and as such is under no obligation to pay the said judgment since the accident was not covered by the policy of insurance, by virtue of the fact that the driver was not the holder of a valid driver’s license at the time.” (My Emphasis).*

## **The Submissions**

[23] Mr Harris’s submissions rested on two main planks; these are: firstly, AGIC’s reliance on hearsay evidence and, secondly, that at the material time of the accident, the driver was not issued a valid driver’s licence.

[24] In relation to the hearsay point, counsel submitted that the evidence contained in the affidavit of Miss Nesbeth, dated November 19, 2021, is in breach of rule 30.3(1) of the Supreme Court of Jamaica Civil Procedure Rules 2002 (“CPR”) and directed the court to paragraphs 5, 6 and 8.

[25] He further submitted that these proceedings brought by the Claimant are not an interlocutory application where rule 30.3(2) of the CPR would have permitted hearsay evidence to be adduced.

[26] Mr Harris further argued that Miss Nesbeth, in her affidavits, referred to different names of the person who was alleged to have been driving and that the several pieces of information presented to this court by AGIC in relation to Wayne Christopher Bayles, Wayne Christopher Baylis, and Wayne Christopher Bayliss are, without more, of no probative value as those names are different from the name Wayne Beyliss contained in the Final Judgment.

[27] In the round, counsel submitted that what AGIC has presented to the court is a cache of irrelevant evidence that has no bearing on the real issues before the court.

[28] By way of illustration, counsel highlighted the following:

- (i) In her affidavit, Miss Nesbeth deposed that the insureds reported to AGIC that one **Wayne Christopher Baylis** was the driver of their vehicle at the time of the accident.
- (ii) Further, based on the name, **Wayne Christopher Baylis**, obtained from the insured, she caused an investigation to be carried in relation to that name and the Constant Spring Tax Office had advised AGIC that **Wayne Christopher Baylis** was never issued a driver's licence.
- (iii) In her affidavit, she further stated that AGIC hired the services of Precision Loss Adjusters Limited, "to investigate further the issue of whether the driver, **Wayne Christopher Baylis**, had a valid driver's licence.
- (iv) However, Miss Nesbeth's affidavit revealed that Precision Loss Adjusters Limited investigated the name **Wayne Christopher Bayles** and also interviewed a driver with that name. (No account was given how they got that the **Wayne Christopher Bayles**, which was not in keeping with the request to investigate a **Wayne Christopher Baylis**).



(v) By her affidavit, Miss Nesbeth clearly stated that the name given to her by the insured was **Wayne Christopher Baylis** as the driver of their vehicle at the time of the accident. **Wayne Christopher Bayles** was not the name that was given to AGIC by the insureds.

[29] In relation to his second point, Mr Harris submitted that AGIC is required to satisfy the court on a balance of probabilities that “Wayne Beyliss” was not the driver of the insured’s vehicle when the accident occurred and further contended that if AGIC established that “Wayne Beyliss” was not the driver at the material time, then it also had to establish who was, in fact, the driver and that whosoever was the driver, he was, at the material time, driving contrary to the terms and conditions of the policy of insurance.

[30] In her response, Ms Dunbar has sought to rely on the evidence contained in the affidavits of Miss Nesbeth, which she described as cogent and sufficient to satisfy the burden of proof that, at the material time, the driver of the insureds’ car did not possess a valid driver’s licence.

[31] She also reminded the court of the evidence regarding the personal checks made by Miss Nesbeth with the Tax Administration online system (cardatasystem.com) and the various communications between Miss Nesbeth and the investigator(s) from Precision Loss Adjusters and representatives from the Collectorate of Taxes.

[32] In support of AGIC’s position, Ms Dunbar referred the court to paragraphs [77] and [78] of the case of **Mecheck Willis v Globe Insurance**. She also relied on section 16(1) of the **Road Traffic Act**, which states, in part, that:

*“16. – (1) A person shall not drive a motor vehicle on a road unless he is the holder of a licence for the purpose (in this Act referred to as a ‘driver’s licence’) and a person shall not employ any person to drive a motor vehicle on a road unless that person so employed is the holder of a such a drivers licence. If any person acts in contravention of the provisions of this subsection he shall be guilty of an offence and shall be liable on summary conviction before a Judge of the Parish Court to a fine not*

*exceeding ten thousand dollars, and the burden of proving that such person holds such a driver's licence shall be upon the person charged:..."*

- [33] Regarding the hearsay submissions, she asked the court to reject the objections now being taken at this late stage of the proceedings by Counsel. To further support her point, she has contended that the Counsel should have notified her before the hearing of the matter and further that Counsel had sufficient time to do so before the court fixed the hearing date.
- [34] Ms Dunbar further argued that in light of the fact that no previous objection was taken to the affidavit evidence of Miss Nesbeth, this court should not now entertain objections. She further argued that Counsel for the Claimant was at liberty to request affiants to attend for cross-examination, which would have been the correct thing for him to do. She contended that he made no such application or request.
- [35] Ms Dunbar also submitted that the court must examine the evidence presented by AGIC and not entertain the "backhand attempt" by the Claimant's Attorneys-at-Law to exempt evidence that they are deemed to have accepted in light of their failure to object.
- [36] Finally, counsel argued that AGIC is a company and documents created and obtained during the business are admissible. She submitted that the documents mentioned in paragraph 8 of Miss Nesbeth's affidavit dated November 19, 2021, were created and received during the business and are, therefore, admissible. In this regard, she contends that the letters of Precision Loss Adjusters, which were sent to AGIC with the seal of the Collectorate of Taxes, are admissible evidence.
- [37] With respect to the Claimant's contention that there was no evidence to create the nexus between the name **Wayne Beylis**, as contained in the Final Judgment, and those different names mentioned in the affidavit of Miss Nesbeth, Ms Dunbar submitted that the cause of that is typographical errors.

## Discussion and Analysis

[38] At this stage, it is useful to outline the several indisputable facts that arise in the case. I have found these to be:

- (i) The motor vehicle registration number PD 5001 was at all material times owned by the insureds.
- (ii) In January 2010, the insureds' motor vehicle was insured with AGIC.
- (iii) On January 18, 2010, when the insureds' motor vehicle was involved in the accident, the vehicle was being driven by an appointed driver of the insureds.
- (iv) The Notice of Proceedings sent to AGIC by the Claimant's Attorney-at-law on November 24, 2011, clearly identified the driver as **Wayne Beyliss**.
- (v) AGIC responded to the Notice of Proceedings using the name **Wayne Bayles**, as the insureds' driver.
- (vi) AGIC took no objection to the name **Wayne Beyliss**. No correction was made regarding whether the name "**Wayne Beyliss**" was an error.
- (vii) AGIC did not make an application refusing to indemnify the Claim upon being served with the Notice of Proceedings and **in** their subsequent responses.
- (viii) The Claimant instituted a claim against the insureds and their driver, **Wayne Beylis**.

- (ix) The Final Judgment was obtained against the insureds, and their driver, whose name is recorded as **Wayne Beyliss**, in keeping with the claim.
- (x) The Final Judgment was entered against the insureds and their driver, **Wayne Beyliss**. The Final Judgment was served on AGIC on August 20, 2020.
- (xi) AGCI has filed no application to set aside the Final Judgment and neither has an appeal been filed.
- (xii) In response to the claim, Miss Nesbeth's affidavit stated that AGCI carried out an investigation concerning one, **Wayne Christopher Baylis** and **Christopher Bayliss**.
- (xiii) Miss Nesbeth also deposed that AGIC engaged investigators of Precision Loss Adjusters to carry out an investigation in relation to **Wayne Christopher Baylis**.
- (xiv) The information presented to the court by AGIC was information obtained from third parties. Those parties have not submitted any evidence before the court or attended court.
- (xv) The information from these third parties was in relation to one **Wayne Christopher Bayles**.
- (xvi) The information received was that **Wayne Christopher Bayles** was not issued a valid licence from the Collectorate of Taxes.
- (xvii) No nexus was created between, or explanation given to account for the names Wayne **Christopher Bayles** identified and referred to by the Collectorate of Taxes, **Wayne Baylis** in the affidavit of Miss Nesbeth and **Wayne Beyliss**, as appeared in the claim and Final Judgment.

- (xviii) The accident report received from the insured was never exhibited to the affidavit of Miss Nesbeth.
- (xix) AGIC did not place any information or supplemental affidavit before the court regarding the name **Wayne Beyliss**.
- (xx) AGIC did not obtain or use the police accident report in these proceedings.
- (xxi) There was no evidence that the driver was ever charged for the offence of driving without a license in keeping with section 16 of the Road Traffic Act.
- (xxii) No evidence was placed before this court that the photo in the driver's licence received from Precision Loss Adjuster speaks to the same person as **Wayne Beylis, Wayne Bayles, and Wayne Christopher Baylis**.
- (xxiii) There was no evidence that, in light of the differences in the names, the insureds (or anyone else) had identified the individual in the driver's licence to be Wayne Beylis, against whom the Final Judgment was obtained.

**ISSUE 1: Whether the evidence provided by AGIC is sufficient to prove that the person referred to as "Wayne Christopher Bayles", "Wayne Christopher Baylis", and "Wayne Christopher Bayliss" are one and the same person as Wayne Beyliss against whom the Final Judgment relates**

**[39]** It is evident that the judgment in respect of this matter was obtained against the insureds and their driver, **Wayne Beyliss**. However, AGIC's pleadings showed that it carried out investigations concerning the names, Wayne Christopher Bayles, Wayne Christopher Baylis and Wayne Christopher Bayliss. Of note, is that AGIC has not produced any evidence to show that the several names refer to in the evidence presented refer to one and the same person.

[40] In this court's view, this has raised an issue of identification, which must be resolved before the court can move to the second issue. The burden of proof rests with AGIC. To succeed in this application, It must, as a matter of law, demonstrate a nexus between the various names it has investigated and the name Wayne Beyliss, which appears in the Final Judgment,

[41] Counsel for AGIC has submitted that the reference to these various names is due to typographical errors. While this may be so, no supplemental affidavit was placed before the court to provide such evidence. This court, therefore, finds that such an explanation remains, as it is, a matter of submission and of no evidential value.

[42] Without the requisite evidence to fill that evidential gap or nexus, this court is not entitled to make that leap that the information received by AGIC that no driver's licence was issued to a "Wayne Christopher Bayliss"/ "Wayne Christopher Bayles" is evidence that no driver's licence was issued to Wayne Beyliss.

[43] Accordingly, I find that the evidence provided by AGIC is insufficient to prove that the person referred to as "Wayne Christopher Bayles", "Wayne Christopher Baylis", and "Wayne Christopher Bayliss" are one and the same person as Wayne Beyliss against whom the Final Judgment relates.

**ISSUE 2: Whether the evidence provided by AGIC is sufficient to prove that at the time of the accident, Wayne Beyliss or Waynes Bayles was driving without a valid driver's licence**

[44] Even if the court were to accept that the names referred to by AGIC were, indeed, a result of typographical errors, there is still another crucial issue to be resolved. That issue relates to whether AGIC has provided sufficient evidence to prove that the driver was without a valid driver's licence. Proof of that fact was necessary to determine whether AGIC could avoid the policy of insurance. As was stated by Phillips JA in **Mecheck Willis v Globe Insurance**, at paragraphs [77] and [78]:

*“[77] The foregoing authorities all demonstrate that an insurer is not liable to indemnify a third party where the liability which had occurred is not one which is covered by the terms of the policy of insurance, and particularly with regard to an unlicensed driver the liability would not be covered by the policy.*

*[78] In the instant case, the respondent stipulated in the insurance policy that it would only insure the motor vehicle according to the terms contained in the policy. The fact that when the accident occurred the Flynn’s motor vehicle was being driven by Devar McFarlane, a 16 year old unlicensed driver, means that Devar McFarlane was not an authorised driver and hence a fundamental term of the insurance policy had been breached. Since this liability was not covered by the policy, the respondent would be entitled to avoid the liability arising out of the accident, and the appellant would not be indemnified by the respondent, and would therefore not be able to obtain the judgment sum or the policy limit from the respondent.”*

[45] Miss Nesbeth, in her affidavit, stated that AGIC received from the insureds, the name “Wayne Christopher Baylis”, to be the driver of their vehicle. She went on to state that a representative of the Constant Spring Tax Office informed AGIC that the driver’s licence presented by “Wayne Christopher Baylis” was never issued by the Collectorate of Taxes. This is hearsay.

[46] Miss Nesbeth further deposed that AGIC hired Precision Loss Adjusters to investigate whether the driver “Wayne Christopher Baylis” had a valid driver’s licence. The contents of a letter dated May 28, 2010, received from Precision Loss Adjusters states as follows:

*“Dear Miss J E*

*Please be advised that prior to receiving your letter, we had interviewed the Insured’s driver, who at the time presented Driver’s Licence number [...]. Checks with the Collector of Taxes revealed that there is no information on their system to indicate that **the insured’s driver was ever issued a Driver’s Licence. We have attached a document received from the St. Andrew Collectorate in this regard** and trust that the information will assist you in the further handling of this matter.” (My Emphasis)*

[47] On a careful examination, this court observed that the “attached document” referred to by Precision Loss Adjusters in its letter to AGIC was not a letter from the “St. Andrew Collectorate”. Instead of responding with their own letter, what

the St. Andrew Collectorate did was write the words, “no information found”, on the letter sent to them by Precision Loss Adjusters. The St. Andrew Collectorate, then sealed the letter with the official stamp and placed a signature over the seal. That signature the court is assuming is “Mr Walker”.

[48] Also marked and attached as an exhibit to the affidavit of Miss Nesbeth was a photocopy of a driver’s licence with a notation that “Mr Walker advised that the D/L not assigned by Collector of Taxes”.

[49] The name on the driver’s licence was not Wayne Beylis.

[50] No affidavit was provided to this court from the insureds, the insured’s driver, any representative from the Collector of Taxes, or any of the investigators from Precision Loss Adjusters.

[51] In **Mecheck Willis v Globe Insurance Company Limited** [2012] JMSC Civ. No. 68 (which was later upheld by the Court of Appeal), similar evidential gaps on the part of the insurer, Globe Insurance Company Limited (“Globe Insurance”), as in this case, emerged.

[52] In that case, a 16-year-old driver, known as “Devar McFarlane”, was erroneously referred to as “Denver McFarlane”. Globe Insurance brought proceedings before Mangatal J to not indemnify the policy of insurance. It was contended that because of the driver’s age, they would not be able to indemnify the third party pursuant to the policy of insurance. Before the hearing commenced, counsel representing Globe Insurance took corrective actions to address the several pieces of hearsay evidence that the claimant’s attorney had sought to challenge vigorously and fill the gaps in the evidence.

[53] On the first point addressing the hearsay evidence and nature of the proceedings, as in this case, Mangatal J addressed whether the proceedings were interlocutory or substantive. She noted at paragraph [13] that:

*“[12] Mrs Taylor-Wright has made a wide-ranging series of objections to the use of the Affidavits filed on behalf of Globe... She submitted that in*



all the Affidavits, there has been non-compliance with Rule 30 of the Civil Procedure Rules, 2002. She submitted that the form renders them defective and inadmissible in that they contain hearsay and do not state the sources of information and belief...

**[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 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... However, since this is the substantive hearing and not a procedural or interlocutory application, Miss Glaves should only attest to matters of fact which she could state from her own knowledge.” (My Emphasis)**

**[54]** Like Mangatal J, I agree that the proceedings before me are not interlocutory; consequently, rule 30.3(2) of the CPR does not apply. This court is, therefore, guided by rule 30.3(1) of the CPR, which states that, as a general rule, an affidavit may contain only such facts as the deponent is able to prove from his or her knowledge. I am, therefore, obliged to give weight only to those matters that Miss Nesbeth can prove from her own knowledge.

**[55]** Additionally, in **Mecheck Willis v Globe Insurance Company Limited**, Mangatal J, in coming to her findings of fact as to whether Globe Insurance had provided sufficient evidence to prove the age and identity of the driver (which I will describe as evidence of connectivity or identification), stated:

*“[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 is 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 McFarlene(’s) Birth Certificate(.) in your previous letter d/d February 14, 2012 the name quoted in your letter was ‘Denver McFarlane’. The additional information that the Birth Certificate provided such as the date of birth and*

*mother's name, I am now able to say 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."*

[20] *I will now move on to 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 10<sup>th</sup> of February, 1984. I also accept and find that 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 car on that day of the 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), Miss Graves' affidavits contained quite an amount of hearsay in relation to Devar McFarlane's and his age, is now of no moment."*

[56] Accordingly, similar to what Globe Insurance was confronted with and had to do to address the deficiencies, AGIC, in the court's view, is obliged to do more to satisfy this court, on a balance of probabilities, that it was not required to indemnify liability in the claim. This would include obtaining the necessary evidence to demonstrate that the Collectorate of Taxes never issued Wayne Beyliss' a driver's licence. Such evidence may have included:

- (i) An affidavit or letter from the Collectorate of Taxes;
- (ii) An affidavit from the investigators of Precision Loss Adjusters addressing the findings of their investigations, including whom they spoke to and attaching the relevant documentary evidence;
- (iii) The accident report the insureds gave to Miss Nesbeth, coupled with a statement or affidavit from the insureds to create the nexus between Wayne Bayles, Wayne Christopher Bayliss, Wayne Baylis and Wayne Beyliss against whom the Final judgment was entered.

(iv) A supplemental affidavit establishing that the errors concerning the spelling of the driver's name were typographical.

[57] This court finds that the evidence remained wanting at the conclusion of the hearing as AGIC provided insufficient evidence to address the deficiencies and the various breaches of the hearsay rule in the affidavit evidence of Miss Nesbeth.

[58] Concerning the submissions of the Defendant that the Claimant did not make a request to have Miss Nesbeth cross-examined, this court does not believe that cross-examination of Miss Nesbeth would have cured the defects arising from the plethora of hearsay evidence to which Mr Harris's submissions were directed. The position, this court notes, would have been different if the individuals (the third parties – Andre Walker from the Collector of Taxes, Precision Loss Adjuster) had also sworn to affidavits.

[59] Also, with respect to the submissions that evidence referred to by Miss Nesbeth in her affidavit ought to be treated as business documents, this court will only say that section 31F of the **Evidence Act** is clear in respect of how such evidence must be received. On a careful examination of the affidavit of Miss Nesbeth, she has not stated that AGIC received the documents in the course of its business or how they came to be so. Additionally, there was no evidence regarding the creation and authentication of the documents.

[60] Furthermore, section 31F(4) of the Evidence Act also makes it clear that the party intending to tender a statement in a document as evidence shall, at least 21 days before the hearing at which the statement is to be so tendered, notify every other party to the proceedings as to the statement and as to the person who made the statement. No such notification was given to the Claimant by AGIC.

[61] Finally, whilst acknowledging that the insureds' driver produced a driver's licence, AGIC argued that the Collectorate of Taxes never issued any such driver's licence. Direct evidence from the Collectorate of Taxes is necessary to satisfy the

court that the driver's licence produced by the insureds' driver was never issued by them and was fraudulent. No such evidence was provided before the court.

**[62]** In the circumstances, this court finds that AGIC has failed to provide the court with sufficient evidence to justify its contention that there is a breach of the policy of insurance between itself and the insureds, which allows it to avoid liability in the claim.

### **Disposition**

**[63]** In light of the foregoing, the order of this court is as follows:

1. AGIC is obliged under the Motor Vehicles Insurance (Third-Party Risks) Act to honour the Judgment in the matter of Claim No. 2011 HCV 071235 – Orville Anderson v Wayne Beyliss, Nally Beckford and Andrea Beckford in the following terms:
  - (a) General damages in the sum of \$1,000,000.00 with interest at the rate of 3 % from the 25<sup>th</sup> of April, 2012, to the 27<sup>th</sup> of July, 2020.
  - (b) Special Damages in the sum of \$ 41,850.00 with interest at the rate of 3% from the 18<sup>th</sup> of January, 2011, to the 27<sup>th</sup> of July, 2020.
2. AGIC is to pay over the judgment sum within 7 days of the date hereof, along with interest of 6% from the 27<sup>th</sup> of July 2020 to the date hereof.
3. Cost of the claim to the Claimant to be taxed if not agreed.
4. Leave to appeal is granted.