In The Supreme Court of Bermuda

CIVIL JURISDICTION
2019 No: 402

BETWEEN:

ANTONIO PIMENTAL DA COSTA

Plaintiff

And

MOTOR INSURERS' FUND

Defendant

And

MINISTER OF TOURISM AND TRANSPORT

Interested Party

And

CHRISTOPHER CARTER

Interested Party

JUDGMENT

Date of Trial:	Thursday 16 July 2020
Date of Judgment:	Thursday 10 September 2020
Plaintiff:	Ms. Sara Tucker, Trott & Duncan Limited
Defendant:	Mr. Jeffrey Elkinson, Conyers Dill & Pearman Limited

Minister of Tourism and Transport (Interested Party):	Mr. Gregory Howard
Christopher Carter (Interested Party):	Mr. Richard Horseman

Claim for compensatory relief for uninsured losses arising out a of road traffic accident - Section 4 of the Motor Car Insurance (Third-Party Risks) Act 1943 - Terms of the Memorandum of Agreement between the Minister of Tourism and Transport and the Motor Insurers' Fund

JUDGMENT of Shade Subair Williams J

Introduction and Background

1. The Plaintiff, a 56 year old male person, was the victim of a two-vehicle road traffic accident which occurred on 1 January 2016 at approximately 2:00am on South Road in Paget Parish. At the time of the accident, the Plaintiff was riding a 150cc motor cycle. The other vehicle involved was a motorcar driven by the perpetrator of the accident, namely Mr. Chris Carter.

2. Mr. Carter callously fled the scene of the accident without providing any assistance to the Plaintiff whom he injured. With some fortune, however, Mr. Carter was later traced and apprehended by officers of the Bermuda Police Service who charged him for various road traffic offences. On 21 May 2016 Mr. Carter was convicted upon his guilty plea for the offence of driving whilst under the influence of alcohol or drugs, contrary to section 35AA of the Road Traffic Act 1947.

3. On 16 March 2017 the Plaintiff issued civil proceedings against Mr. Carter and BF&M General Insurance Company Limited ("BF&M") in the Supreme Court. By a Specially Endorsed Writ of Summons (Case No. 92 of 2017) the Plaintiff pleaded a claim for negligence against Mr. Carter and claimed against BF&M as Mr. Carter's insurer. Within those proceedings a preliminary point dispositive of BF&M's liability was determined by Mr. Justice Stephen Hellman. His written judgment in resolve of this background litigation is dated 8 November 2017.

4. Amongst Hellman J's key findings, he held that at the time of the accident the car, which was being driven by the offending Mr. Carter, in fact belonged to a third person, Mr. Ian Mummery. Mr. Carter thus held the car as a bailee, as he had Mr. Mummery's permission to drive the car but held no legal ownership over the car. The significance of this finding was that BF&M's insurance policy was applicable to a driver who held a valid and current driver's licence and who drove with the permission of the policy holder.

5. However, in defence to the Plaintiff's claim, BF&M relied on an exclusion clause under its policy for coverage ("the Exclusion Clause"). That clause is restated in Hellman J's judgment [para 34]:

"*This Policy does not cover:*

...

11) A claim where the driver of the vehicle has been convicted (or prosecution is pending) relating to the level, concentration and/or quantity of alcohol or drugs at the time of the event that caused the loss or damage. In addition, the Policy will not cover a claim where the driver of the vehicle is convicted of refusing to provide a sample of breath or blood which could have been the basis of a conviction relating to the level, concentration and/or quantity of alcohol or drugs in the body, or where a subsequent medical record confirms a blood to alcohol or drugs ratio that is over the legal limit immediately after the event giving rise to a claim."

6. It was common ground between the parties that if the Exclusion Clause did apply, BF&M would nevertheless be liable to pay a maximum sum of $125,000.00 so not to infringe the requirements of section 4(1) of the Motor Car Insurance (Third-Party Risks) Act 1943 which requires a policy of insurance to cover the insured in respect of any liability for death or bodily injury.

> *"**Requirements in respect of policies***
>
> *4 (1) In order to comply with the requirements of this Act, a policy of insurance must be a policy—*
>
> *(a) which is issued by a person who is an insurer; and*
>
> *(b) which insures such person, persons or classes of persons as may be specified in the policy in respect of any liability which may be incurred by him or them in respect of the death or of bodily injury to any person or damage to the property of any person caused by or arising out of the use of the motor car on a highway or on an estate road:*
>
> *Provided that such a policy shall not be required to cover—*
>
> *(i) [deleted by 1987:53]*
>
> *(ii) liability in respect of any sum in excess of $125,000 arising out of the death or bodily injury to any person being carried in or upon or entering or getting into or alighting from a motor car;*
>
> *(iii) …"*

7. It was uncontentious between the parties that the effect of section 4(1) only permitted BF&M to exclude liability in excess of $125,000.00. In settling the Court's judgment on the applicability of the Exclusion Clause as modified by section 4(1), Hellman J held and remarked [para 41]:

"*I therefore find that the Exclusion Clause applies to any claim brought by Mr. Carter under the policy for an indemnity in relation to Mr. Da Costa's claim against him for damages. The effect is that the amount payable by BF&M in relation to this claim is limited to $125,000.00. This is substantially less than the damages claimed by Mr. Da Costa. I respectfully endorse the view expressed by Kawaley CJ in Thomson v Thomson and Colonial Insurance Co Ltd at para 38 that:*

"The time may well be ripe for Parliament, if it be right that the present financial limits were fixed more than two decades ago, to consider elevating the minimum obligation owed by insurers to third parties, contract apart."

8. By Consent Order dated 1 July 2019, judgment against Mr. Carter in the sum of $733,659.20 was entered in favour of the Plaintiff. BF&M paid the mandatory sum of $125,000.00 leaving a residual balance of $608,659.20 to be paid by Mr. Carter.

These Proceedings against the Motor Insurers' Fund

9. These proceedings against the Motor Insurers' Fund ("the Fund") were commenced by an Originating Summons filed on 10 October 2019. The Fund is a corporate body limited by guarantee pursuant to the terms of a Memorandum of Agreement ("the Agreement") with the Minister of Transport. The Agreement, which was last revised on 16 July 2007, is modified by subsequent Addenda prescribing the limits of the Fund's liability in respect of death or personal injury to victims of uninsured or untraceable drivers. The maximum sum which may be recovered by any one person is $375,000 and the maximum sum which may be claimed against the Fund for any one accident is $700,000.

10. The principal form of relief claimed against the Fund is pleaded in the following terms:

"*Damages pursuant to an Order of Consent dated 1 July 2019 for the amount of $733,569.20 save in so far as the Plaintiff has recovered the statutory minimum under the BF&M Policy of Insurance of $125,000.00 pursuant to the Judgment of the Honourable Justice Hellman dated 8 November 2017 delivered under Supreme Court Civil Jurisdiction 2017 No. 92. This figure now being reduced to $608,569.20 and falling subject to the repayment by the Defendant fund within the thresholds as set out in the Addendum to the Agreement dated 31 January 2011, limiting payment to the cap of $375,000.00*."

11. Additionally, the Plaintiff seeks an order for costs, which is pleaded to arise as a matter of contractual right, and interest at the statutory rate.

12. In support of his Originating Summons, the Plaintiff filed affidavit evidence in his own name sworn on 10 October 2019. In response, the Defendant relied on an affidavit sworn by the Chairman of the Fund, Mr. Graham Hillier, on 28 November 2019. No other evidence was placed before me for consideration by this Court.

13. In the Plaintiff's evidence, Mr. DaCosta recounts the particulars of the accident and his resulting injuries [paras 7-9]:

"*7. On 1 January 2016, in the early hours of the morning namely approximately 2.00 a.m., I was operating a Black Symax vS150 license number BO428 and I was travelling east along South Road Paget near the junction of Lover's Lane. As I approached the junction a White Nissan car license number 29030 operated by Mr. Chris Carter ("Mr. Carter") who was travelling west then veered into the eastbound lane, and into my path. This caused the car to collide violently with me thereby causing me to sustain severe injuries and to suffer loss and damage. At the time of the accident I was 51 years old, having been born on 11 March 1964.*

8. Following the accident I was caused to spend approximately six months in the King Edward VII Memorial Hospital where I was diagnosed and treated for having suffered a dislocation of the right hip joint with a posterior acetabular fracture. I also sustained a right femoral mid-shaft fracture and a severe distal Pilon fracture (ankle). Additionally it was noted that I had 0/5 power of abduction in my right shoulder and weakness in my biceps. I remained in hospital for an initial four months. However, I began to experience complications with my injuries as early as 7 January 2016 when a subluxation began to manifest and persist in my ankle joint requiring the initial surgery thought to remedy that particular injury to be redone. I went on to undergo 12 more invasive surgeries and suffered serious infections during his [sic] [this] *healing process which required intravenous antibiotic care over the course of several weeks to treat. I was required to remain an additional two months making my total stay six months.*

9. Upon my departure from treatment and care I was no longer able to work and support myself. I am gardener and landscaper by profession and I was also the holder of a valid work permit as a Portuguese National, resident here in Bermuda. Given the extent of my injuries I was no longer able to work and retained Messrs. Trott & Duncan Limited…"

14. In Mr. Hillier's affidavit evidence, he defends the Fund's refusal to cover the expense of Mr. DaCosta's injuries [paras 3-5 and 10]:

" …

3. The Fund is a body incorporated under the Companies Act, limited by guarantee. It was created to fulfil the need to have some mechanism whereby anyone in Bermuda who is injured by an uninsured or untraceable driver could have some compensation payable. Motor insurance is mandatory but whether by accident or design, drivers of motor vehicles may have had no insurance cover and their victims would not receive any compensation. …I should say that the directors of the Fund have always been conscious of the fact that the pay-out from the Fund in respect of death or injury to any one person is greater than the statutory requirement of $125,000 but the directors, while wishing to be fiscally prudent, also wanted to try and ensure that victims got meaningful compensation where it was appropriate…

4. As a preliminary point, to be expanded on by our attorneys. Conyers Dill & Pearman ("Conyers") at the hearing of the application, I would state that this is an Agreement between the Fund and the Minister of Transport. I say and believe and I am advised that it is not enforceable by any third party and that Mr. DaCosta has no direct claim against the Fund.

5. The Fund was created to ensure that there was a resource for any persons injured by uninsured or untraceable drivers. It is funded by a surcharge on insurance policies; $10 for a motor car and $5 for a motor bike. Over the years, the Fund has sought to make payments out to those persons who are injured and have no other recourse. I beg to refer to the terms as set out in the Memorandum of Agreement, including the recital which establishes the purpose of the Fund and in particular paragraph 2 of the Agreement concerning the role of the Fund, namely to compensate injured persons where otherwise the liability to compensate them would fall under a policy of insurance the issue of which is governed by the Motor Car Insurance (Third Party Risks) Act 1943 ("the Act"). The purpose of the Memorandum of Agreement is to provide a limited indemnity to persons injured either by the driving of an uninsured vehicle or where the driver of a motor vehicle is untraceable. It is a fund of last resort for those who can get no compensation for their personal injuries suffered in a road traffic accident from an insurance company, even though it is mandatory under the law to have third party insurance in place for the driving of a motor vehicle. It is not a fund to increase the compensation payable where a party has received a payment under an insurance policy, even though that compensation may not be adequate. It has been the case that the Fund has paid out the maximum amount pursuant to [the] *Fund's obligations and in some cases this does not even go anywhere near meeting the dollar value of the catastrophic injuries suffered by a Claimant.*

…
10. The Fund had determined that it was not appropriate, given the intent of the Memorandum of Agreement and the language therein contained, to make any payment where there existed a policy of insurance"

Analysis and Decision

15. Within the recitals of the Agreement it is stated; "…*the parties agreed to enter into an agreement to provide a limited indemnity to persons injured either by the driving of an uninsured vehicle or where the driver of a motor vehicle is untraceable*."

16. The scope of the circumstances for which the Fund would indemnify an accident-victim's damages and costs relating to death or personal injury and caused by "*the driving of an uninsured vehicle*" is illuminated under paragraphs 2(i)-(ii) of the Agreement:

"*2. If final judgment in respect of liability in respect of death of, or bodily injury to, any third party which liability is required to be covered by a policy of insurance under the Act* [the Motor Car Insurance (Third Party Risks) Act 1943], *is obtained against any person or persons* …

(i) at the time of the accident giving rise to such liability there is not in force a policy of insurance as required by the Act, or

(ii) the policy of insurance required by the Act is, for the purposes of the Act, of no effect for any reason (other than inability of the Insurer to make payment), or

(iii) … and

(iv) any such judgment is not satisfied in full or to the limits of the policy within twenty-eight days from the date upon which the person or persons in whose favour such judgment was given became entitled to enforce it"

17. Thus, under the Agreement, "*the driving of an uninsured vehicle*" also applies to an insurance policy which is of no effect for any reason other than the Insurer's inability to make payment. The effect of an insurance policy "*for the purposes of the Act*" is expounded under section 4(1)(a)-(b). Thus, an effective policy provides coverage for any "…*person, persons or classes of persons as may be specified in the policy in respect of any liability which may be incurred by him or them in respect of the death or of bodily injury to any person or damage to the property of any person caused by or arising out of the use of the motor car*…"

18. The Defendant's case is that the Fund is not liable for payment in cases where there exists a policy of insurance. In backing this contention that Mr. Carter was insured, Mr. Elkinson pointed to Hellman J's finding in his judgment [para 33] that Mr. Carter was covered by the policy:

"*I therefore find that at the date of the collision the car driven by Mr. Carter which was involved in the collision was owned by Mr. Mummery and driven by Mr. Carter with his permission. Consequently, for the purposes of Mr. DaCosta's claim, Mr. Carter was covered by the insurance policy issued to Mr. Mummery in respect of that motor car by BF&M*."

19. This conclusion must be read and understood in the context the judgment as a whole. The stated finding was merely made during the course of a step by step approach by the Court in answer to BF&M's denial that it ever insured Mr. Carter. BF&M's case before Hellman J was that it previously insured the motor car concerned but its coverage was limited to a previous point in time when it was being driven by Mr. Mummery. It was for this reason that Hellman J engaged in an initial analysis as to whether the policy was automatically cancelled on account of the averred transfer of legal title from Mr. Mummery to Mr. Carter.

20. In resolving this dispute, Hellman J found that Mr. Mummery had not in fact effectively transferred his legal title. Instead, Mr. Mummery remained the legal owner of the car and Mr. Carter was found to be a bailee. So, where Justice Hellman found that Mr. Carter was covered by the insurance policy issued to Mr. Mummery [para 33] he was merely rejecting the proposition put forth by BF&M that the policy could not apply because it terminated upon a transfer of legal title.

21. Of course, Hellman J dealt with this point prior to his consideration of the applicability of the Exclusion Clause. Once, the Court found that the Exclusion Clause applied, the resulting question was twofold: Did the application of the Exclusion Clause invalidate the contractual entitlement to insurance coverage or did it modify the contractual entitlement by operation of statute? Hellman J found the latter to be so [para 35]:

"*It is common ground that, if the Exclusion Clause does apply, it is modified by section 4(1) of Motor Car Insurance (Third Part Risks) Act 1943 ("the 1943 Act"). This provides in material part that, in order to comply with the requirements of the 1943 Act, a policy of insurance must cover the insured in respect of any liability which may be incurred by him in respect of the death of or bodily injury to any person, or damage to the property of any persons, caused by or arising out of the motor car on a highway. However, a policy shall not be required to cover liability in respect of any sum in excess of $125,000 arising out of any one claim by any one person. The practical consequence of Section 4(1) is that with respect to Mr. DaCosta's claim the Exclusion Clause can only exclude any liability in excess of $125,000*."

22. Mr. Elkinson was therefore correct in his submissions before the Court that the application of the Exclusion Clause (as read in compliance with section 4(1) of the 1943 Act) could only

limit the coverage because the law does not permit an insurance policy to fully withhold coverage. So, where a term of an insurance policy in force purports, on the face of its wording, to fully withhold coverage in a case of death, personal injury or damage; the Courts will read any such term of exclusion as being subject to the parameters prescribed by section 4(1).

23. Had the Exclusion Clause been lawfully capable of giving rise to an absolute denial of coverage, only then could it be correctly stated that Mr. Carter was uninsured. However, the reality is that his insurance coverage was limited not excluded. That being the case, I find that neither paragraph 2(i) not 2(ii) of the Agreement apply to the Plaintiff.

24. As a mere observation, Mr. Horseman queried the inclusion of the words "or to the limits of the policy" in paragraph 2(iv) of the Agreement:

"2. If final judgment in respect of liability in respect of the death of, or bodily injury to, any third party which liability is required to be covered by a policy of insurance under the Act, is obtained against any person…and either

(i) … [no policy of insurance in force]

(ii) *the policy of insurance required by the Act is…of no effect… or*

(iii) *the claimant either knew or ought to have known of the circumstances prevailing in (i) and (ii), and*

(iv) *any such judgment is not satisfied in full* ***or to the limits of the policy*** *within twenty-eight days from the date upon which the person or persons in who favour such judgment was given became entitled to enforce it*

then the Fund will, subject to the provisions of this Agreement, pay or cause to be paid to the person or persons ("the Plaintiff") in whose favour such judgment was given such sum set out in the judgment…

25. The words "*or to the limits of the policy*" are clearly misplaced as subparagraph (iv) is conjunctive with circumstances where no policy of insurance is in force or where a required policy is of no effect. Paragraph 2 requires the Fund to make a payment to the Plaintiff where a final judgment of the Court has been obtained.

26. In this case, final judgment was obtained but was covered by BF&M to the limits of its policy (i.e. the statutory modification of the Exclusion Clause) as I have explained herein. For these reasons, I find that the Fund is not liable to make any payment to the Plaintiff.

27. While, as a matter of legal principles, I have found in favour of the Defendant, it would be remiss of me not to offer some commentary in expression of the Court's profound sympathy for the Plaintiff's result. The devastating reality of this case is that Mr. DaCosta, through no fault of his own, has endured years of a life-changing tragedy triggered by an irresponsible impaired driver who was more than prepared to cruelly leave Mr. DaCosta abandoned at the scene of the accident. Mr. DaCosta suffered serious and chronic injuries requiring more than a dozen of surgeries and several months as an in-patient at the hospital. This has all been compounded by his inability to resume his trade and his added financial burden of hundreds of thousands of dollars in unrecovered damages and legal costs. No doubt, the submissions passionately made by Ms. Tucker were fueled by the calamitous nature of this case. It is hoped that cases of this kind will not reoccur and that the Legislator will give some strong consideration to revising the inadequate $125,000 limit for coverage as set out under section 4(1) of the Motor Car Insurance (Third-Party Risks) Act 1943.

Conclusion

28. The Originating Summons is dismissed.

29. If any party wishes to be heard on costs a Form 31TC shall be filed within 14 days.

Dated this 10th day of September 2020

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THE HON. MRS JUSTICE SHADE SUBAIR WILLIAMS
PUISNE JUDGE