[2014] JMSC Civ. 133

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2011 HCV 07203

BETWEEN	PAULINE STONE-MYRIE	CLAIMANT
AND	SONIA GORDON WILLIAMS	DEFENDANT

Charles Piper, Ms. Marsha Locke and Wayne Piper instructed by Charles E. Piper & Associates for the claimant

David Johnson instructed by Samuda & Johnson for the defendant

Heard: June 9, 2014 and September 15, 2014

Damages - Assessment of – whiplash injury – role of motor vehicle assessor – propriety of claim for full repairer's cost – policy excess – necessity for evidence to prove foreign currency component of claims.

OPEN COURT

E. BROWN, J

[1] On Thursday the 24th December, 2009 at about 1.30 p.m. the paths of the claimant and the defendant crossed with the suddenness characteristic of the impact of a motor vehicle collision. As the claimant sat around the steering wheel of her Toyota Rav4 in a line of traffic along Red Hills Road in the parish of St. Andrew, she felt a "major" bang to the rear of her vehicle. That bang was the result of the vehicle, owned and being driven by the defendant, crashing into the claimant's vehicle as the vehicles ahead of the claimant commenced moving.

[2] In the Amended Claim Form filed on the 8th October, 2012, the claimant alleged that she suffered injury, loss and damage as a consequence of the collision. Additionally, in her Further Amended Particulars of Claim, at paragraph 4, the claimant averred that the collision was caused by the negligence of the defendant. In the Amended Defence filed on the 3rd October, 2012, liability was not disputed but the claimant was required to prove her loss at an assessment of damages. This is the assessment of damages.

Property Damage Claim

[3] In her Particulars of Special Damage a claim was made for $106,162.50 for the cost of the repairs to the Toyota Rav4. At paragraph 6 of the Amended Defence the defendant denied that this is an item recoverable by the claimant. The defendant went on to aver, at paragraphs 7-10 that:

> *"The defendant says that the cost of repairs to the claimant's said motor vehicle registered 0729 EA was an insurable loss recoverable by the claimant's insurers Advantage General Insurance Company Limited (AGI),on the satisfaction of the claimant's claim under section 1 of Motor Vehicle Policy No. MPCC-81965.*
>
> *By the terms of an Own Damage Release & Discharge dated February 19, 2010, the claimant accepted from AGI the sum of $76,162.50 in "full and final settlement of all claims under section 1 of my motor vehicle Policy Number MPCC-81965, arising out of an Accidental Collision involving my vehicle, Registration Number 0729 EA, Chassis Number SXA110083860 which occurred Red Hills Road, on or about December 24, 2009." AGI subsequently accepted the sum of $84,562.50 from JIIC [Jamaica International Insurance Company] representing the amount due to AGI for property damage arising out of the said*
> *accident referred to in paragraph 8 hereof and being the amount due to AGI under their subrogated rights under the said policy of insurance. The relevant form of Release and Discharge dated November 16, 2010 was duly executed by AGI's representative and a cheque for the said sum paid over by JIIC to AGI.*
>
> *In the premises the defendant says that the claimant was well aware of the circumstances surrounding the settlement of her claim for the cost of repairs to her said motor vehicle as at February 19, 2010 and consequently her claim for this item of special damages represent an*

attempt by her at double recovery of all or a substantial portion of this item of loss and is not therefore recoverable."

[4] In her witness statement, the claimant admitted receiving the sum of $76,162.50 from AGI. The claimant went on to say that this figure represents the amount of the estimated cost of repairs, less her policy excess of $30,000.00. She stated the actual cost of repairs as $135,606.00. However, in her further witness statement the claimant disclosed that this latter sum was the figure being charged by Pro Car Limited. Although the claimant spoke to a replacement invoice, none was tendered. From the assessors' report, the estimate submitted by Pro Car Limited was for $116,400.00. That figure was adjusted to $94,700.00 by Mendez, Livingston Inc., the assessors, and seems not to have taken the claimant's excess into consideration.

[5] In an apparent effort to justify the claim, the claimant said that in her understanding, JIIC was unprepared to make a partial settlement to her and therefore made no payment to her. Neither did the defendant make any payment to her for any part of her claim. The claimant disavowed any personal knowledge of the alleged payment by JIIC to AGI and said she gave no authority to AGI to receive any such payment on her behalf. Indeed, AGI never communicated to the claimant that they were waiving either any part of her claim against the defendant or the claimant's responsibility to repay to AGI any sum she "received as a result of the fact they have paid a part of the costs of the repairs of my vehicle."

[6] In any event, the repairs to the vehicle were not done by Pro Car Limited but by Addie's Auto and Repairs at a cost of $127,451.00. Michael Wright, the operator of Addie's Auto and Repairs was called in support of this contention. Through Mr Wright the invoice evidencing the estimated cost of repairs and a 'replacement receipt' were tendered and admitted into evidence as exhibits 11 and 12 respectively, both in the sum of $127,451.00. Under cross-examination Mr Wright agreed that the original estimate was not given to an assessor before it was handed to the claimant, and it appears there was no post repairs assessment as the vehicle was delivered to the claimant's husband as soon as the repairs were completed.

[7] The defendant called Mr Cyril Eldemire, claims officer in the Third Party Unit at JIIC, to bolster the averment of double compensation. Mr Eldemire reiterated the contentions in the Amended Defence concerning the payment made to AGI and confirmed by the claimant's execution of the Own Damage Release and Discharge issued by AGI to JIIC. According to Mr Eldemire, AGI, in furtherance of their subrogation rights, negotiated the settlement of its insurable losses directly with JIIC, including the cost of repairs to the claimant's vehicle. The result of that settlement was the payment to AGI of $84,562.50, which AGI accepted as the entire sum due to it under its subrogation rights. He concluded his witness statement by asserting that should the amount of $106,162.50 being claimed as the cost of repairs be awarded to the claimant, this will result in double compensation.

[8] Under cross-examination Mr Eldemire defined a motor vehicle excess as that portion under the policy which is a prescribed amount, represented by a percentage of the value of the sum insured, which is allotted to the insured. He said it is also known as a deductible. He agreed it was correct to say when settling a claim that an insurance company deducts the amount of the excess before settling its own insured's claim. Having been directed to the paragraphs of his witness statement speaking to the $76,162.50 accepted by the claimant in full and final settlement of all claims, Mr Eldemire at first disagreed that that sum would not have included any amount for her excess. He later agreed that the sum of $76,162.50 did not include any part of the claimant's excess. As far as he was aware JIIC didn't pay any part of the claimant's excess.

[9] In respect of the difference between the sum paid to the claimant by AGI, $76,162.50 and the sum paid by JIIC to AGI, $84,562.00 that is, $8,399.50 Mr Eldemire initially said AGI would have added this as the assessors' fee. He went on to say as far as he was aware AGI did not pay any part of the assessors' fees for the claimant. Further, when he said earlier that the sum of $84,562.00 included the assessors' fees, he was speaking to the claim made by AGI upon JIIC.

Submissions on Property Damage

[10] Learned counsel for the defendant submitted that the claimant is not entitled to the entire sum of $106,162.50 but to the difference between that figure and what was assessed. Counsel pressed home the point by highlighting the absence of evidence that AGI expects any more money at all. In this regard, counsel said the evidence of Mr Eldemire that JIIC paid to AGI the amount of $84,562.50 in full and final satisfaction for its insurable losses remained uncontroverted. It was therefore further submitted that the invoice from Addie's Auto and Repairs be disregarded. It should be disregarded because it was not assessed. Counsel continued, the claimant is entitled to the difference between what she was paid by AGI and her established excess of $30,000.00. At the beginning of his submissions, Mr Johnson observed that the sum being claimed in the claimant's witness statement is greater than that pleaded.

[11] In reply, Mr Charles Piper applied for and obtained an amendment to the Particulars of Claim, substituting $127,451.00 for $106,162.50 as the sum claimed for motor vehicle repairs. Mr Charles Piper submitted that the question is whether the sum being claimed is reasonable. He argued that notwithstanding the absence of an assessor's report, it is the actual loss that is being claimed not an estimate of the loss.

[12] On the question of awarding to the claimant the entire sum being claimed for repairs, counsel submitted that the court will have to consider whether the claimant can be awarded the sum paid to her on the basis that it would have to be refunded to AGI. Counsel conceded that the claimant received $76,162.50 in pursuit of her claim under her policy of insurance. He went on to submit that there was no agreement by which the claimant waived that claim against the defendant or the defendant's insurers. The submission continued, if the sum of $76,162.50 is not allowed, the court will be asked to allow the excess of $30,000.00 in addition to any amount the court finds represents her property damage loss. His concluded the point in this way, if the court allows $127,451.00 for this loss which will include the policy excess, then $76,162.50 will be deducted.

[13] On the question of the claim for loss of use, counsel for the defendant submitted that the only evidence from the claimant in this regard is that she hired a vehicle. There is no supporting evidence, that is, no receipts from the person or company from whom

the vehicle was hired. Neither is there viva voce evidence from the hirer nor that the person or company is no longer in existence. Mr Johnson concluded by saying this item should therefore be disallowed.

[14] In reply, Mr Charles Piper asked the court to examine the claimant's conduct and ask itself whether that conduct is reasonable. Against the background of the production of a multitude of documents to support other aspects of the claim, counsel asked the court to accept the claimant's evidence on the point, particularly since no contrary evidence was led and the claimant was not challenged in cross-examination.

Assessment of Property Damage Claim

[15] I come to the question of what is the claimant's entitlement, what was her loss for which she should be compensated? The guiding principle was enunciated by Lord Wright more than a century ago in the celebrated case ***Owners of Dredger Liesbosch v Owners of Steamship Edison*** [1933] A.C. 449, 459 (***The Liesbosch***):

> *"It is not questioned that when a vessel is lost by collision due to the sole negligence of the wrongdoing vessel the owners of the former vessel are entitled to what is called restitutio in integrum, which means that they should recover such a sum as will place them, so far as can be done by compensation in money, in the same position as if the loss had not been inflicted on them, subject to the rules of law as to remoteness of damage."*

So, the general compensatory aim of the law of tort is to place the claimant in the same position she would have been in if there had been no collision with the defendant's vehicle. To put the discussion in the context of an insurance claim, if the damage to the claimant's vehicle had resulted in its total loss, the measure of damages would have been the replacement cost. The replacement cost would be determined by the market value of the Rav4 at the time and place of loss: ***Re Wilson and Scottish Insurance Corp***. [1902] 2 Ch. 28. In other words, the court would seek to discover the second-hand or resale value of the Rav4, simply because that is what it would have cost the claimant to purchase a similar vehicle.

[16] However, what I am concerned with in the instant case is not a total loss but a partial loss. That is, the damage to the claimant's vehicle was repairable and was in fact

repaired. Since the vehicle was repairable, the measure of damages is the cost of repairs minus any amount by which the insured is better off post repairs, what is called betterment. Further, as was recognized in ***The Liesbosch***, the claimant cannot be restored to the pre-accident position unless she is also compensated for the delay occasioned by having to take the vehicle out of service for repairs. This is the item particularised as loss of use. To this I shall return below.

[17] When the principle of ***The Liesbosch*** is reflected through the lens of an insurance indemnity contract it comes to no more than this, when the insured has suffered a loss covered by the policy the insured shall be fully indemnified but never more than being fully indemnified***: Castellain v Preston and Others*** (1883) 11 Q.B.D. 380 (***Castellain v Preston***). The principle is encapsulated in a time honoured quotation from the judgment of Brett, L.J. at page 386:

> *"The very foundation, in my opinion, of every rule which has been applied to insurance law is this, namely, that the contract of insurance contained in a marine or fire policy is a contract of indemnity, and of indemnity only, and that this contract means that the assured, in case of loss against which the policy has been made, shall be fully indemnified, but shall never be more than fully indemnified. That is the fundamental principle of insurance, and if ever a proposition is brought forward which is at variance with it, that is to say, which either will prevent the assured from obtaining a full indemnity, or which will give to the assured more than a full indemnity, that proposition must certainly be wrong."*

[18] Although Brett, L.J. spoke only of marine and fire policies, all non-life insurance policies are in general contracts of indemnity***: Modern Insurance Law***, John Birds Third Edition at page 8. Therefore, insurance against loss occasioned by damage to a motor vehicle is a contract of indemnity. The fact of the insured being only entitled to full indemnity and no more is reflected in the doctrine of subrogation. Subrogation has been described as a restitutory remedy which allows an insurer to recover from its insured sums the insured received in consequence of the loss insured against, for which the insurer has already compensated the insured. In other words, subrogation operates to prevent the insured being doubly indemnified, that is receiving more than a full indemnity and thereby receiving a profit: ***Castellain v Preston***, *supra*, at page 387. Implicit in the doctrine of subrogation in the predicate that the insurer cannot subrogate

into a right of action until he has paid out the sum insured and indemnified the loss: ***Castellain v Preston***, *supra*, at page 389.

[19] In speaking of full indemnity, it must always be borne in mind that the loss the insured suffered may well have been, and in respect of motor vehicle insurance it is always, more than the sum for which the insured is entitled to be indemnified. That is so because the average motor vehicle insurance policy contains what is known as an excess clause, also called a deductible. The excess clause stipulates that the insured is to bear the first amount of any loss. This is usually expressed either as a fixed amount or as a percentage of the loss: ***Modern Insurance Law***, *supra,* at page 262. The insured is therefore only entitled to be indemnified only to the extent that her loss exceeds the limit fixed as the excess. In the language of Lord Templeman in ***Lord Napier v Hunter and Ettick and Another*** [1993] 2 W.L.R. 42, 47 (***Napier v Hunter***), for this first portion of her loss "the [insured] in fact acts as [her] own insurer."

[20] So, to be fully compensated for her loss, subject to limiting principles such as contributory negligence, the insured is entitled to the insurance money as well as damages from the person responsible for her loss. In this case no issue of contributory negligence was raised. The claimant therefore has a right to be fully compensated to the extent that the claimant is able to prove all claimed consequential losses. By consequential loss I mean those items for which the claimant will not be indemnified by her insurers but flow proximately from the peril suffered.

[21] Since I am in the area of special damages it is advisable to remind myself of the applicable law. The basic position is as was held in ***Lawford Murphy v Luther Mills*** (1976), 14 J.L.R. 119, 121 (***Murphy v Mills***), citing with approval, adopting and adapting the dictum of Lord Goddard, CJ in ***Bonham-Carter v Hyde Park Hotel, Ltd.*** (3) [(1948) 64 T.L.R., at page 178]:

> *"In any action in which the plaintiff seeks to recover special damages the onus is on him to prove his loss strictly. It is not enough for a plaintiff "to write down particulars, and, so to speak throw them at the head of the court, saying: 'This is what I have lost; I ask you to give me these damages'. They have to prove it."*

In ***Murphy v Mills*** the award for loss of earnings was disallowed in the absence of documentary support although the claimant worked with an established company at the material time. However, in ***Omar Young & Michael Meade v June Black*** SCCA #106/2001 delivered on December 19, 2003 (***Meade v Black***), it was recognized that there may be occasions when the proof of the loss will not abide documentary evidence and oral evidence may suffice.

[22] With these principles in mind, I turn my gaze upon the award for the damage to the claimant's vehicle. A good point at which to commence the assessment of the claimant's property damage claim is to ascertain the value of the loss suffered. The assessed property damage loss the claimant suffered was $94,700.00 down from an estimated loss of $116,400.00. The unassessed loss being claimed is $127,451.00, the total cost of the repairs effected by Addie's Auto and Repairs. A comparison of the Assessors' report and the invoice from Addie's Auto and Repairs is rather revealing.

[23] In the opinion of the assessors the impact to the rear of the vehicle resulted in moderate damage to the vehicle. Their description of the damage is as follows: tail door – buckled and deformed/caved in, tail door glass – shattered, spare wheel carrier – twisted and deformed, tail door moulding – twisted and creased, rear panel – kinked and distorted. In the opinion of the assessors, "the estimate is fairly accurate and required some adjustments." Pro Car Limited's estimated cost of replacement for the tailgate was $66,800.00, adjusted to $55,000.00. Addie's Auto and Repairs was $71,000.00.

[24] For the labour cost, both repairers estimated a cost of $3,000.00 for the rear bumper. Mendez, Livingston Inc. adjusted that cost to $1,600.00. Likewise, both repairers gave the identical estimated labour cost of $3,000.00 for work on the rear inner trims and fittings. That was adjusted to $2,000.00. Both also charged $5,000.00 to jack and straighten the flooring, an item disallowed by the assessors. Addie's Auto and Repairs had an additional cost of $8,500.00 to 'jack and straighten rear panel' which does not appear on Pro Car Limited's estimate. Pro Car Limited's estimated cost to refinish the rear panel was panel was adjusted from $4,000.00 to $2,000.00. On the other hand, Addie's Auto and Repairs estimate to repaint the tailgate and tailgate

moulding was $9,500.00. Finally, Addie's Auto and Repairs total labour cost was $38,300.00 while Pro Car Limited's estimated cost was $39,100.00, adjusted to $29,200.00.

[25] So then, the assessed restoration cost for the damage sustained by the claimant is $94,700.00, excluding the policy excess. I have formed the view that this figure excludes the policy excess for three reasons. First, there is no reference to the excess in the assesors' report, which suggests that it was not taken into their consideration. Secondly, the sum recovered by the claimant's insurers under their subrogation rights from the defendant's insurers was declared to exclude any sum for the claimant's excess by Mr Eldemire. Thirdly, Mr Eldemire's evidence that the excess is a deductible which the insurance company makes when settling the claim of its insured. Indeed, this finds congruence with the law as expressed in ***Modern Insurance Law*** (see paragraph 19).

[26] Mr Johnson submitted that the court should only award the difference between $76,162.50, the subrogation figure and the sum claimed $106,162.50. As an aside, there is no explanation why the claimant's insurers settled the claim for $10,038.50 less than the amount of the assessed loss. Returning to the question of the award, that submission was made before the eleventh hour amendment granted to the claimant. Since Mr Johnson is also asking that the invoice from Addie's Auto and Repairs be disregarded, I understand him to be saying the claimant's further entitlement is limited to her excess of $30,000.00. If that course is not adopted, the award would be increased by the difference represented by the invoice from Addie's Auto and Repairs, that is, $51,288.50 a difference of $21,288.50.

[27] The question is, can I ignore the invoice which the claimant tendered through Michael Wright, operator of Addie's Auto and Repairs. Mr Johnson wants the invoice ignored on the basis that it lacks the imprimatur of any assessor. Mr Piper wants it honoured because it represents the claimant's actual loss. What then is the role of the motor vehicle assessor in the context of an insurance claim? Typically these persons are employed by the insurer and not the insured. In the case at bar there is the irresistible inference that the assessors were employed by AGI as the difference

between what they paid to the claimant and the sum recovered from JIIC is identical to the sum being claimed as assessors' fees. That is, $8,400.00. More on the assessors' fees anon. Generally, the motor vehicle assessor is responsible for appraising the level and extent of the damage to a motor vehicle arising out of a motor vehicle accident. The purpose of this assessment is to determine the extent of the loss occasioned. That is to say, the assessor makes a determination whether the motor vehicle can be repaired and if so the work needed and the length of time the repairs should take. This assessment will of necessity contain estimates of the replacement parts and labour cost.

[28] It seems therefore that a motor vehicle assessor is cast in the mould of a loss adjuster. That is, someone contracted to assess the value of an insurance claim. The motor vehicle assessor will seek to clarify the claim in terms of quantity, description and pricing. The rationale for the services of the motor vehicle assessor appears to be the tendency of some claimants to inflate their claims in the belief that insurers will never fully indemnify them. In fine, the motor vehicle assessor's duty appears to be to ensure fairness. In other words, the motor vehicle assessor is he who wields the sword of Solomon, cutting through the tangled web of the claim to ensure no fraud is perpetrated upon the insurer and simultaneously guaranteeing as it were, full indemnity for the insured.

[29] It is clear that the motor vehicle assessor brings clarity to the claims procedure, the absence of which could well send the insurance industry into a tailspin. It is not melodramatic to say our modern society in which the motor vehicle has become an indispensably ubiquitous carriage for social, domestic and commercial purposes would teeter on the brink of collapse without a fully functional motor insurance claims procedure. It seems then that the predicate assessment of repairers' estimate is an important safeguard in the claims process, performed by the motor vehicle assessor in his gatekeeper role in the motor vehicle claims process. It is therefore no small matter to allow a claim to proceed without having been assessed. In my opinion, that course should never be adopted without clear and compelling reason or reasons to do so.

[30] In the instant case the claimant's reason for changing her repairers is the insufficiency of the amount received from her insurers viz-a-viz the estimate prepared by Pro Car Limited. That is as far as it went. I do not understand this to have been offered as an explanation for going ahead with a repairer whose estimate had not been subjected to the assessor's assay. So, no explanation, let alone an insufficient explanation, was given for avoiding the assessment aspect of the claims process. As I tried to show (paragraphs 23-24), the invoice from Addie's Auto and Repairs includes items adjusted and, in one case disallowed by the assessors on the Pro Car estimate. That, at the very least, puts in doubt the veracity of the sums therein claimed. Consequently, I am in agreement with Mr Johnson that the invoice from Addie's Auto and Repairs should not feature in the assessment of the claimant's property damage claim. Further, to allow the claimant in this case to bypass the assessment aspect of the claims procedure would be turning the industry upon its head and opening the flood gates to a deluge of unassessed claims. The claimant's property damage claim is therefore assessed on the basis of the assessed repairer's estimate: $76,162.50 in addition to the excess of $30,000.00.

[31] Although the claimant did not make use of the assessed repairers' estimate, there is a claim for the assessors' fees. The claimant gave no evidence to suggest that she paid the assessors' fees. While she spoke to her vehicle being assessed in early January, 2010, she did not say that she paid the assessors. Neither did she tender any receipt evidencing payment. On the other hand, Mr Eldemire gave conflicting evidence on the point. First, he said AGI would have added the assessors' fees to the sum paid to the claimant to bring it to the sum actually received from JIIC. For ease of reference, $76,162.50 paid to the claimant plus $8,400.00 paid to the assessors equals $84,562.50, the subrogation figure. Mr Eldemire muddied the water when he said later in cross-examination that as far as he was aware AGI did not pay any part of the assessors' fees for Miss Myrie.

[32] With all due respect to Mr Eldemire the latter answer is incomprehensible. That the claimant's insurers deducted the identical figure from the recovered sum before paying over the remainder to the claimant removes all doubts about the assessors' fees.

It is patently clear that AGI was reimbursing itself for having paid the assessors' fees. No other explanation is commends itself to me. And since the claimant's insurers were self reimbursing then it cannot be that the claimant herself had expended this sum for the identical purpose. I am therefore firmly of the view that Mr Eldemire's first response is the correct position. That being the case, the assessors' fees do not properly form a part of the claim and is accordingly denied.

[33] It is convenient at this point to return to the item of loss of use (see paragraph 16). The sum claimed is $28,000.00, $4,000.00 per day for a period of seven (7) days. There is no question of this being recoverable as a head of special damages. The only question is the proof thereof. There is no proof. The question for me is whether, in all the circumstances of this case, the letter of ***Murphy v Mills,*** *supra* or the spirit of ***Meade v Black***, *supra* should apply. The spirit of ***Meade v Black***, *supra*, is given pre-eminence over ***Murphy v Mills***, *supra* in cases where the relevant arrangement or activity is informal and the sum being claimed is relatively small.

[34] In the case at bar there is no direct evidence to say if the rental arrangement was formal or informal. However, the obtaining of a receipt is strongly suggestive of a formal commercial arrangement. The claimant said she submitted a receipt to her insurers. No evidence was given to explain why it was not retrieved from the insurers. And, if it could not be retrieved from them, for whatever reason, whether any effort was made to obtain a copy from whosoever or whatever entity issued the original. I am therefore in sympathy with the submissions of Mr Johnson. Although the sum being claimed is small, both within and without the context of the claim, its formal commercial genotype dictates the application of the letter of ***Murphy v Mills***, *supra*. Accordingly, this item is disallowed.

[35] Finally, there remains the question whether the award for property damage should include the sums already paid to the claimant by her insurers. Mr Charles Piper expressed it this way the court will have to consider whether the claimant can be awarded the sum paid to the claimant on the basis that it would have to be refunded to AGI. There is authority of some vintage to support the position being pursued by the claimant namely, ***Commercial Union Assurance Company v Lister*** (1874) 9

L.R.Ch.App. 483. In that case the owner of a building brought an action to recover damages against the corporation for the destruction of the building by fire. He had insured the building with several insurance companies but not for its full value. The insurance companies contended that the insured was not entitled to be the master of the action, among other things. Sir G. Jessel, M.R. disagreed and held further, at page 484:

> *"He is entitled, and is bound, and has agreed, to bring the action for the whole loss to himself, including that part of the loss against which his indemnified by the insurance companies."*

That decision was upheld on appeal.

[36] In the course of delivering that judgment Sir G. Jessel, M.R. took it as indisputable the following proposition. That is, if the insured obtained from the corporation an amount greater than the difference between the sum received from the insurance companies and the total of the loss, the insured becomes a trustee for the insurance companies to the tune of the excess. Indeed, that is the position of Mr Charles Piper. However, this case is distinguishable from ***Commercial Union Assurance Company v Lister***, *supra*.

[37] In ***Commercial Union Assurance Company v Lister***, *supra*, the motion was between the insured and his insurers and how the sum recovered from the guilty party should be apportioned. There was no third party insurer involved and consequently no question of recovery from the third party's insurers as in the case at bar. The claimant's insurers have already exercised their subrogation rights and recovered the insured loss from the defendant/third party insurers. Therefore, there are no outstanding issues of recovery concerning the amount by which the claimant was indemnified between the claimant and her insurers.

[38] To put it bluntly, AGI was required to indemnify the claimant in the amount of $76,162.50. Whether that amount was paid out under the claimant's policy and then recovered from JIIC or first recovered from JIIC then paid to the claimant, AGI was not exposed under the contract of insurance and at this point is not entitled to recover any

further sums. Unless, of course, the question being considered was a surplus over the claimant's total loss. There is no question of a surplus in the instant case.

[39] There is therefore no useful purpose to be served in making an award to the claimant which includes the sum already paid to her by AGI. If the claimant acts honourably and accounts to AGI for an additional $76,162.50 AGI would have one of two options; either to say to the claimant we have already recovered so you keep the money or to retain it. In that event, either AGI or the claimant would stand to benefit from a windfall at the expense of the defendant. And neither is lawfully entitled to make a profit under the contract of insurance. The award will therefore be made for only the claimant's proved uninsured losses. I now turn my attention to the claimant's personal injury claim.

Personal Injury Claim

[40] The claimant particularized her resultant injuries as follows:

(i) Cervical Myofacial Pain Syndrome
(ii) Sacro-Iliac Joint Pathology
(iii) Neck pain and lower back pain
(iv) Whiplash Syndrome

Under prognosis and treatment, the averment was to this effect, "the claimant has undergone physiotherapy treatment. She has had to have a complete lifestyle change to avoid aggravating the injury and to cope with its effects." The only cross averment in this regard appears at paragraph 11 of the Amended Defence. I quote it *in extenso*:

> *"As regards the "Physiotherapy treatment NSA Medical Centre, St. John'sAntigua and Cost of Medical Report" which are itemized in the particulars of special damages and designated in Eastern Caribbean currency, the Defendant says that those sums are not recoverable as the Claimant has failed to state in the Claim Form or particulars of Claim the equivalent sum in Jamaican currency and the date and basis on which the calculation was made."*

[41] The claimant describes herself as a Communications Consultant. Some of her work is done in office. However, a great deal of travelling is involved as well, inside and outside of Jamaica. At the time of the collision the claimant was home for Christmas from working with a client in Antigua. Although she was feeling pain, the press of the

Christmas holidays made it difficult for the claimant to get an appointment to see a doctor. She returned to Antigua on the 4th January, 2010 to continue performance of her contract. At that time she was feeling pain in her upper and lower back.

[42] The claimant elaborated on the lifestyle changes to which she averred in her statement of case, in her witness statement. Her carrying computer bag had to be replaced with one that rolls. The heaviest thing she is now permitted to lift is her dinner plate. No longer can she walk long distances and traversing a gradient is particularly painful. She experiences pain and discomfort in ascending and descending stairs. To get around airports a wheelchair is now required. Whenever and wherever she is using her laptop computer, it has to be propped up. And no longer can she recline in bed while watching the television, she has to sit up.

[43] The claimant saw Dr Edgar Abbott in Jamaica thrice. Dr Abbott is a Consultant Orthopaedic Surgeon. According to the claimant, Dr Abbott's first examination was in February, 2010. In Dr Abbott's interim report dated June 7, 2010, the claimant's age is stated as 63 years. An examination of her neck revealed a full range of motion. There was pain in the trapezius with rotation right and left flexion, with associated pain at the base of the neck. Extension was pain-free. Spurling's test was negative. Reflexes were normal throughout the upper and lower limbs, power grade 5/5.

[44] Dr Abbott's assessment was:

1. Cervical Myofascial Pain Syndrome – Mild
2. Bilateral Sacro-Iliitis
3. Bilateral Osteoarthritis of the Knees.

The claimant was managed with analgesia: Arcoxia; Neurontin and Voltaren Emugel and referred for physical theraphy. When he next saw her on the 5th February, 2010, the claimant still complained of neck and lower back pain. Dr Abbott's examination revealed a continuation of cervical pain with range of motion along with Bilateral Faber

positive. His assessment was unchanged as was his recommendation for continued physical theraphy.

[45] Physical therapy was conducted by Dr Patrick Matthews at NSA Medical Surgical Rehab Centre St. John's Antigua. In his report dated 19th October 2009, (an error with which no one took issue) Dr Matthews said "Ms Pauline Stone-Myrie has suffered whiplash trauma and is undergoing physiotherapy/rehabilitation treatment." The estimated period of treatment was twelve (12) weeks. The initial phase for rehabilitation was two (2) days per week at a cost of EC$110.00 per session.

[46] Dr Abbott's final medical report dated March 30, 2011 is reproduced below with only cosmetic abbreviation and no redaction:

> ***"Complaints***
>
> *"At last review Mrs. Stone-Myrie had a few complaints, she stated that she had completed Physical Therapy in Antigua and had an Ergonomic Assessment and was advised on proper work environment. She stated that she was no longer having any pain. She also stated that based on the requisite lifestyle changes that she was no longer having any weakness or numbness in the Upper Limbs.*
>
> *"There was no history of Cauda Equina Syndrome or any Long Tract Signs suggestive of any Acute or Chronic Spinal Cord Compression (there was no history of bowel or bladder incontinence). There was a history given of having been taking Arcoxia for the past year on somewhat a continuous basis, which may have led to an alteration in the Renal Function indices as discovered by her Personal Physician and as such the medication was stopped with a return to normal indicies (sic).*
>
> *"Mrs. Stone-Myrie states that she no longer requires a wheel chair to travel, as she had been doing throughout the duration of her symptoms.*
>
> ***"Physical Findings***
>
> *"The patient was Obese. She had a full Range of Motion of the Cervical Spine although extension limited by a 'Buffalo Hump'. The excursion of the Cervical Spine was pain free without Radicular Pain and the Spurlings test was negative. The Muscle Power in her Upper Limbs were (sic) Grade 5/5. The Reflexes were normal throughout with Normal Plantar Reflexes. The Straight Leg Raise Test and the FABER Test were both Grossly Normal.*

"Assessment

Cervical Myofascial Pain Syndrome resolved. Permanent Disability at the time of Assessment (MMI) 0% Whole Person."

[47] The claimant is at odds with Dr. Abbott. In her witness statement dated 16th October, 2012, the claimant expressed herself in this way:

> *"Despite the contents of Dr. Abbott's report dated March 30, 2011 I continue to feel severe back pains when I have to take long flights and walk for long distances as occurred on a recent trip to New York in the United States of America with a client. I follow the advice of my Physiotherapist, Dr. Patrick Matthews but despite this, when I am required to perform strenuous duties for my clients I cannot avoid the effects of it on my body. I simply continue to feel pain that did not exist before the collision. I still attend Dr. Shane Bryan on a weekly basis for chiropractic and back treatment."*

In cross-examination the claimant said as far as she knew, it was correct to say Dr. Abbott continues to practice in Jamaica.

Submissions on General Damages

[48] In his address, Mr Johnson underlined the conflict between the claimant's allegation of continuing experience of pain and Dr. Abbott's final medical report. Mr Johnson submitted that the claimant is suffered soft tissue injuries of a mild nature. Accordingly, two cases were cited for my guidance***: Peter Marshall v Carlton Cole et al*** Khan's volume 6 at page 109, with an updated award of $750,000.00 using the Consumer Price Index (CPI) for April 2014 that is, 213.6; ***Lascelles Allen v Ameco Caribbean Incorporated et al*** delivered 7th January, 2011 which updates to $750,000.00, using the same CPI. Counsel said that an award of $850,000.00 would be reasonable in this case.

[49] In ***Peter Marshall v Carlton Cole et al***, *supra*, assessed on the 17th October, 2006, the claimant sustained moderate whiplash, sprain, swollen and tender left wrist and left hand and moderate lower back pain and spasm. In addition to two (2) weeks sick leave, the claimant was given analgesics and cataflam injections. He was treated

over sixteen (16) medical care weeks with no residual pain or suffering at the time of being discharged. For General Damages he received an award of $350,000.00.

[50] ***Lascelles Allen v Ameco Caribbean Incorporated et al***, *supra* was a case in which ***Peter Marshall v Carlton Cole et al*** was cited. The claimant in that case suffered injuries to his side, neck and back. He was diagnosed with whiplash injury and was expected to have complete resolution of the injury, though relatively trivial trauma can cause a recurrence of his symptoms. Within four (4) months of the accident he seemed to have fully recovered. He underwent sessions of physical therapy. In addition to the whiplash injury he complained of occasional numbness in the left hand but had no permanent partial disability (PPD). He was awarded $600,000.00.

[51] In response to the submission of a conflict between the claimant's evidence and the report of Dr. Abbott, Mr Charles Piper argued that the medical reports indicate the position when the claimant was last seen by the doctor. In any event, Mr Piper urged, the court has never looked at personal injury without a look at the claimant's evidence in regards to the claimant's own injury and treatment. Mr Piper continued, unless the witness was challenged on these aspects of her testimony in a manner to suggest that she was being untruthful, and there is evidence which convinces the court that she is being untruthful, then this evidence ought properly to be taken into consideration.

[52] Turning his attention to the cases cited by Mr Johnson, Mr Piper took them in the order in which they were cited. In ***Peter Marshall v Carlton Cole et al*** the treatment was completed between 14th August, 2001 and 20th December, 2001. Further, that claimant had no residual pain or suffering. In the instant case the claimant's treatment lasted from January 2010 to March 2011. Additionally, her evidence is that she is currently being treated for back injury.

[53] Counsel sought to distinguish ***Lascelles Allen v Ameco Caribbean Incorporated et al*** on the basis of that claimant's full recovery within four (4) months of the accident. In Mr Piper's submission, the evidence in the case at bar clearly indicates more serious injuries than both cases cited by the defence. Consequently, in his opinion ***St. Helen Gordon and Another v Royland Mckenzie*** Khan's volume 5 at page 152 as

more apposite. In that case the award for General Damages was $400,000.00 updated to $1,766,384.12 using the April 2014 CPI. Counsel concluded that this award should be reduced to reflect the absence of a PPD in the instant case, resulting in an award of $1,500,000.00.

[54] The case of ***St. Helen Gordon and Another v Royland Mckenzie*** was also one in which the claimant suffered whiplash injury with pain centred in the neck and shoulder. There were no fractures in the cervical spine and shoulder. The claim arose out of a motor vehicle accident which occurred on the 11th November, 1995. The claimant was a bank officer who was right handed. She visited her doctor on four (4) occasions who recommended physical therapy and prescribed painkillers.

[55] Initially her range of movement of the neck and right shoulder decreased by 50% but on her last visit, on the 18th May, 1998 there was 80% improvement in movement. However, she still complained of pain and stiffness in her neck. An examination revealed mild tenderness over the base of her neck and across her right shoulder. The doctor thought that the whiplash injury was taking a long time to be resolved and that her whole person disability was 3%. The doctor thought that was likely to improve over time but slowly.

[56] The claimant could not lift the children in her care and had to use her left hand to do a number of chores. She had difficulty driving a car as in reversing she could not turn her neck. However, she resumed driving after some while. Her daily chores were also curtailed. She had difficulty sleeping on her right side.

Assessment of Personal Injury

[57] There is therefore a chasm of $650,000.00 between what each side thinks is a just award in this case. Is there a judicial consensus on what the award should be and what are the principles by which I should be guided in arriving at the award? Before attempting to answer those questions I will seek to characterize the claimant's injury. The claimant gave the most pellucid of descriptions of the effects of the collision upon her person. She said when her car was hit she was wearing her seat belt. The impact

pushed her forward in the belt and the belt brought her back backward into the seat. Both the forward and backward motions were severe.

[58] Let me now juxtapose that description with an extract from the ***Attorneys' Dictionary of Medicine and Word Finder*** by J.E. Schmidt, M.D. dealing with whiplash injury of the neck:

> *"An injury of the neck sustained when the head is suddenly and violently hyperextended or thrown backward, then flexed or thrown forward. Such injuries generally occur in automobile accidents when the car is rammed from the rear. The sudden thrust of the car pitches the body, which is supported by the seat and especially by the back of the seat, in the same direction that is forward. The head, however, which is generally not supported by the back of the seat, lags behind and is thus, in effect, thrown backwards when the forward thrust of the car is dissipated, the head generally rebounds by bending violently forward. The injury may result in displacement or fracture of the cervical (neck) vertebrae, protrusion of an intervertubrae disk, damage to the cervical nerves, concussion etc."*

It is clear that the description of the motion the claimant gave is the classic matrix for a whiplash injury. The diagnosis in Antigua was in fact 'Whiplash Syndrome'. However, this may be accompanied by other injuries.

[59] Dr. Abbott confirmed in his interim medical report that Mrs. Stone-Myrie sustained mild tissue injury in the region of the neck; that is, injury to the tissue or membrane covering the cervical spine. Additionally, there was bilateral sacro-iliitis. In other words, the integrity of the sacroiliac joint – the joint which the sacrum forms with the hip bone, on either side – was compromised. I therefore understand item three in the particulars of injury, neck pain and lower back pain, to be a compendious and perhaps superfluous statement of the claimant's injuries. Although bilateral osteoarthritis of the knees appears in the interim medical report, it appears to be part of the claimant's medical history and, in any event, was not among her pleaded injuries.

[60] It appears the claimant was seen by Dr. Abbott on four occasions, first in early February, 2010. Her initial complaint was pain in the neck across the shoulders and arms bilaterally which was muscular in nature. The claimant said she next had a major

consultation, which is described in the interim medical report as follow-up, on the 5th February, 2010. The doctor says in that report that she still complained of neck and lower back pain. His assessment was unchanged. Her next visit was on the 26th February, 2010, then lastly on the 2nd February, 2011. Therefore, although Dr. Abbott's final medical report is dated March 30, 2011, the date of the last visit is the relevant date.

[61] So, as at the 2nd February, 2011 the claimant's whiplash injury, cervical myofascial pain syndrome, had been resolved with no resultant disability. Not only did the claimant report that she was no longer having any pain, the subjective aspect, Dr. Abbott's tests confirmed this, the objectively. There was a full range of motion of the cervical spine with extension limited by the claimant's own physical trait, a 'Buffalo Hump'. As I understand it, the Spurling's test, used to assess nerve root pain or what the doctor described as radicular pain, would have revealed underlining pain issues in the area.

[62] Adverting now to the lower spine, there was no history of Cauda Equina Syndrome and both the straight leg and FABER tests were grossly normal. What is the Cauda Equina Syndrome? According to ***The Merck Manual of Medical Information*** second Home Edition:

> *"The bundle of nerves extending from the bottom of the spinal cord is called the cauda equina because it resembles a horse's tail. The cauda equina may be compressed by a ruptured or herniated disk, a tumor, an abscess, damage due to an injury, or swelling due to inflammation (as in ankylosing spondylitis). The symptoms that result are called the cauda equina syndrome. Pain is felt in the lower back, but sensation is reduced in the area of the body that would come in contact with a saddle (a condition called saddle anesthesia), including the buttocks, thighs, bladder, and rectum. Other symptoms include erectile dysfunction (impotence), urinary incontinence at night, and loss of reflexes in the ankle. If compression is great enough, bladder and bowel function may be lost. People who have this syndrome require immediate medical attention. The disorder causing the compression is treated, sometimes with surgery and corticosteroids may be given to reduce swelling."*

[63] And what of the FABER test. FABER stands for Flexion, Abduction and External Rotation. When these three motions are combined they result in a clinical pain provocation test to find pathologies at the hip, lumbar and sacroiliac region. The FABER Test is a passive screening tool for musculoskeletal pathologies in the middle region of the body. The combination of the FABER test and the absence of Cauda Equina Syndrome seems conclusive medical proof that on her last visit to the Consultant Orthopaedic Surgeon the claimant had made a full recovery from the injury to her lower spine.

[64] What then of the claimant's insistence, and her counsel's reliance thereon, that post 2nd February, 2011 she had unresolved issues resulting in the continuance of "severe back pains" when she gave her witness statement on 16th October, 2012, approximately one year and eight months later? This is a pertinent question as the answer to it will of necessity affect the quantum of general damages awarded to the claimant. It is therefore convenient to remind myself of the guiding principles at this point.

[65] Since we are still in the area of tortious liability, when it comes to principles the bedrock is the same as for the claimant's property damage claim namely, *restitutio in integrum*. That is, so far as money can do it the claimant must be restored to the position she would have been in if the tort had not been committed. The compensation contemplated in the area of personal injury is best encapsulated in the judgment of Lord Reid in ***H. West & Son Ltd. And Another v Shephard*** [1964] A.C. 326,341:

> *"Unless I am prevented by authority I would think that the ordinary man is, after the first few months, far less concerned about his physical injury than about the dislocation of his normal life. So I would think that compensation should be based much less on the nature of the injuries than on the extent of the injured man's consequential difficulties in his daily life."*

What the claimant is being compensated for is "the extent to which the injury will prevent [her] from living a full and normal life and for what [she] will suffer from being unable to do so," per Lord Reid, *ibid.*

[66] The dictum of Lord Reid was applied by the local Court of Appeal in ***Beverley Dryden v Winston Layne*** SCCA 44/87 delivered 12th June, 1989. So, in arriving at a just award, I should take into consideration the fact of the physical injury and the consequential difficulties it poses, weighting the latter over the former. Furthermore, in seeking to discover the judicial consensus of awards, as far as possible, I am to compare like injuries and arrive at an award that is not inflated. As Campbell J.A. said in ***Beverley Dryden v Winston Layne***, *supra*:

> *"personal injury awards should be reasonable and assessed with moderation and that so far as possible comparable injuries should be compensated by comparable awards."*

[67] In seeking to compare personal injury cases, the pitfall of attempting to standardise damages must be scrupulously avoided. The decided cases are a mere guide to avoid making "a wholly erroneous estimate of the damage suffered" or awarding either an inordinately low or inordinately high sum. In fine, the damages awarded should be moderate and just. Birkett L.J. summed up the position with admirable clarity in ***Bird v Cocking & Sons, Ltd.*** [1951] 2 T.L.R. 1263:

> *"The assessment of damages in cases of personal injuries is, perhaps, one of the most difficult tasks which a judge has to perform ... The task is so difficult because the elements which must be considered in forming the assessment in any given case vary so infinitely from other cases that there can be no fixed and unalterable standard for assessing the amounts for those particular elements. Although there is no fixed and unalterable standard, the courts have been making these assessments over many years, and I think they do form some guide to the kind of figure which is appropriate to the facts of any particular case, it being for the judge, ... to consider the special facts in each case; ... one case cannot really be compared with another. The only thing that can be done is to show how other cases may be a guide, and when, therefore, a particular matter comes for review one of the questions is, how does this accord with the general run of assessments made over the years in comparable cases?"*

This comparative approach is in essence a gathering, or more precisely an unveiling, of the general consensus of opinion as to what the claimant in contemporary society should be awarded: ***Rushton v National Coal Board*** [1953] 1 All ER 314,317.

[68] Before I can approach the task of comparative awards, I must return to the question of the impact of the injuries upon the claimant, Lord Reid's synonymous encapsulations, "dislocation of his normal life" and "consequential difficulties". Specifically, should I accept that the claimant continued to experience pain whenever she took long flights and walks subsequent to her last examination by Dr. Abbott, and in the same breath reject the conclusions of Dr. Abbott? Be it remembered that the claimant had the option of obtaining an updated medical from Dr. Abbott as she admitted under cross-examination that the doctor continued in practice, as far as she was aware.

[69] Were I to reject Dr. Abbott it would have to be on the following two grounds. First, when the doctor said the claimant told him she was no longer experiencing pain he was either mistaken or being untruthful. Save for the aspersion cast by the insistence on the continuation of pain, the claimant never denied having told Dr. Abbott that her pain issues had been resolved. Further, the doctor was not afforded the opportunity of a retraction, if retraction became necessary, either through a fresh examination of the claimant or attendance at the assessment hearing and being subjected to cross-examination.

[70] Secondly, Dr. Abbott's confirmatory Spurling's and FABER Tests were either inadequate or inappropriate for the purpose. Without the aid of medical opinion which contradicts Dr. Abbott, it would be quite the quintessential quantum leap outside of a judge's education and training to arrive at such a conclusion. In my opinion, such a conclusion would be tantamount to reducing the consultant orthopaedic surgeon to little more than a charlatan, at best, and that would be an extraordinary position. On the contrary, I would venture to opine that at the level of consultant the orthopaedic surgeon would at least fall within the contours of the savant rather than the charlatan.

[71] So, on neither ground can I properly reject the medical evidence of Dr. Abbott. In the same vein, it is the claimant's evidence that must be rejected. With all due deference to learned counsel for the claimant, his submission misses the mark. Since the conflict arises on the claimant's case, it was a matter for the claimant to resolve. It amounts to a reversal of the burden of proof to leave the conflict standing like a

monolith and then say unless the claimant was challenged on it, it ought to be accepted. The nature of the conflict brought the claimant's credibility on the issue into sharp focus as it wasn't just the doctor's tests which pronounced her pain free but her own admission. Consequently, either a retraction from Dr. Abbott or contrary medical opinion to bolster the claimant's assertion was required. In the absence of any such evidence I am compelled to prefer the evidence of Dr. Abbott.

[72] Therefore, the claimant experienced pain from the date of the accident, the 24th December, 2009, to the date of her last visit with Dr. Abbott, 2nd February, 2011. That is, just over thirteen (13) months post accident. Additionally, in sum, the claimant suffered soft tissue injury with pain in the upper and lower back with 0% permanent disability of the whole person. Her treatment was analgesia and physical therapy over twelve (12) weeks. She was seen by the consultant orthopaedic surgeon on three occasions. Her use of the wheelchair had been discontinued prior to 2nd February, 2011, notwithstanding the use of the present tense when her witness statement was certified on the 16th October, 2012. There were lifestyle changes which, save for the restriction on lifting heavy objects, did not result in the ultimate abandonment of any previously performed social, domestic or industrial activity, only in the method of performance.

[73] What therefore should be the award in the instant case? I agree with Mr Piper that the claimants in both ***Lascelles Allen and Peter Marshall*** suffered less serious injuries, if their recovery period is to be a sufficient yardstick. On the other hand ***Helen Gordon and Another v Royland Mckenzie*** is palpably more serious than the case at bar. in the instant case there is no decrease in the range of movement of the neck with the corollary of incapacitation in being able to drive. Neither has Mrs. Stone-Myrie suffered any loss of use of a dominant member of her body. Like the claimant in ***Helen Gordon and Another***, Mrs. Stone-Myrie has suffered a deficit in her ability to lift weight. After nearly three (3) years that claimant still complained of pain and stiffness in her neck while Mrs. Stone-Myrie reported a cessation of pain after approximately thirteen (13) months. Having considered the cases cited and accounting for the differences between them and case before me, applying the principles referred to above, I have come to the view that a just award is $1,000,000.00.

Foreign Currency Expenses

[74] As previously stated, the claimant worked in Antigua in the Eastern Caribbean at the material time. Consequently, a part of her claim, namely for physiotherapy services, is in the currency of the Eastern Caribbean. Mr Johnson has submitted that this part of the claim should be disallowed as there is no evidence of the exchange rate as required by the ***Civil Procedure Rules*** (***CPR***), notwithstanding it having been pleaded. Mr Piper countered, in fine, that since the defence failed to join the issue in the pleadings the claimant was not obliged to lead any evidence in relation thereto.

[75] ***CPR*** 8.7 governs what must be included in a claim form and rule 8.7(5) speaks specifically to the issue at hand. Rule 8.7(5) reads:

> *"A claimant may make a claim for a specified sum of money in a foreign currency but must state the equivalent sum in Jamaican currency and the date and basis on which the calculation was made."*

Undoubtedly this is what the learned authors of ***Harrisons' Assessment of Damages*** (2nd Edition) at page 3, had in mind when they wrote, "where sums of money for expenses and claims are expressed in foreign currency they ought to be converted into Jamaican dollars at the assessment stage."

[76] As Mr Piper submitted, this is precisely what the claimant did. The question is, was the claimant obliged to do more, that is, lead evidence? I am in full agreement with Mr Piper that no such duty is placed on the claimant, there being no counter-averment by the defence. In any event, this was an agreed item of special damages. Mr Piper contended it would be anomalous, I would say incongruous, for no award to be made in respect of this item since it was an agreed expenditure. Incongruous not only because the item was agreed but also there was no challenge to the pleaded rate of exchange. Since no issue was taken in the statement of case it would be a waste of everybody's time to seek to establish by evidence that which called for no further proof.

[77] In consequence of the foregoing I make the following awards:

(i) Special Damages - $360,315.18 less $8,400 (assessors' report), $106,162.50 (cost of motor vehicle repairs) and $28,000.00 (loss of use) plus $30,000.00

(policy excess) = $247,752.18 with interest at 3% from the 24th December, 2009 to the 15th September, 2014.

(ii) General Damages $1m, with interest at 3% from the 16th November, 2011 to the 15th September, 2014.

Costs to be agreed or taxed.