IN THE SUPREME COURT OF BELIZE A.D. 2014
(CIVIL)

CLAIM NO. 587 of 2014

BETWEEN

RF&G INSURANCE COMPANY LTD.	**Claimant**
AND	
JODY RENEAU	**Defendant/Ancillary Claimant**
DINSDALE THOMPSON	**Ancillary Defendant**

Before: **The Honourable Madame Justice Griffith**
Date of hearing: **16th December, 2015; 11th January (on Written Submissions)**
Appearances: **Mr. Jaraad Ysaguirre, Barrow & Co. for the Claimant, Ms. Julie Ann Ellis-Bradley, Bradley Ellis & Co for the Defendant/Ancillary Claimant and Mrs. Peta Gaye Bradley for the Ancillary Defendant.**

DECISION

Liability for Accident – Proof of Negligence – Subrogation by Insurer – Right of Insurer to bring action in own name - Assignment of Rights of Insured

Introduction

1. The Claimant RF&G Insurance Company Ltd has brought an action for damages ('the claim') against the Defendant, Jody Reneau, arising out of a traffic accident which occurred on the 23rd July, 2010. The Defendant Mr. Reneau has denied liability for the accident and in turn joined Mr. Dinsdale Thompson as ancillary defendant, alleging that the accident was caused by Mr. Thompson (the 'ancillary claim'). The claim is for the sum of eight thousand six hundred and sixty five dollars and seventy three cents ($8,665.73) plus costs, being damages for the cost of repair to the vehicle of the Claimant's insured, Mr. Radford Baizer.

2. In order to bring this claim in its own name, the Claimant relies upon a term of the insurance policy with its insured, as having created an assignment of their insured's rights against third parties, in the event of damage or loss to the insured vehicle. The Defendant brought the ancillary claim against Mr. Thompson on the basis that the latter was the driver of the insured's vehicle at the time of the accident and this claim is for special damages in the sum of four thousand six hundred and fifty dollars ($4,650) and general damages for pain and suffering and loss of amenities as a result of injury sustained in the accident.

Issues

3. The issues which arise for determination in this claim are as follows:-
   (i) Was the Claimant, as insurer, entitled to bring proceedings in its own name to recover the loss under its policy with its insured?
   (ii) Who caused the accident?
   (iii) What damages have been proven against the person responsible for the accident?

Analysis of Issues

Issue (i) – The right of the Insurer to bring proceedings in its own name

4. The claimant compensated its insured Radford Baizer pursuant to the terms of its written policy of insurance which was effective at the time of the accident and now bring this action in their own name, to recover from the Defendant, the amount paid out under the policy. Consideration of this issue commences with the Claimant's statement of claim which firstly pleaded that pursuant to a contract of insurance, the Claimant paid their insured for damage done to his vehicle. It was thereafter pleaded (paragraph 2 of the statement of claim) that:-

> *"It was a term of the policy that the Claimant would, in consideration for indemnifying the insured, be entitled to all rights of the insured and to prosecute in the Claimant's name for its own benefit, any claim for indemnity or damage or otherwise."*

The term of the policy referred to is Condition 5 which provides as follows:-

> *"No admission offer promise or payment shall be made by or on behalf of the Insured without the written consent of the Company which shall be entitled if it so desires to take over and conduct in its name the defense or settlement of any claim or to prosecute in its name for its own benefit any claim for indemnity or damages or otherwise and shall have full discretion in the conduct of any proceedings and in the settlement of any claim and the Insured shall give such information and assistance as the Company may require."*

5. Learned Counsel for the Defendant contended that this clause, which was pleaded as the basis of the Claimant having brought the proceedings in its own name, did not entitle them to do so, with the effect that the Claimant had no standing to bring the claim. In very helpful written submissions on this issue, learned counsel for the Defendant firstly examined the doctrine of subrogation and its operation in insurance law to demonstrate the failure of the Claimant to properly place the proceedings before the Court. With liberal reliance on MacGillvary on Insurance Law[1] learned counsel for the Defendant illustrated the nature of the doctrine of subrogation as taking two forms in relation to an insurer who has satisfied a claim in favour of an insured, namely – (i) to entitle the insurer to the benefit of all rights or remedies available to the insured against a third party responsible for the loss or damage; or (ii) to entitle the insurer to claim from the insured, any benefit received by the insured as compensation for his loss or damage.
6. The right to take proceedings against the third party responsible for the loss of the insured, submitted learned counsel for the Defendant, could however only be exercised by the insurer in the name of the insured. The insured has no right to bring an action against a third party in its own name, as the cause of action remains that of the insured. Learned counsel for the Defendant cited **Smith (Plant Hire) v Mainwaring**[2] in support of this submission. Following from the principle that the insurer in exercise of the doctrine of subrogation, is only entitled to bring proceedings in the name of the insured, is the exception in the case of assignment.

[1] 11th Ed. Cap. 22 paras 22-001 – 22-012; paras 22-034 – 22-053
[2] 1986 BCLC 342

A valid legal assignment of the insured's cause of action to the insurer is the only basis on which an insurer is able to bring an action against a third party to recover a claim paid out by him to his insured. In addition to **Smith**, learned counsel for the Defendant also cited the case of **Compania Colombiana de Seguros v Pacific Steam Navigation Co**.[3] It was submitted that In light of the fact that the Claimant brought the proceedings in its own name, the issue was not one of subrogation, but whether Condition 5 operated as a legal assignment of the insured's right to the Claimant.

7. In submitting that Condition 5 failed to effect a valid assignment of the insured's right to bring an action against the Defendant in this case, learned counsel advanced two arguments. The first was that the language of the instrument said to constitute the assignment must be clear and evince an obvious intention to assign. In this regard, learned counsel submitted that the language of condition 5 assigned no specific right, as no such right existed at the time, so that the effect of the condition was merely declaratory of the insurer's right to require the insured to assign his rights whenever a cause of action arose. Learned counsel contrasted two letters which were held to constitute valid assignments in ***Compania Colombiana*** with the terms of condition 5. Additionally, it was submitted by learned counsel for the Defendant, that section 133(1) of the Law of Property Act, Cap. 251 of the Laws of Belize, would have required notice of the assignment to be have been given to the Defendant and no such notice was given. Section 133(1) is a replica of the English Law of Property Act's section 136, in respect of which ***Compania Colombiana*** also held that failure to give notice to the third party debtor, in accordance with section 136 would render a claim based on an assignment of a cause of action ineffective.
8. On the other hand, learned counsel for the Claimant contended that the wording of condition 5 of the policy created a valid legal assignment which by virtue of the Privy Council's decision in **King v Victoria Insurance Co. Ltd.**[4] entitled the Claimant to sue in its own name.

[3] [1964] 1 AllER 216
[4] [1896] AC 250

Further, having paid out the claim to its insured under a valid policy, that the Claimant has the requisite commercial interest to sustain the assignment, as opposed to it being viewed as an assignment of a bare right of action which remains illegal. Finally, counsel on behalf of the Claimant submitted that there was no form of assignment necessary in order for there to be a valid assignment by the insured to the Claimant, so that the fact that the assignment was incorporated into the insurance policy rendered it no less a valid assignment.

The Court's Consideration of issue (i).

9. The issue of subrogation was raised for consideration in this claim on the basis that the Claimant, as an insurance company, was seeking to recover from a third party – the Defendant - monies paid out under an policy with its insured. Having sued in its own name, it is clear, as submitted on behalf of the Defendant, that the claim was not one of subrogation at all, but one based on assignment of the insured's right. This notwithstanding, the submissions of counsel for the Defendant regarding the operation of the doctrine and the rule that the insured can take proceedings to recover its loss in the name of its insured only, are entirely correct. By way of completeness, it suffices for the court to add that the doctrine of subrogation applies in insurance law based on the fact that the contract of insurance, is one of indemnity[5] and the insured is entitled to recover no more than the extent of his loss. After satisfying a claim, the insurer is entitled to recover from the insured any moneys paid by a third party and so prevent the insured from gaining any benefit in excess of his loss as paid out by the insurer.[6] The question of whether or not an assignment was created by condition 5 so as to allow the Claimant to sue in its own name, is now considered.
10. Learned counsel for the Defendant very efficiently set out for the court the origin of the issue of assignment of an insured's right of action against a third party, insofar as it is firstly contextualized as an assignment of an action in tort.

[5] Castellain v Preston (1883), 11 QBD 380 per Brett LJ

[6] Castellain v Preston Ibid p 386-87; further - Yorkshire Insurance Co Ltd v Nisbet Shipping Co Ltd [1961] 2 All ER 487 per Diplock LJ @ 490*, that an assured shall be fully indemnified but never more than fully indemnified*.

The assignment of a cause of action in tort, was and remains unlawful as being against public policy by reason of offending against the law 'maintenance' and 'champerty'. That is, in the barest of terms – interfering in the disputes of others where one has absolutely no interest.[7] The prohibition against assignment of bare rights of action is subject to the exception of the assignee possessing a commercial interest in the subject matter of the assignment. The interest of an insurer who has paid out a claim against a third party legally liable for the claim, is one such instance of a viable commercial interest. This position was acknowledged by both counsel and is acknowledged as the correct one.

11. With respect to Condition 5 of the Claimant's insurance policy, the question is whether the terms of the condition created a valid assignment of the insured's right to bring proceedings against Mr. Thompson for the amount of loss incurred as a result of the accident of July, 2010. The actual terms of condition 5 (paragraph 4 above), state that the Claimant is entitled for its own benefit if it so desires, to take over and conduct in its name or bring in its name, any claim for indemnity or damages or otherwise and that the insured is obliged to give such information or assistance as the Claimant may require. It is clear, that at the time of execution of that policy, the condition was contracted in relation to rights of the insured which were not yet in existence. The question then becomes whether the rights then contemplated, were capable of future assignment. The Defendant says not.

12. This issue is resolved in concurrence with the submissions on behalf of the Defendant. **In re Clarke, Coombe v. Carter**[8] Cotton LJ stated with respect to an attempted assignment of '*any monies that were to become due'*, that:-

> *It is clear that an assignment cannot at law pass future property, but it may be made effectual against future property on the ground that a Court of Equity will in a suitable case enforce it as a contract.*

Further, Halsbury's Laws of England[9] provides:-

[7] Giles v Thompson [1994] 1AC 142
[8] [1886 - 1887) 36 Ch.D. 348
[9] 5th Ed. Vol

"Where a loss under an indemnity insurance policy has already taken place, the right to recover the sum payable is a right of action assignable either in equity or under the Law of Property Act 1925. A future claim however, cannot be assigned although it is capable of being the subject of a contract to assign."

13. A distinction must be made between the attempted assignment of Condition 5 and the rule that a future debt even if unascertained at the time, may be assigned. The clear difference is that a debt already exists, as opposed to becoming payable at some time in the future or the amount becoming known sometime in the future. If the specific liability to pay already exists, that is different from the instant case, where no cause of action existed at the time of the purported assignment. It is thus found that condition 5 cannot operate as a valid assignment for want of any property in existence at the time of the purported assignment. In ***Compania Colombia*** there were two letters issued by the insured authorizing collection by the insurers, of monies already paid out by the insurers under a claim that had arisen. These letters were found sufficient to establish assignment of the insured's rights but the claim failed for other reasons. In ***King v Victoria***, the judgment, albeit not identifying the specific terms of the assignment, made clear that the insurer was held entitled to bring the proceedings in its own name because the right to recover the claim already paid out had been specifically assigned by the insured bank therein. Given that no cause of action existed at the time of execution of the policy, the insured had no property at that point in time to assign, thus an assignment was not created. It is found instead, that the Claimant had at best, an enforceable contract with his insured, for the latter to assign any cause of action or other right associated with a claim under the policy, whenever that right came into existence.
14. The final point for discussion on this issue concerns the provision of notice under the section 133(1) of the LPA Cap. 190. For completeness it is found useful to deal with this issue notwithstanding that it is already found that condition 5 did not effectively create an assignment of the insured's cause of action in favour of the Claimant in this case. Section 133 is extracted as follows:-

"(1) Any absolute assignment by writing under the hand of the assignor (not purporting to be by way of charge only) of any debt or other legal thing in

action, of which express notice in writing has been given to the debtor, trustee or other person from whom the assignor would have been entitled to claim such debt or thing in action, shall be effectual in law (subject to equities having priority over the right of the assignee) to pass and transfer from the date of such notice-

(a) the legal right to such debt or thing in action;

(b) all legal and other remedies for the same; and

(c) the power to give a good discharge for the same without the concurrence of the assignor:

Provided that, if the debtor, trustee or other person liable in respect of such debt or thing in action has notice-

(i) that the assignment is disputed by the assignor or any person claiming under him; or

(ii) of any other opposing or conflicting claims to such debt or thing in action, he may, if he thinks fit, either call upon the persons making claim thereto to interplead concerning the same, or pay the debt or other thing in action into court under the Trustee Act.

(2) This section shall not affect any Act relating to assignments of policies of assurances or transfers of rights required to be made in any statutory form."

15. Counsel for the Claimant did not address the issue lack of notice at all, but perhaps there was not much that could be said in countering the submission (assuming a valid assignment to have been created), that the Claimant's failure to give notice in accordance with section 133(1) was fatal. In the ***Compania Colombiana*** case, Roskill LJ stated[10] that (assuming English law to be the proper law), given that the action was taken out by the insurers three days prior to notice having been given to the defendants, there would have been no answer as to the fatal effect of such lack of notice on the claim.

Issue (ii) – Liability for the Accident

16. The particulars of the accident were not disputed by any of the parties. The accident occurred on the 23rd July, 2010 about 11.45pm at a speed bump near the Evangelical Primary School on the Phillip Goldson Highway. The vehicles were traveling in opposite directions, there was no allegation of rain or other hazardous condition on the road aside from the time of night.

[10] Supra, pgs 235-236; cf Re Miller, Gibb & Co. Ltd [1957] 2 All ER 266.

Mr. Thompson was driving the Saturn car from the direction of Belize City to Ladyville, whilst Mr. Reneau, the owner and driver of the Honda Civic, was travelling from the direction of Burrell Boom to Belize City. The defendant's case was supported by 1 witness whilst the case for the ancillary defendant was supported by 2 witnesses.

17. With respect to the evidence, the Court was unassisted by any independent evidence by way of eyewitnesses who were not passengers in the vehicles involved The police were called to and did come to the scene but no measurements were taken nor were explanations recorded from the drivers, thus no police report was available with respect to the accident. There were also no photographs taken by the police, either driver or their respective passengers. The evidence from which the Court is asked to determine liability for the accident thus rests upon the accounts of the drivers and a passenger travelling in the vehicle driven by the ancillary claimant.

The Evidence

18. Mr. Reneau's case was largely consistent with respect to his claim as pleaded, the evidence in his witness statement and his answers under cross examination. As stated before, Mr. Reneau was travelling from Burrell Boom with two friends on the way back to Ladyville having set out initially from Belize City. He says the road was well lit and that he had seen a speed bump sign and noticed the speed bump from a distance of about 40-50 yards away (his demonstration in court accorded a distance of 40-50 feet instead). Mr. Reneau said he had slowed down on his approach to the speed bump but before he crossed the speed bump he noticed a vehicle coming towards him 'with speed'. The approaching vehicle, having come with speed, hit the speed bump so hard he saw sparks from underneath the vehicle when it made contact with the bump. The vehicle lost control, came onto his side of the road and collided with his vehicle causing it severe damage.
19. It was suggested to Mr. Reneau under cross examination that had he really been travelling slowly and the oncoming vehicle lost control as he said, he would have had time to swerve and avoid the accident.

It was further put that he had been drinking having been out on a Friday night with his friends and that he was not paying attention to the road as he was engaged chatting with his friends and listening to music in the car. Mr. Reneau denied all suggestions put to him that he was driving without due care and attention, had been drinking and thereby caused the accident. He did not vary from his account of the accident.

20. With respect to the aftermath of the accident Mr. Reneau claimed that the result of the impact was that his badly damaged vehicle remained on his side of the road and Mr. Thompson's vehicle stopped a short distance away with half on his lane and the other half on the other side of the road. Mr. Reneau stated however that Mr. Thompson reversed his vehicle from the position where it ended up onto the soft shoulder of the highway (on Mr. Thompson's side and on Mr. Reneau's opposite side) before the Police arrived. Mr. Reneau stated that his vehicle could not be moved thus he left it on the highway, went to the police station where he made his statement and then returned to the scene where he received assistance from a friend to push it onto his side of the highway. The next morning Mr. Reneau obtained professional assistance to have his vehicle towed from the scene.

21. On the other hand, Mr. Thompson in his witness statement gave his account of the accident that whilst travelling from Belize City to Burrell Boom accompanied by his three daughters, he had crossed the speed bump by the Evangelical School and saw another vehicle coming very close to his. Almost immediately, that other vehicle he says, suddenly and without warning entered his path, hitting the left front wheel and left front bumper of his vehicle. Having seen the vehicle coming towards his lane, Mr. Thompson said he drifted off the road a little so as to avoid the impact, but he was unable to do so and the oncoming vehicle nonetheless entered his lane and collided with his vehicle. As a result of the impact Mr. Thompson says his vehicle came to a sudden stop in his lane, it was unable to move because of the damage to the wheel and that both vehicles rested upon each other. The evidence of Mr. Thompson was further that the defendant pulled his vehicle away by reversing it away from where it rested on his vehicle, and parked it off the road on the left side.

When the Defendant reversed his vehicle, his (Mr. Thompson's) vehicle was in the process moved closer to the yellow line in the middle of the road, but still on his correct side. Finally, Mr. Thompson also said, that upon saying he was going to call the police, Mr. Reneau and his passengers threw out beer bottles from their vehicle.

22. On cross examination, it was submitted that there was significant variation in Mr. Thompson's evidence. He was unable to recall many facts put to him but he pointed out that the accident had occurred 5 years ago so he could not be expected to recall all details. In relation to how the accident occurred, Mr. Thompson answered under cross examination that the he saw the lights of a vehicle (regular lights, not high beam) come upon him suddenly and he pulled slightly to his right to avoid it. Counsel for Mr. Reneau viewed him pulling slightly to the right as a significant difference from his evidence in chief which was that he drifted off the road a little. With regard to the aftermath of the accident, Mr. Thompson first answered under cross examination that when the Police arrived on the scene both vehicles were still in the road, most of the Mr. Reneau's vehicle was in the left lane (facing Boom); then he said, the vehicle was half in the left and half in the right lane. When reminded of his witness statement Mr. Thompson then refused to accept that he had just said Mr. Reneau's vehicle was half and half in the two lanes when the Police arrived.
23. He went on to revert to what was in his witness statement, that when the Police arrived Mr. Reneau had already reversed his vehicle onto the left side of the highway, pulling his own a little closer to the yellow line in the middle of the road. Having reverted to his evidence in chief that the Defendant had reversed his vehicle from the middle to the side of the road, Mr. Thompson volunteered under cross examination that the Defendant reversed his vehicle to allow traffic which had backed up to pass. Counsel for the Defendant suggested that because of the time of night there could not have been much traffic on the road for traffic to have become backed up as stated by the Mr. Thompson, so his account of the traffic being backed up was untrue.

Mr. Thompson did not respond to this suggestion. He also maintained that he saw Mr. Reneau and his companions throw beer bottles out from the car, but made no mention of having observed any physical signs of intoxication on the Defendant.

24. The final witness who testified with respect to the way the accident happened was Mr. Thompson's daughter, Ms. Charlesworth, who did not entirely support her father's evidence. Ms. Charlesworth confirmed under cross examination that the accident did indeed happen very quickly and that all she saw was a high beam coming towards her then felt the impact of the collision. Ms. Charlesworth, like Mr. Thompson, stated in her witness statement that her father had to drive off the road a little to try to avoid the collision and further, that after the collision, she looked over to the right and saw that they were off the road. Under cross examination Ms. Charlesworth said that they were not entirely off the road completely, just a little. She further recalls that after the accident they had remained in their lane and Mr. Reneau's vehicle was hinged to theirs and also was a little in their correct lane.
25. Ms. Charlesworth stated that the Defendant and a couple other gentlemen worked together to tug the vehicles apart (and this was before the police arrived), then they took their vehicle over to the opposite side of the road. In answer to a specific question Ms. Charlesworth stated that the men pushed Mr. Reneau's vehicle over to the side of the road. Ms. Charlesworth made no mention of beer bottles being thrown out of Mr. Reneau's car, in her statement and she was not asked about it under cross examination. Ms. Charlesworth stated that she recalled Mr. Reneau and the gentlemen removing parts from out of the road and placing them into the vehicle. She was certain that her father did not drive to the station as their vehicle could not be moved.

<u>Analysis of the Evidence</u>

26. Firstly, the impressions of the witnesses were that Mr. Reneau, the defendant, was mostly truthful in his relay of the occurrence of the accident but the Court views his wholesome account of his activities of earlier in the evening and on the way to the accident with some reserve.

With respect to Mr. Thompson, the Court found him largely not to be a witness of truth and his daughter Ms. Charlesworth to be somewhat forthright but not entirely objective insofar as there appeared to be an intent to support her father's evidence as far as possible. The weakest evidence was that of Mr. Thompson - his demeanour was almost entirely reticent, he prevaricated on many if not most of his answers, particularly relating to the aftermath of the accident.

27. It is found that of the explanations given, Mr. Reneau was far more aware of his environs leading up to the accident, insofar as he recounted seeing a sign for the speed bump which he then saw from about 40-50 feet away and he also apprehended the approach of Mr. Thompson's vehicle as he neared the speed bump. On the other hand, Mr. Thompson's and his witness' accounts allege that a vehicle came upon them with some immediacy after they had crossed over the speed bump, and their evidence suggested that they had not otherwise noticed the other vehicle's approach. Both witnesses stated that they saw the light of the vehicle and then it collided with them immediately after.
28. From these respective accounts I draw the conclusion that Mr. Reneau's explanation of having seen a speed bump sign, then seen the speed bump from about 50 feet away, slowed down for the bump and seen a vehicle coming towards him even before it reached the bump, is more believable given the physicality of the area as accepted by both sides. Mr. Thompson, as he said, had just crossed the bump, which meant that he would have had to have slowed down to do so, also that he would not have had the time to regain much speed after going over the bump – the road was a straight road, at best with a slight curve, but with full visibility ahead – thus it is considered less likely that he would have failed to see an oncoming vehicle until the last moment. That Mr. Reneau's vehicle appeared and collided with his, with the immediacy asserted by both Mr. Thompson and his witness, is therefore found to be less likely when considered against the account given by Mr. Reneau.
29. Additionally, Mr. Reneau's explanation of having seen the vehicle hit the speed bump hard as a result of its speed and to have seen sparks from the bottom of the car where it hit the bump, strikes a ring of truth.

A witness' descriptions can sometimes be so specific to a particular state of affairs or peculiar characteristic, that it is hardly likely to be fabricated. To testify to seeing sparks flying from the bottom of a vehicle which was going at high speed when it made contact with the concrete or pitch of a speed bump, would be a fabrication borne of a witness of some guile and dis-ingenuity. It is not found that Mr. Reneau was a witness of such guile and dis-ingenuity. He is a sales clerk who appeared honest in giving his account of the accident. Mr. Thompson on the other hand was evasive most of the time and was even caught wrong footed in some of his answers under cross examination.

30. With respect to the aftermath of the accident and the opposing allegations of the drivers, as already stated, Mr. Thompson was not consistent in his account of what happened. Under cross examination he claimed that when the Police arrived both vehicles were still in the road, also that Mr. Reneau's vehicle was half and half in between the left and right lanes. In his witness statement he had alleged that the vehicles were resting on each other after the collision and Mr. Reneau having come out of his vehicle, returned to it, reversed it away and parked it off the road on the left hand side. When pressed on the issue of the inconsistency in cross examination, Mr. Thompson returned to his original position as in his witness statement, but he refused to accept that he had been saying anything different about where the vehicles were when the police arrived on the scene.

31. Apart from Mr. Thompson's sullen demeanour on this issue and prevarication on most issues, Ms. Charlesworth, his daughter and passenger, had also said in her witness statement that she observed when Mr. Reneau pulled his vehicle from her father's (and this was before the police arrived). Ms. Charlesworth had further said in her witness statement, that after Mr. Reneau pulled his vehicle away - '*he resorted to parking it off the road on [the] left hand side of the road away from the position of the collision*". In her cross examination Ms. Charlesworth stated that the vehicles '*had to be pulled apart'*, '*they were stuck together'*, and that '*Mr. Reneau and a couple other gentlemen worked together to tug the vehicles apart'* and '*it was quite a bit of maneuvering to get them apart'*.

This is not considered consistent with her witness statement which gave the impression that Mr. Reneau himself removed his vehicle from her father's then drove it to the side of the road.

32. Further, in answer to a specific question from Counsel for Mr. Reneau as to how Mr. Reneau's vehicle was moved from in the road to the side of the road, Ms. Charlesworth stated the gentlemen pushed it there. It is one thing to say that Mr. Reneau reversed his vehicle onto the side of the road, and another to say that a few gentlemen had to push it there. This variance leads the court to the conclusion that in her witness statement, Ms. Charlesworth was simply putting forward evidence to be consistent with her father's, but under cross examination, her oral evidence was a little closer to the truth. Ms. Charlesworth's evidence about the vehicle being pushed to the side of the road by a few gentlemen is also consistent with Mr. Reneau's evidence that his vehicle could not be driven after the accident and was pushed off the road by his friends after he returned from the police station. Ms. Charlesworth also in answer to a specific question from Mr. Reneau's counsel as to traffic blocks at the scene, stated that she did not recall any traffic blocks. This answer cemented the Court's view that Mr. Thompson's evidence of Mr. Reneau reversing his vehicle to allow for traffic to pass was an untruth made up in response to being pressed on the inconsistencies which arose on this issue in cross examination.
33. Additionally, the Court does not find as proven, Mr. Thompson's assertion that Mr. Reneau and the occupants of his vehicle threw out beer bottles after the accident. Ordinarily, the fact that one witness observes a particular fact and another does not is no reason for a court not accept the fact if satisfied with the evidence of the first witness. In this case however, as the Court takes a dim view of Mr. Thompson's evidence as a whole the fact that this allegation about the beer bottles is not supported by his daughter, a passenger who was also actively at the scene, is reason for the Court not to accept this evidence as proven. Mr. Reneau may or may not have thrown beer bottles out of his car but the state of the evidence was not as such to allow the court to make that a finding of fact.

34. With further reference to the state of Mr. Thompson's evidence, he was adamant on the witness stand that he had given no prior explanation of the accident to anyone besides the police. He was clearly contradicted when the accident report of the insurance company was put to him which bore a written explanation of how the accident occurred, signed by him. This report was not admitted into evidence, thus the contents of that explanation do not form part of the evidence. However, the fact of the report's existence serves to further discredit Mr. Thompson's evidence, given his vehemence that he gave no report to anyone other than the police and that he had had no contact with the insurance company after the accident, as the vehicle was not his.
35. At this stage, the Court finds that the version of how the accident occurred was more likely on the account given by Mr. Reneau. This is firstly so because Mr. Reneau's explanation is more believable as it is more consistent with the physical location of the accident which was accepted as accurate by both parties. Mr. Thompson's account rendered it less likely to have occurred his way given the physical location. Secondly, Mr. Thompson's inconsistencies, prevarication and poor demeanor under cross examination significantly mitigated against the Court accepting his account of events after the accident, whilst Mr. Reneau was found to be forthright and unwavering. In the circumstances, it is found on a balance of probabilities, that it was Mr. Thompson who caused the accident, by failing to slow down to cross the speed bump, losing control upon hitting the speed bump at a fast speed, and subsequently losing control of his vehicle, thereby colliding into Mr. Reneau's vehicle on his (Mr. Reneau's) side of the road. Mr. Reneau's claim against Mr. Thompson for damages arising out of the accident is therefore successful. The question of damages must now be addressed.

<u>Issue (iii) - Assessment of Damages in favour of Mr. Reneau.</u>

36. Mr. Reneau's claim comprises general as well as special damages, the special damages arising out of an alleged injury to his face as a result of the accident found to have been caused by Mr. Thompson. Mr. Thompson's liability is now to restore Mr. Reneau to the position he had been but for the accident.

With respect to general or as is otherwise known, non-pecuniary damages, the quantification is to be assessed according to the guidelines set out in **Cornilliac v St. Louis** [11]per Wooding CJ as follows:-

(a) The nature and extent of the injuries sustained;
(b) The nature and gravity of the resulting physical disability;
(c) The pain and suffering which had to be endured;
(d) The loss of amenities suffered; and
(e) *The extent to which consequentially the plaintiff's pecuniary prospects have been materially affected.*

These guidelines can be compressed into three broad heads of (a) pain and suffering which would include the first three above, (b) loss of amenities and (c) loss of future earnings or earning capacity. In this regard Counsel for Mr. Reneau submitted that an award that an award of about $11,000 was appropriate given the nature of the injury to the face and teeth and the claim for special damages was in the sum of $4,650.

Special Damages

37. We examine the issue of special damages first, the claim for which needs to be specifically pleaded as it represents those pecuniary losses capable of precise quantification. Mr. Reneau's claim is for $4,650 being the sum of $4,500 for dental expenses to replace three teeth which he says fell out as a result of the accident and $150.00 being the cost of towing his vehicle from the scene of the accident. In relation to the damages, it is either that learned counsel for the Ancillary Defendant was not paying sufficient attention or was completely confident of her case. Even though the ancillary defence denied the loss and damaged alleged by Mr. Reneau, there was no challenge to the evidence adduced in support of the claims for special damage. In fact, learned counsel for Mr. Thompson, declined cross examination of the dentist who gave a witness statement as to the dental treatment required by Mr. Reneau and its cost. The evidence for the special damages claimed in the sum of $4,500 was therefore accepted.

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There was also no cross examination of Mr. Reneau in relation to him claiming to have hit his face on the steering wheel of his vehicle on impact in the collision.

38. It is noted by the Court that Mr. Reneau consulted the dentist in November, 2014. The accident occurred in July, 2010. There would have been much room to cross examine the dentist as to the possible exacerbation of any initial injury suffered by failing to attend to the injury as Mr. Reneau clearly outlined in his witness statement. The possibility of deterioration due to time passed and its effect on the present cost of treatment would also have been relevant questions for the dentist. These questions were not asked and there is sufficient nexus in Mr. Reneau's account of hitting his face to his steering wheel and feeling significant pain and in the weeks after, feeling a biting sensation to three lower front teeth which became shaky. About 6 months after Mr. Reneau says his three lower teeth eventually fell out whilst he was brushing them. There being no challenge to this evidence and there being sufficient information from Mr. Reneau for the loss of his teeth to be connected to the blow to his face which he sustained as a result of the accident, the special damages of $4,500 as claimed and proven by the dentist's evidence is accepted.
39. With respect to the claim for $150 for the cost of towing his vehicle from the scene. Aside from the claim as pleaded, there was no evidence that spoke to this expense at all. Mr. Reneau gave no evidence of the amount he incurred in his witness statement. This amount is not accepted as proven and is therefore not allowed.

General Damages

40. In respect of this non pecuniary claim, the only evidence before the court is the oral account of Mr. Reneau of him having hit his face on his steering wheel, feeling pain in his mouth and having headaches, which persisted for about one month before he went to see a doctor at Medical Associates. There was no medical report in support of his injuries. It is certainly accepted that he suffered an injury for which he felt pain and now suffers a loss of amenity in the form of the embarrassment and presumably challenges to his ability to masticate food. The dental report which spoke to his condition some four years after the accident cannot speak to the extent of his injuries at the time of the accident.

Acceptance of the Mr. Reneau's word aside however, the failure to support the precise nature and extent of injury suffered precludes the Court from making a properly quantified award. Mr. Reneau seemed able to withstand pain for an entire month before he was driven to see a doctor which lessens his own testament to the extent of the pain. Having seen a medical practitioner, it was within reach to obtain and present a medical report to the Court to assist in the quantification of his injury. A nominal award of two thousand ($2,000) only is made, which recognizes the Court's acceptance of his testimony of having suffered a blow to his face, injury to his mouth and pain as a result thereof.

Conclusion

41. The Claimant is firstly found to have had no standing to bring the claim against Mr. Reneau, on the basis that Condition 5 of the Policy with its insured did not create a valid assignment. The Claimant was thus not at liberty to bring the proceedings in their own name. With respect to the remaining issues on the ancillary claim, the ancillary defendant Mr. Dinsdale Thompson is found liable for the accident and as such liable in damages for injury suffered by Mr. Reneau. The total award in favour of Mr. Reneau is **six thousand five hundred dollars ($6,500)** consisting of $4,500 special damages and $2,000 general damages. Post judgment interest only is awarded to Mr. Reneau on the sum of $6,500 as there was no evidence that he had pursued any claim against Mr. Thompson for his injuries arising from the accident, and but for the insurance company's claim against him, there was no sign that he would have done so. Finally, costs are awarded to Mr. Reneau to be assessed if not agreed, at a proportion of fifty percent 50% liability on the part of the Claimant and the Ancillary Defendant, respectively.

Final Diposition

42. On conclusion of the claim and ancillary claim, the following orders are made:-

    (i) The claim by RF&G Insurance Co. Ltd. against the Defendant Jody Reneau is dismissed.

(ii) Judgment on the ancillary claim is granted to the Ancillary Claimant Jody Reneau and damages are awarded against the Ancillary Defendant Dinsdale Thompson in the sum of **$6,500**.

(iii) Costs are awarded to Mr. Reneau to be assessed if not agreed at a proportion of 50% each to be paid by the Claimant and Ancillary Defendant.

(iv) Post judgment interest only is awarded to Mr. Reneau on the sum of $6,500 from the date of judgment until satisfaction thereof.

Dated this 27th day of January, 2016.

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Shona O. Griffith
Supreme Court Judge