The Educator

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A light at the end of the tunnel – is it, or is it not?

The *Educator* has had several requests for an article on whether a motor insurer is, under the *Motor Vehicles Insurance (Third Party Risks) Act,* required to pay interest and costs on the judgment awarded to a third party that is covered by the Act. In this issue of *The Educator* we look at some of the cases that chronicle the development of this issue.

Judgment day

In 1968 the Jamaica Court of Appeal looked at the island's ***Motor Vehicles Insurance (Third Party Risks) Act***, to determine whether an insurer is required to pay interest and costs on the judgment awarded to a third party that is covered by the section 16(1) of that Act.

Luckhoo J.A. in ***Jamaica Co-op. Fire and General Insurance Co. Ltd. v Sanchez***(1968), in the course of his judgment also referred to the Acts of Barbados, Guyana and Trinidad and Tobago and pointed out that section 8 of the Trinidad and Tobago *Motor Vehicles Insurance (Third Party Risks) Ordinance*, 1941, which is the section of that Ordinance corresponding to section 8 of the Guyana Act, did not contain the additional words to be found in section 8 (1) of the Act of Guyana and section 9(1) of the Act of Barbados. Luckhoo J.A. said:

> "No reported cases were cited to us to show how the respective Barbados, Guyana or Trinidad and Tobago provisions have been interpreted, but I would venture to think that despite the omission of words similar to those mentioned above from the corresponding Trinidad and Tobago provisions that enactment would, when construed, have the same effect and result that the Barbados and Guyana provisions have".

At that time, the Jamaica legislation stated that "No sum shall be payable by an insurer" for "liability for which is exempted from the cover granted by the Policy …" Therefore, the insurer was not required to pay interest and costs on the judgment.

In ***James Harker v Caledonian Insurance Co.*** decided by Donalson J. on the 24th June, 1977, in the High Court of England, Mr. Harker was a soldier in the British Army stationed in Belize [The official name of the territory was changed from British Honduras to Belize in June 1973, and full independence was granted on 21 September 1981]. As a result of a motor accident, he suffered severe injuries. He was awarded $175,000.00 damages, but because the car driver in his case was a man of straw and because of the very low limitations permitted by the *Motor Vehicles Insurance (Third Party Risks) Ordinance*, recovered only $4,000.00.

The judge held that the paragraphs of the proviso to section 4(1) of the Ordinance which relate to quantum, limited the scope of the opening words of that section which requires the policy to cover the insured "in respect of any liability which may be insured by him or them in respect of

the death or bodily injury to any person caused by or arising out of the use of the motor vehicle on a public Road".

Since the Privy Council cases of ***Suttle v Simmons*** (1989), on Appeal from the Bermuda Court of Appeal), and ***Goberdhan v Caribbean Insurance Company Limited*** (1998), on Appeal from the Trinidad and Tobago Court of Appeal, the Privy Council in several cases has maintained that insurers are liable for no more than such liability as is required to be covered and that no liability is required to be covered in excess of the amount prescribed by the relevant statute. However, as legislation changed, so too has the case law.

Let us look at some judgment days:

Barbados

About 44 years ago, Williams J., in the Barbados case of ***Greaves v. New India Assurance Co. Ltd*** [1975], in construing a provision of the Barbados *Road Traffic (Insurance) Act*, that is similar to most regional jurisdictions, concluded that the insurer was obliged to pay the costs and interests over and above the limit imposed under the policy without reference to any limit.

Bermuda

In ***Suttle v Simmons*** (1989) the Privy Council determined that the terms of the policy were clear that there is a limit on the amount any single injured person in an accident can recover directly from the insurer and that insurers are liable for no more than such liability as is required to be covered and that no liability is required to be covered in excess of the amount prescribed by the relevant statute.

Guyana

While case law from Guyana are difficult to source, Guyanese born Luckhoo J.A. in the 1968 Jamaica Court of Appeal case of ***Jamaica Co-op. Fire and General Insurance Co. Ltd. v Sanchez,*** implied that the additional words found in section 8(1) of the Act of Guyana, if they were contained in the Jamaica law, it would have had the same effect as the Barbados legislation.

Trinidad and Tobago

Four decades ago, the construction given by the Trinidad and Tobago Court of Appeal in the case of ***Presidential Insurance Co. Ltd. v Stafford*** (1997), to their equivalent section of the *Motor Vehicles Insurance (Third Party Risks) Act,* was that the phrase '*including any amount payable in respect of costs and …interest*' was held to mean '*as well as*' any amount payable in respect of costs and interest.

The Trinidad & Tobago Court of Appeal directly considered the phrase 'including costs and interest' arising in the same manner in the Trinidad equivalent provisions. Sharma JA posed the issue to be determined in the following terms:-

> *The question is really does the word 'including' in the section serve to emphasise that the amount payable by the insurer is limited to the sum which he is required to pay under the policy and no more, in other words is it restrictive in its meaning? Or is it a word of extension in that it operates to render the insurer liable to pay costs and interest in addition to the sum; in other words, to mean 'as well as'?*

Hamel–Smith JA concurred with Sharma J.A. in concluding that the word **"including"** meant "**as well as"** and also took the liberty of giving further reasons for so holding.

About 15 years ago and 25 years after ***Stafford,*** support for this construction was buttressed by the Privy Council in ***Matadeen v Caribbean Insurance Co. Ltd (Trinidad & Tobago)*** [2002]. The phrase *('including any amount payable in respect of costs and…interest')* was expressed by the Privy Council as 'inherently ambiguous'. The ambiguity was said to be that the words could mean either that the statutory limit could be exhausted by the inclusion of costs and interest or that costs and interest were recoverable in addition to the statutory limit on damages to be covered by the policy. The Privy Council expressed that the latter construction (that 'includes' means 'as well as') was that to be preferred.

Saint Lucia

By 2003, insurers were conceding that under Section 9 of the Saint Lucia ***Motor Vehicles Insurance (Third Party Risks) Act*** they would have to pay interest and costs to the Claimant in addition to the policy limit. Their legal Counsels were in agreement that the Trinidad and Tobago case of ***Presidential Insurance Co. Ltd v Stafford*** was settled authority for the payment of interest and costs.

In fact, in the Saint Lucia High Court case of ***James Woodward Jr. v. John Stanislaus*** [2003], Saunders J. (as he then was) assessed damages in this fatal injury case in the sum of $973,897.15 with interest and costs of $50,000.00. As a result, New India paid the policy limit of $300,000. Madam Justice Hariprashad-Charles, at an Application hearing, whilst discharging the insurer from further liability having paid out the limit of its liability, made the Order discharging New India Assurance from further liability in accordance with Section 4 (2) (d) of the Motor Vehicle Insurance (Third Party Risks) Act, on condition that the Company paid the costs and interest as specified in an earlier related judgment of Saunders J.

Anguilla

Nine years ago, the Anguilla High Court, in ***Jackilyn Henry McGibbon v. National General Insurance Corporation N.V.*** [2008], considered the insurer's obligation to pay the policy limit in addition to interest and costs under the following provisions of the Anguilla ***Motor Vehicles Insurance (Third Party Risks) Act:***

> *"6 (1) If after a certificate of insurance has been issued under section 3(4) in favour of the person by whom a policy has been effected, judgment in respect of any such liability as is required to be covered by a policy under section 3(1)(b) and (c) (being a liability covered by the terms of the policy) is obtained against any person insured by the policy, then, notwithstanding that the insurer may be entitled to avoid or cancel, or may have avoided or cancelled, the policy, the insurer shall, subject to the provisions of this section, pay to the persons entitled to the benefit of the judgment any sum payable thereunder in respect of the liability, **including** any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any enactment relating to interest on judgments. (Judge's* emphasis).

However, in *McGibbon,* Madam Justice Janice George-Creque, of the Grenada High Court rejected the Trinidad and Tobago Court of Appeal decision in ***Presidential Insurance Co. Ltd. v Stafford***, where Hamel–Smith J.A. concurred with Sharma J.A. in concluding that the word "including" meant "as well as". George-Creque J: ruled that the amount to which the claimant

is entitled to claim from NAGICO, "whether in respect of damages, interest and/or costs, is limited to the statutory limit of $10,000."

Legal minds may argue that *McGibbon* is now dated.

Jamaica

Last year, the Jamaica Court of Appeal case of **Advantage General Insurance Co. Ltd v Doreen Wright** [2016], raised an important point of construction in relation to section 18(1) of the *Motor Vehicle Insurance (Third Party Risks) Act* as to whether this section obliges a motor vehicle insurer to pay costs and interest to a third party to whom, subject to any applicable policy limit, it is liable to pay the amount of a judgment obtained against the holder of an insurance policy issued by it.

> "18 – (1) If after a certificate of insurance has been issued under subsection (9) of section 5 in favour of the person by whom a policy has been effected, judgment in respect of any such liability as is required to be covered by a policy under subsections (1), (2) and (3) of section 5 (being a liability covered by the terms of the policy) is obtained against any person insured by the policy, then, notwithstanding that the insurer may be entitled to avoid or cancel, or may have avoided or cancelled, the policy, the insurer shall, subject to the provisions of this section, pay to the persons entitled to the benefit of the judgment the amount covered by the policy or the amount of the judgment, whichever is the lower, in respect of the liability, including any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any enactment relating to interest on judgments."(Emphasis added)

The Court of Appeal's interpretation of this section of the *Act* is that the insurer has the obligation to pay legal costs being in addition to the statutory limit on damages. The Court noted that the objective of these provisions is to create a scheme of compulsory motor vehicle insurance. The Court said:

> On the face of it, therefore, the policy limit will define the extent of the insurer's liability to a third party. But section 18(1) goes onto state that the amount which the insurer is liable to pay shall include "any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any enactment relating to interest on judgments". The insurer's obligation under section 18(1) supersedes any contractual entitlement which the insurer may have as against the insured to avoid or cancel the policy.

Belize

This year, Madam Justice Shona O. Griffith decided the Belize Supreme Court case of ***Geon Hanson v. Home Protector Insurance Co. Ltd*** [2017] (released 18th day of January, 2017). In this case, the Claimant Geon Hanson, was by virtue of Judgment in Supreme Court, awarded damages for personal injuries in excess of the statutory $50,000, as well as interest on that sum and costs. The Defendant, Home Protector Insurance Co. Ltd. was the insurer of the at fault driver and thereby liable under a policy of third party insurance for the damages awarded to the Claimant. The Insurance Company acknowledged its liability under the Judgment but only to the extent of the statutory limit of $50,000. The Claimant also sought payment of the interest and legal costs which were awarded to him, alleging that section 19 of the Motor Vehicle Insurance (Third Party Risks) Act, Cap. 231 of the Laws of Belize ('the Act'), entitled him to recover the interest and costs over and above the sums awarded to him as damages. The only

issue for decision in this case was one of law – that being the interpretation of section 19 of the Act – namely, whether the limit on liability applied inclusive of interest and costs.

Here is what the Belize *Motor Vehicles Insurance (Third Party Risks) Act says:*

> **19.**–(1) If, after a certificate of insurance has been issued under section 4(3) of this Act, in favour of the person by whom a policy has been effected, judgment in respect of any such liability as is required to be covered by a policy under section 4(1)(b) or (c) of this Act (being a liability covered by the terms of the policy) is obtained against any person insured by the policy, then, notwithstanding that the insurer may be entitled to avoid or cancel, or may have avoided or cancelled the policy, the insurer shall, subject to this section, pay to the persons entitled to the benefit of the judgment any sum payable thereunder in respect of the liability including any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any enactment relating to interest on judgment…… (My emphasis)
>
> 19.-(4) If the amount which an insurer becomes liable under this section to pay in respect of a liability of a person insured by a policy exceeds the amount for which he would, apart from the provisions of this section, be liable under the policy in respect of that liability, he shall be entitled to recover the excess from that person. (Judge's emphasis)

The light

For those jurisdictions where there is no jurisprudence, it is on these authorities that a Claimant will compare their legislation with others and likely seek an order for payment of her legal costs and interest in addition to satisfaction of the judgment for damages.

However, the *Motor Vehicles Insurance (Third Party Risks) Act* goes on to make it clear that no sum shall be payable by an insurer under the relevant section unless, among other things, before or within ten days [or a specified time (seven days in Guyana)] after the commencement of the proceedings in which the judgment was given, the insurer had notice of the bringing of the proceedings.

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Strange but true

At about 5:25 a.m. on July 7, 2014 the Plaintiff left her house to purchase a coffee from a McDonald's Restaurant drive-through. When she arrived at McDonald's she ordered her coffee and then pulled alongside the drive-through window where she paid for and was handed her coffee. She attempted to transfer the cup of coffee across her body to the vehicle's cup holder while holding it by its lid. During this process, the cup released from the lid, spilling scalding coffee on the Plaintiff's thighs.

Although the vehicle remained in gear and was running during the incident it was not in motion. There was no collision involving the vehicle and no movement of the vehicle that contributed to the incident. However, the plaintiff was seated in the vehicle and had her lap and shoulder harness on. These would have prevented her from taking any reflexive evasive action to avoid the spill or lessen the amount of coffee that spilled on her.

At issue in this case is whether the use of the vehicle was a cause of the Plaintiff's injuries (causation-in-fact) and if so, whether there was an intervening act that caused the injuries that cannot be said to be part of the "ordinary course of things".

The trial judge said:

> In the case before me the automobile was being used to allow the Plaintiff to acquire a hot beverage at a drive-through window of a fast food restaurant. That the beverage might inadvertently spill is a normal incident of the risk created by that use. Accordingly it cannot be said to have been outside the "ordinary course of things" as would be the case with such intervening acts as a drive-through attendant deliberately throwing hot coffee on the claimant or the claimant falling ill due to impurities in the coffee that was served. Such intervening acts would not be a normal incident of the risk created by the use of the car and would effectively break the chain of causation.

The trial judge concluded by saying:

> I come to this conclusion because but for her use of the vehicle she would not have been in the drive-through lane, would not have received the coffee cup while in the seated position, would not have been transferring the coffee cup to the cup holder across her body, and would not have had the coffee spill on her lap. In addition, but for her being seated and restrained by a lap and shoulder harness she may have been able to take evasive action to avoid or lessen the amount of coffee that was spilled on her.
>
> …
>
> When I apply the test for direct causation prescribed in the cases noted above, I am driven to the conclusion that the Plaintiff's use of the automobile was a direct cause of her injuries.

The Ontario Court of Appeal dismissed the insurer's Appeal, as a result, the plaintiff is entitled to Ontario no fault (personal accident) benefits.

Source: Dittmann v. Aviva Insurance Company of Canada, 2017 ONCA

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