

ANTIGUA AND BARBUDA

IN THE HIGH COURT OF JUSTICE

ANUHCV2005/0039

BETWEEN:

RUTH SPENCER

Claimant

And

BERNARD BONNY

Defendant

Appearances:

Mr Septimus Rhudd and Ms Gale Pero for the Claimant
Ms Veronica Thomas of Richards & Co. for the Defendant

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2006: May 9th
July 12th
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JUDGMENT

- [1] **Blenman J:** This is a claim and counterclaim for damages as a result of a motor vehicular accident.
- [2] Mrs. Ruth Spencer (Ms Spencer) is the owner of a 1995 Nissan Infiniti a 45 motor car (motor car), its registration number is A 1946.
- [3] Mr. Bernard Bonny (Mr. Bonny) is the owner of a Datsun motor pickup (pickup) whose registration number is C 1504
- [4] At all material times Mr. Troy McKinnon (Mr. McKinnon) was driving the motor car as Mrs. Spencer's servant or agent.
- [5] On 21st January 2004, Mr. McKinnon was driving Mrs. Spencer's motor car, along the Cedar Grove Main Road in St John's heading from North to South, when there was a

collision with the pickup driven by Mr. Bonny. The pickup was proceeding from South to North. As a result of the accident both vehicles were damaged. Unfortunately, Mrs. Spencer's vehicle was not repairable; it was a total write off and so too was Mr. Bonny's vehicle.

[6] Mrs. Spencer alleged that Mr. Bonny was negligent and caused the accident while Mr. Bonny says that it was all Mr. McKinnon's fault. Each side pleaded particulars of negligence in the standard form: such as drove too fast, failed to keep a proper lookout, drove on the wrong side of the road, and failed to exercise proper control of the vehicle.

[7] Mrs. Spencer claimed special damages in the sum of \$149,520. She also claimed general damages together with interest and costs. Mr. Bonny has counterclaimed for special damages in the sum of \$14,730.00 together with general damages and costs.

Issues

[8] (A) The main issue that the Court has to resolve is who is liable for the accident;

(b) The second issue to be determined is the amount of damages the Court should award.

[9] Mrs. Spencer testified in support of her claim. Her daughter Miranda and Mr. Troy McKinnon also testified in support of Mrs Spencer's claim. Mr. Bonny testified in his own defence and called one witness Mr. Charlesworth Samuel (Mr. Samuel) in support of his claim.

[10] Each side gave different versions as to how the collision occurred. I have no doubt that the resolution of the issue of liability must be based on the Court's determination of which version of the events the Court accepts.

Mrs Spencer's evidence

- [11] Mrs. Spencer said that in 1999 she purchased the motor car at a cost of \$189,000. After the collision she obtained several estimates one of which indicated the cost of repairing the motor car was \$80,969.87. This cost exceeded the pre-accident value.
- [12] She obtained another estimate which recommended that her vehicle be treated a write off.
- [13] Subsequently, she was able to obtain an estimate which indicated that the pre accident value of her vehicle was \$75,000. The salvage value of the vehicle after the accident is \$5000. She had to write off the vehicle since the cost of repairing it exceeded its value.
- [14] She claimed loss of use of the vehicle for 365 days at \$216 per day.
- [15] She also claimed the sum of \$1500 for the cost of the estimates.
- [16] During cross examination by learned counsel Ms. Veronica Thomas, Mrs. Spencer stated that she purchased the vehicle at a duty free price for \$80,000 resiling from her earlier position that she had purchased it for \$189,000.00. Mrs. Spencer admitted during further cross examination by learned counsel, Ms. Thomas that the cost of the estimates was \$680.00.
- [17] She stated that she was claiming loss of use for 365 days at \$216 per day since she used the vehicle to transport her father who was disabled. The vehicle was used to take him for therapy. Her father was also a businessman and also had to be taken around. While she did not have receipts to prove that she expended \$216.00 per day she was sure that was the amount of money she had spent.
- [18] Under further cross examination Ms. Spencer was forced to concede that she purchased another vehicle approximately 4 months after the accident had occurred.

Mr. McKinnon's evidence

- [19] Mr. McKinnon told the Court that on 23rd January 2004 between 7.00pm and 8.00pm he was traveling along the Cedar Grove Main Road heading North to South from Hodges Bay to St John's driving Mrs Spencer's motor's car and on his proper side when Mr. Bonny's pickup, that was in the process of overtaking a vehicle, collided with the motor car. At that time Mr. McKinnon had other passengers in the motor car. Mr. McKinnon denied that he was drunk or that he operated the vehicle negligently.
- [20] Mr. McKinnon maintained that it was Mr. Bonny whose vehicle in overtaking a parked car came over into the path of the motor car and caused the collision.
- [21] Mr. McKinnon further stated that he was driving the motor car at approximately 20-30 miles per hour. His vehicle was on the left side of the road. The road was dry. As soon as he came over the rising in the road, he observed the lights of an oncoming vehicle. The vehicle was coming towards him on his side of the road at that time was about one car length away. When he first saw the bright lights they were in front of the motor car. He applied his brakes immediately to avoid the collision yet the vehicles collided head-on.
- [22] During cross examination by Ms. Thomas, Mr. McKinnon stated that he first saw the head lamps and bright lights from the vehicle just after he had passed the hill. When he first saw the other vehicle it was about 2 car lengths away and even though he "had his foot on his brakes" he was unable to avoid the accident.
- [23] Mr. McKinnon admitted that his vehicle skidded when he applied his brakes. He denied that he was speeding and said that he was unable to explain how the brake mark from the motor car he was driving to the point of impact was stated as 86 feet.
- [24] He maintained however, that when he first saw the bright lights they were right in front of him.

Ms Miranda Spencer's evidence

[25] Ms. Miranda Spencer testified in support of her mother's claim. She stated that on the night in question she was a passenger in the motor car that was driven by Mr. McKinnon. She was in the front passenger seat.

[26] She stated that the motor car came over the rising in the road in Cedar Grove and she saw lights of another vehicle. The vehicle was on the same side of the road as the motor car. He was sure that the motor car was on the left hand side and that Mr. McKinnon "immediately hit the brakes and in a few seconds we collided with the other vehicle."

[27] Under cross examination by Ms Thomas, Ms. Spencer said that it was when the motor car had come over the hill that she observed the bright lights and felt the impact. As soon as their vehicle had come over the hill, the two vehicles were about 1 car length away. She, too, said that when she first saw the bright lights the vehicle was right in front of them.

Mr. Bonny's evidence

[28] In his defence Mr. Bonny stated, that on the night in question he was driving his pickup at approximately 8.00pm on his proper side of the road. He was driving at approximately 20 miles per hour. A car was parked on the left side of the road. While he was passing the car, he heard car brakes screeching and saw the bright lights of a car coming towards him. He said that he swerved to the left and then he felt an impact to the front of his pickup. He maintained that his pickup was on the proper side of the road when the motor car came into collision with it. He denied that he drove negligently and caused the accident.

[30] As a result of the accident, he was hospitalized for 3 days.

[31] Mr. Bonny said that after the collision, he had no transportation and lost his job since he was unable to get transportation from Hodges Bay to take him to East Bus Station for 630am. At that time, he was on probation and earned \$600 per week. He claimed to be entitled to loss of income for 4 weeks at \$600 per week.

[32] Mr. Bonny also alleged that he suffered injuries as a result of the accident and sought compensation in the sum of \$5,000 for pain and suffering.

[33] During cross examination by learned counsel Mr. Septimus Rhudd, Mr. Bonny said that he had already passed the parked car and had gotten back into his correct lane when the collision occurred. He insisted that he was on the left hand side of the road when he felt the impact to his pickup.

[34] Mr. Bonny stated that based on the width of the road 3 vehicles could not pass there comfortably. While Mr. Bonny stated that the road is narrow he denied that it was necessary for his pickup to go into the other lane of a vehicle in order to pass.

[35] Even though a car was parked on his side of the road, Mr. Bonny was sure that he did not have to go into the other lane to pass the car. Later, he stated that he had passed the parked car when the collision occurred. However, under persistent cross examination he maintained that while he was in the process of crossing the car the collision occurred.

Mr. Charlesworth Samuel's evidence

[36] Mr. Samuel testified in support of Mr. Bonny. He stated that on the night in question he was on duty as a watchman and was sitting on the verandah of the UPP's office on the Cedar Grove Main Road. He heard a vehicle coming from Hodges Bay area, he said "the vehicle was speeding and the tyre was 'bawling' from around the corner." The vehicle seemed to go into a lower gear but it was still in high 'rev.' Mr. Bonny's pickup was coming from opposite direction and the driver was taking his time about 30mph. Mr. Bonny's pickup had passed a parked car that was on the left when the oncoming motor car lost control and ended up on the western side of the road hitting Mr. Bonny's vehicle. It was a head on collision.

Mrs Ruth Spencer's submissions

[37] Learned counsel Mr. Septimus Rhudd submitted that based on the evidence there can be no doubt that Mr. Bonny's negligent driving was the sole cause of the accident. Mr.

Bonny's evidence should not be relied on but rather the Court should accept the version of events as stated by Mr. McKinnon. Mr. Rhudd asked the Court to believe Mr. McKinnon when he denied that he was speeding. Mr. McKinnon stated that "when he first saw the bright lights they were directly in front of him" Mr. Rhudd stated that this strongly suggested that Mr. Bonny's vehicle was in Mr. McKinnon's lane.

[38] Mr. Rhudd said that there can be no doubt that the collision occurred when Mr. McKinnon was about to pass the parked car and in doing so his vehicle came over into the path of Mr. McKinnon's vehicle.

[39] Mr. Rhudd further submitted that Mr. Bonny is solely responsible for the accident since he caused the accident by overtaking a vehicle when it was unsafe to do so. In support of his submissions, counsel relied on **Mc Call v Ogiste (1965) 9 WIR 291** in which the Court of Appeal of Trinidad and Tobago stated that "the onus on the driver of an overtaking vehicle is to make sure that the entire movement is safely conducted and completed, one must make sure that one can pass a vehicle and get back at once on the proper side before the approach of oncoming vehicle." Mr Rhudd stated that the evidence clearly showed that Mr. Bonny attempted to overtake at a time when it was manifestly unsafe to do so. This was the primary cause of the collision.

Mrs Ruth Spencer's Submissions

[40] Ms. Thomas learned counsel submitted that based on the evidence before the Court, the Court should properly find that the accident was caused solely as a result of Mr. McKinnon's negligent driving. Counsel said that it is obvious that the speed at which Mr. McKinnon was driving made it impossible for him to stop and or control the vehicle which resulted in the violent collision. Counsel referred to the police report which indicated that "the distance from the debris to beginning of brake mark of the motor car A 1946 was 80 feet and that the length of brake marks from beginning of left rear wheel of Motor Car A 1946 was 86 feet."

[41] Ms. Thomas also referred to the police report and stated that the momentum of the car caused the pickup to be pushed back some 15 feet after the impact. Ms. Thomas therefore submitted that all of the above indications were consistent with the fact that Mr. McKinnon was driving the motor at an excessive speed. It is no excuse for Mr McKinnon to simply assert that his vehicle skidded. Mr. McKinnon drove the motor car negligently, Ms. Thomas asserted.

[42] Ms. Thomas submitted in the alternative that, should the Court not be of the opinion that the accident was caused due to Mr McKinnon's negligent driving, the Court should find that Mr. McKinnon was liable for contributory negligence. Counsel stated that Mr. McKinnon in driving at such an excessive speed failed to take ordinary care of himself or such care as a reasonable man would take for his own safety and that his failure was a contributory cause of the accident. Ms. Thomas referred to **Lewis v Denye [1939] 1 All ER 310** in support of her proposition together with **Davies v Swan Motor Co [1949] 1 All ER 626**.

Cost of Vehicle

[43] Ms. Thomas sought to dispute the pre accident value of the vehicle as stated by Mrs. Spencer. She stated that Mrs. Spencer was only able to provide the Court with an estimate of the cost of the vehicle and that the Court should not rely on the estimate.

[44] Mr. Rhudd urged the Court to award Mrs. Spencer the entire sum claimed as damages. Counsel stated the Court should accept this to be \$75,000 less salvage \$5000 = \$70,0000.

Loss of use

[45] Ms. Thomas took issue with Mrs. Spencer's claim for loss of use for 365 days at \$216.00 a day. Counsel stated that the clear evidence is that Mrs. Spencer purchased another vehicle 4 months after the collision and there is no evidence that Mrs. Spencer had to hire a replacement vehicle. Counsel contended that Mrs. Spencer has not provided the Court with any receipts in order to substantiate her claim for loss of use at \$216.00 a day and therefore the Court should disallow this item.

[46] Mr. Rhudd submitted that the Court should award Mrs. Spencer loss of use at a rate of \$216.00 per day for 365 years the total sum being \$78,840.00

Cost of Estimates

[47] Ms. Thomas stated that while Mrs. Spencer had originally claimed the sum of \$1500 as representing the costs of the estimates. During cross examination she was forced to admit that she only expended \$680.00 in this regard. The Court should only award her the sum of \$680.00 as the cost of the estimates. For his part, Mr. Rhudd has not disputed the cost of \$680 for the estimate of the repairs.

Counterclaim

[48] Ms. Thomas submitted that the Court should find that the collision was caused solely as a result of Mr. McKinnon's negligence. As a consequence, Mr. Bonny should succeed in his counterclaim. Ms. Thomas stated that the Court should accept the evidence presented by Mr. Bonny that he suffered the following losses.

[49] Ms Thomas stated that the pre accident value of the pickup was \$12,000. The vehicle is presently valued at \$1500.00 and Mr. Bonny admitted having sold parts from the vehicle to the extent of \$700.00. Further, Ms. Thomas posited that there can be no doubt, Mr. Bonny expended the sum of \$300.00 to store and tow the wrecked pickup. He also spent \$40.00 being the cost of medical certificate ought to be compensated. There is no doubt that Mr. Bonny is entitled to be compensated for his pain and suffering caused by the accident.

Mr. Bonny's loss of income

[50] Ms. Thomas advocated that the Court should be minded to award Mr. Bonny's loss of income in the sum of \$2400 even though he was unable to prove this item of his claim by producing any pay slips or job letter, that he was employed. He stated that he earned \$600.00 a week and claimed for 4 weeks. Counsel referred to Mr. Bonny's evidence that while he was on probation his employer was willing to provide him with transportation from East Bus Station and the "pickup time" was 630am. With his pickup being damaged, he was unable to get transportation from Hodges Bay to East Bus Station and counsel opined

that the absence of receipts is not fatal to Mr. Bonny proving his claim for special damages.

[51] Mr. Rhudd disputed that Mr. Bonny suffered the loss of income as alleged or at all. Mr. Bonny did not adduce any evidence of his employment.

[52] Ms. Thomas relied on **Grant v Montréal Moonam Ltd and Another (1988) 43 WIR 372** in which it was held that:

“The question of the absence of receipts only goes to the test of the credibility of the claimant. Where the cross examination does not go to proof of the cost of the articles or services claimed or to the veracity of the claimant’s testimony of the facts of their purchase, then the claimant establishes a prima facie case as to the loss and the cost. Where there is no evidence in rebuttal of the amounts claimed then the claimant meets the standard of proof required to succeed.”

[53] In further support of her argument, Ms. Thomas referred to the judgment of Mitchell J in **Liverson Sandy v. Antigua Public Utilities Authority, Antigua and Barbuda High Court Suit No. 156 of 1998** where it was held that “the standard applicable to proof of special damages is the balance of probability. Where the claimant by oral testimony in Court establishes the value of a claim for special damages and the value placed on the claim is not challenged, then unless the value claimed appears unreasonable, the only course of action properly open to the assessor is to accept the claimant’s claim in full.”

Personal Injury

[54] Ms. Thomas submitted that based on the evidence before the Court that Mr. Bonny was injured and had to be hospitalized for 3 days, the Court should award him damages in the sum of \$5000 for pain and suffering.

[55] Mr. Rhudd argued that the Court should not award Mr. Bonny the sum of \$5000 since the Medical Report indicated that Mr. Bonny’s injuries were not serious.

Court’s findings and analysis

Vehicle

[56] Mrs. Spencer purchased her motor car in 1999 at a price of \$80,000.00. The motor vehicle is a 1996 model and was not a new vehicle. The current market value of the vehicle was stated as \$75,000. I am of the opinion that Ms. Thomas's objection to Mr. Hadeed's hypothetical assessment of the vehicle in the sum of \$75,000.00 is well founded. However, Mr. Bonny has not adduced any evidence to assist the Court in its determination of the value of the motor car. Let me say at the onset that, I entertain no doubt based on the evidence adduced that the motor car is a write off. In the circumstances, I must seek to determine a fair and reasonable assessment of the value of the motor car before the accident. I am of the view that \$60,000.00 is a fair reasonable value of the vehicle taking into consideration that the vehicle would have depreciated in value over the years and at the time of the accident would have been approximately 8 years old.

[57] I would deduct from the figure of \$60,000 the sum of \$5000 which Mrs. Spencer stated is the salvage value (her evidence in this regard was not controverted). The extent of the loss suffered by Mrs. Spencer as a consequence of her vehicle being a write off is \$55,000.

Liability

[58] I have further reviewed the evidence adduced by both parties. I am satisfied that on the night in question Mr. Bonny was driving his pickup and was in the process of overtaking a parked vehicle, in so doing, he came out of his lane and into the lane of the oncoming motor car driven by Mr. McKinnon. Mr. Bonny clearly miscalculated or misjudged the situation and sought to overtake in a manner that was not safe. I accept the submissions of Mr. Rhudd that Mr. Bonny was required to overtake the vehicle and to be able to complete the manoeuvre in a safe manner. Clearly Mr. Bonny was unable to do so. I adopt the principles stated in **Mc Call v Ogiste** *ibid* that the onus is on the driver of an overtaking vehicle to make sure that the entire movement is safely conducted and completely.

[59] I am very familiar with the Cedar Grove road. I have no doubt that Mr. McKinnon's view was initially impeded by the bump (hill) on the road. Mr. McKinnon ought to have

exercised more care since it was difficult for him to see oncoming vehicles and should have driven at a slower speed which would have enabled him, if necessary, to take defensive measures in order to prevent the collision.

[60] I am equally satisfied that Mr. Bonny in overtaking the parked vehicle went over his proper side of the road and while he may have swerved his pickup in order to prevent the collision his efforts were too late in coming. I do not believe that Mr. Bonny had completed the manoeuvre and had straightened up and was on his proper side when the accident occurred. I am fortified in my view based also on the evidence from Mr. Bonny that it was impossible for 3 vehicles to pass comfortably on that road, I have no doubt that Mr. Bonny's pickup came into the path of the motor car.

[61] I am also satisfied that Mr. Bonny's negligent driving caused the accident.

[62] I am equally satisfied that the negligent speeding of Mr. McKinnon contributed in great measure to the accident.

[63] I hold that Mr. Bonny was negligent in driving his pickup and caused the accident, I am also of the view that Mr. McKinnon is also liable on the basis of his contributory negligence. I accept the principles of contributory negligence as relied on by Ms. Thomas.

[64] It is the law that where a defendant is found to be negligent and the plaintiff is guilty of contributory negligence, the Court may apportion the damage: 'the damages recoverable shall be reduced to such extent as the court thinks just and equitable having regard to the share of the (plaintiff) in the responsibility for the damage. See: **Kunwarsingh v Ramkelawan (1972) 20 WIR 441 (High Court, Trinidad and Tobago)**

"There BD was driving the plaintiff's car at night when he collided with the defendant's van, which was parked on the road without lights. The car was damaged. BD's evidence was that he was driving at 25mph and did not see the unlighted van until he was almost eight feet behind it. **Rees J held at p 444** that there is a presumption of negligence where a vehicle is parked on a road at night without lights; therefore, the defendant was liable in

negligence, but BD was contributorily negligent (with 25% apportionment), in that
...there is a principle in cases of this kind to the effect that if a driver of a vehicle proceeds at such a speed that he is unable to pull up within the limits of his vision, he is in the wrong. If the driver is unable to see where he is going, he must stop. Applying this principle, if BD did not see the van until he was eight feet away, with the beam of his light presumably showing much more than eight feet, he was not keeping a proper lookout. If he saw the van before he was a distance of eight feet from it and did not stop before striking it, then he was traveling at a speed at which he could not stop within the limits of his vision. In either event he was guilty of contributory negligence."

- [65] Applying the above mentioned principles referred to by Ms. Thomas together with those stated above, I apportion the liability for the accident in the following ratio: 70% to Mr. Bonny and 30% to Mr. McKinnon (the latter who was the servant and agent of Mrs. Spencer).

Loss of use

- [66] I have no doubt that Mrs. Spencer is entitled to recover compensation for the loss of the use of her motor car. I am not of the view that she should be compensated for 365 days. She was required to mitigate her losses and she did this by purchasing a motor vehicle approximately 4 months after the accident. Plausible though her argument is in support for compensation for the entire period of 365 days, I am far from persuaded that she should be compensated for the period during which she had the use of the other vehicle. I am therefore of the opinion that Mrs. Spencer should be compensated for the loss of use of her vehicle for the period of 120 days. Further, I entertain serious doubt that Mrs. Spencer was forced to expend the sum of \$216 per day in transportation expenses as she would have me believe. Her accuracy on this aspect was seriously challenged in cross examination. However, Mr. Bonny was unable to adduce any positive evidence to show that Mrs Spencer spent less; this is to be expected given the nature of this aspect of the claim. I am therefore required to determine what is a fair and reasonable sum that Mrs. Spencer would have had to expend in transportation expenses for the period under review. I am of the considered opinion that the sum of \$150 per day is a reasonable sum.

[67] I therefore conclude Mrs. Spencer loss of use is represented by the sum of \$150 x 120 = \$18,000. I also find that Mrs. Spencer spent the sum of \$680 on the repair estimate. I therefore find that the total loss Mrs Spencer suffered as a consequence of the collision is \$73,680.

Counterclaim

[68] Mr. Bonny alleged that the value of his pickup was \$12,000 and has provided the Court with proof of this. He stated that the salvage value of his pickup was \$1500. I believe him. I am therefore of the opinion that the loss he has suffered as a result of his vehicle being write off is \$12,000 less \$1500 that is \$10,500.

[69] There is no dispute in relation to the storage and towing fees that he claimed so he is entitled to be compensated for the entire figure of \$300.

Medical report

[70] I have no doubt that he spent \$30.00 on the order to obtain the medical report and is therefore entitled to compensation under this head.

Loss of income

[71] I do not for one moment doubt that Mr. Bonny was employed as a carpenter and as a result of the accident was unable to continue due to him not having his pickup as a result of the collision. I have no reason to disbelieve that he earned \$600 per week. However, I am satisfied that he had a duty to mitigate his losses and should have taken steps to avoid the losses that were avoidable at least 2 weeks after the incident. He is therefore only entitled to recover for the loss of salary he suffered for a period of 2 weeks at \$600 per week.

Pain and suffering

[72] Mr. Bonny sought to make it appear that the injuries he suffered were more serious or grave than they were in effect. However, the medical report he submitted clearly painted a very different picture. I accept Mr. Rhudd's submissions on this aspect of Mr. Bonny's

counterclaim that a substantial award for pain and suffering should not be awarded. I am therefore of the view that Mr. Bonny should be awarded damages in sum of \$3,000 for his pain and suffering.

Apportionment

[73] I am now required to apportion the damages awarded in view of my findings above that Mr. Bonny was 70% liable for the collision and Mr. McKinnon was 30% liable.

[74] Accordingly, on her claim against Mr. Bonny, Mrs. Spencer is entitled to recover 70% of her proven damages whereas Mr. Bonny shall recover 30% of his proven damages on his counterclaim against Mrs. Spencer.

[75] Mrs. Spencer has proven that the total losses she has suffered as follows:

	$\$60,000 - \$5,000 = \$55,000$
Loss of use \$150 x 120days	\$18,000
Cost of estimate repairs	<u>\$680</u>
Total	\$73,680

[76] Mrs. Spencer is entitled to recover 70% of \$73,680 which is the sum of \$51,576.00

[77] Mr. Bonny has proven that he has suffered losses in the sum of:

	$\$12,000 - \$1500 = \$10,500$
Medical certificate	30
Pain and suffering (damages)	\$3,000
Salary (loss of salary)	<u>\$1,200</u>
Total	\$14,730

[78] Mr. Bonny is entitled to recover 30% of \$14,730 which is \$4,419.00

Conclusion

[79] In conclusion and for the above reasons, I give judgment for Mrs Ruth Spencer against Mr. Bernard Bonny on her claim in the sum of \$51,576.00 together with prescribed costs.

[80] I also give judgment for Mr. Bernard Bonny for damages on his counterclaim against Mrs. Ruth Spencer in the sum of \$4,419.00 together with prescribed costs.

[81] I commend all counsel for their industry.

Louise Esther Blenman
Resident High Court Judge