

**IN THE GRAND COURT OF THE CAYMAN ISLANDS
CIVIL DIVISION**

Cause No.: G 70 of 2017

BETWEEN

ALEX WILLIAM BALLS

Plaintiff

AND

BEEDYWATTE SHEWRAJ

1st Defendant

AND

**SAXON MOTOR & GENERAL INSURANCE COMPANY LTD
(Trading as SAXONMG)**

2nd Defendant

CHAMBERS

Appearances: Mr. Shaun Tracey, of Campbells for the Plaintiff/Respondent
Mr. Paul Keeble with Ms. Sulekha Tummala for the
Defendants/Applicants.

Before: The Hon. Justice Marlene Carter (Actg.)

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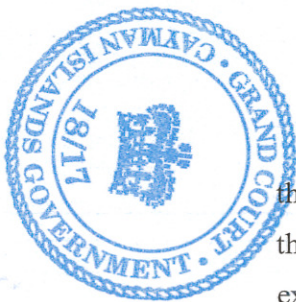


HEADNOTE

Personal injury claim; settlement discussions; without prejudice communications

RULING

1. The parties are involved in a claim arising out of a motor vehicle accident that took place at Northward in Grand Cayman on the 13 August 2014 ["the accident"]. Before the Court is a summons filed on 30th August 2017 in which the Defendants seek to strike the whole or part of



the Plaintiff's First Affidavit sworn the 22nd August 2017 ["the First Affidavit"] on the ground that the affidavit was "*scandalous, irrelevant or otherwise oppressive*", introducing as it does and exhibiting an email exchange expressly marked "without prejudice" and being subject to the privilege applicable to settlement negotiations. The Defendants' summons was supported by the affidavit of David L. Merriott sworn 20th October 2017, ["the Merriott affidavit"].

2. The Plaintiff also sought to place before the court an unfiled summons seeking an order to permit the Plaintiff to cross-examine the deponent on the Merriott affidavit. Given the Order for directions made by this court on 7 September 2017 in relation to various outstanding summonses, the Plaintiff was not permitted to adduce these matters before the court and this ruling does not encompass matters relating to such application.
3. The Plaintiff instituted civil proceedings against the Defendants in April 2017 and obtained default judgment against the 1st Defendant dated 12 May 2017. The Plaintiff's summons, unfiled at the time of this hearing to strike out the 1st Defendant's Summons to set aside the default judgment is not properly before this court and is not dealt with in this ruling.
4. At the hearing the Defendants' attorney indicated that they would not pursue Paragraph 3 of the summons dated 30th August 2017 and this ruling does not refer to that paragraph further.
5. The focus of the instant application is paragraphs 28-36 of the First Affidavit and various exhibits to that affidavit. Specifically, the Defendants object to paragraph 33 of the First Affidavit and the Exhibit AWB3 annexed to that affidavit as well as the first page of Exhibit AWB5. The Defendants allege that the Plaintiffs should not be permitted to introduce and exhibit the communications contained therein which allude to statements made by SaxonMG's independent loss adjuster, David Merriott. The Defendants state that these were plainly marked 'without prejudice' and made for the purposes of discussion and promoting settlement.

The Law

6. The Defendant submitted a number of authorities for the Court's consideration. First among these, pointing to the purpose and scope of the without prejudice privilege, is the case of *Rush &*

*Tompkins Ltd v Greater London Council*¹. The following passage from Lord Griffiths' judgment was cited:



*"The 'without prejudice' rule is a rule governing the admissibility of evidence and is founded upon the public policy of encouraging litigants to settle their differences rather than litigate them to a finish. It is nowhere more clearly expressed than in the judgment of Oliver LJ in **Cutts v Head** [1984] Ch. 290, 306:*

*"That the rule rests, at least in part, upon public policy is clear and from many authorities, and the convenient starting point of the inquiry is the nature of the underlying policy. It is that parties should be encouraged so far as possible to settle their disputes without resort to litigation and should not be discouraged by the knowledge that anything that is said in the court of such negotiations (and that includes, of course, as much the failure to reply to an offer as an actual reply) may be used to their prejudice in the course of the proceedings. They should, as it was expressed by Clauson J. in **Scott Paper Works Ltd.** (1927) 44 RPC 151, 156 be encouraged fully and frankly to put their cards on the table.....The public policy justification in truth, essentially rests on the desirability of preventing statements or offers made in the course of negotiations for settlement being brought before the court of trial as admissions on the question of liability."*

The rule applies to exclude all negotiations genuinely aimed at settlement whether oral or in writing from being given in evidence...if it is clear from the surrounding circumstances that the parties were seeking to compromise the action, evidence of the content of those negotiations will, as a general rule, not be admissible at the trial and cannot be used to establish an admission or partial admission."

7. The observations of Walker LJ in *Unilever Plc v Proctor & Gamble Co*². were also noted:

"...they [the cases] make clear that the without prejudice rule is founded partly in public policy and partly in the agreement of the parties. They show that the protection of admissions against interest is the most important effect of the rule. But to dissect out identifiable admissions and withhold protection from the rest of without prejudice communications (except for a special reason) would not only create huge practical difficulties but would be contrary to the underlying objective of giving protection to the parties....[citing Rush & Tompkins] "to speak freely about all issues in the litigation..." Parties cannot speak

¹ [1989] AC 1280

² [2001] 1 ALL ER 783



freely at a without prejudice meeting if they must constantly monitor every sentence, with lawyers or patent agents sitting at their shoulders as minders.”

8. These observations on the scope of the without prejudice communications were also favorably referred to in *Suh and another v Mace (UK) Ltd*³ and in *Ofulue v Bossert*⁴.
9. In *Farmington Group Ltd and another v Barnettson*⁵ it was emphasized that: “...for the ‘without prejudice’ rule to give full effect to the public policy underlying it, a dispute may engage the rule, notwithstanding that litigation has not yet begun.” On the question of how proximate the unsuccessful negotiations in a dispute leading to litigation, should be to the start of that litigation to attract the without prejudice rule, Auld LJ stated as follows:

“However, the claim to privilege cannot, in my view, turn on purely temporal considerations. The critical feature of proximity for this purpose, it seems to me, is one of the subject matter of the dispute rather than how long before the threat, or start, of litigation it was aired in negotiations between the parties. Would they have respectively lowered their guards at that time and in the circumstances if they had not thought or hoped or contemplated that, by doing so, they could avoid the need to go to court over the very same dispute? On that approach, which I would commend, the crucial consideration would be whether in the course of negotiations the parties contemplated or might reasonably have contemplated litigation if they could not agree. Confining the operation of the rule, as the Judge did, to negotiations of a dispute in the course of, or after threat of litigation on it, or by reference to some time limit set close before litigation, does not, with respect, fully serve the public policy interest underlying it of discouraging recourse to litigation and encouraging genuine attempts to settle whenever made.”

The Defendants’ arguments

10. For the Defendants, their position is best summarized by the following paragraphs of the Merriott affidavit:

³ [2016] EWCA Civ 4

⁴ [2009] 1 AC 990

⁵ [2007] EWCA Civ 502



“8. I stress that all of my communications with Mr. Balls, his family and his attorneys, were on an express ‘without prejudice’ basis as to liability, and I had no authority to admit liability for the accident without the instructions of SaxonMG, nor did I at any time do so. After nearly 31 years’ experience in the industry, this is second nature to me, and I am careful to engage with parties only on the express understanding that it is ‘without prejudice’.

9 While I understand that the law is concerned with the substance of such communications not the form (such that discussions aimed at settlement will be treated as privileged from disclosure regardless of such ‘without prejudice’ label), I was careful in my emails and communications with Mr. Balls, his family, and later his attorneys, to ensure that my ‘without prejudice’ settlement communications were so marked.

.....

12. As a practical matter in the interest of promoting settlement discussions and avoiding litigation, I was happy to put to one side the issue of liability for the accident, as my “without prejudice” email of 2 September 2016 to Mr. Balls (Exhibit AWB3/29”) and my “without prejudice” email of 14 October 2016 to Mr. Roper (Exhibit “AWB5/51”) indicates, “concentrate[ing]” as I said on quantum, since obviously if agreement could be reached on appropriate terms as to the quantum of the claim, arguing unnecessarily as to the precise mechanics of the accident and the contributory negligence of Mr. Balls would be counterproductive and otiose. In neither case did I say that liability was admitted, and the position in this respect was entirely reserved.”

Merriott went further to state that liability was still in issue from the Defendants’ point of view.

11. Counsel for the Defendants raised a number of matters for the Court’s consideration as to why paragraph 33 and the highlighted exhibits to the First Affidavit should not be allowed. He submitted that the Court should consider that there were important public policy considerations which permit the screening of without prejudice conversations to enable parties to come to a settlement of a dispute. He argued that in the instant case the Plaintiff could not point to any admissions in the exhibited emails and that even if there was an admission on the part of the Defendant that it was protected by the “without prejudice umbrella”.



12. Counsel admitted that Merriott was the Defendants' agent, however he contended that within the context of the without prejudice negotiations, the Plaintiff had to show that there was, on the part of Merriott, some element of dishonesty in the negotiations, of detrimental reliance by the Plaintiff on the perceived admission of liability or estoppel, to take the matters outside the without prejudice banner. He submitted that the Plaintiff could not point to any admission on the Defendants' behalf which constituted a completed or concluded agreement, to dishonesty or to any circumstances in which an estoppel could be implied.
13. Counsel submitted that there must be an objective assessment by the Court and that on a plain interpretation of the conversations in the exhibited emails the Court would assess these to be in the course of negotiation. He went further to argue that the Court should concern itself only with the email correspondence, pointing to the Plaintiff's own statement in his affidavit filed in opposition to the instant summons that all exchanges between himself and Merriott were by email.
14. Counsel for the Defendants also invited the Court to look at what the liability picture was regarding the accident at the time of the email conversations. He submitted that liability was still very much in issue, and that despite the 1st Defendant's guilty plea, there are matters against the liability presumption, such that there was a clear split in civil liability.
15. Counsel for the Defendants submitted that the fact that there was no response to the Plaintiff's inquiry of whether liability was admitted does not equate to liability being admitted; there was no evidence that liability was admitted. To support this point Counsel directed the Court's attention to the Merriott affidavit at paragraph 8 which confirmed that there was no unequivocal admission of liability/no concluded settlement on the issue of the personal injury claim.⁶
16. Counsel for the Defendants went further to question why, if liability had been admitted as the Plaintiff claims, would the Plaintiff's attorneys writing on the 12th of August 2016 have sought confirmation that liability was admitted or seek information on the issue of the limit to the value of the indemnity on the insured's policy of insurance.

⁶ Paragraph of the Merriott affidavit is quoted above.



The Plaintiff's arguments

17. The Plaintiff filed three affidavits in opposition to the Defendants' summons to strike; two affidavits of the Plaintiff, dated the 11th October 2017 and 17th October 2017, and the affidavit of Timothy Balls dated the 11th October 2017.
18. In the First Affidavit the Plaintiff states at paragraph 33 that "*the issue of liability was confirmed as having been accepted*" and it is then that he referred to and attached the emails to which the Defendants now object.
19. Counsel for the Plaintiff contends that the Court should find that the parties had agreed on liability based on the exhibited emails passing between the Plaintiff and Merriott. The Plaintiff's arguments centered especially on an email dated 2nd September 2016, within which, in response to an earlier email from the Plaintiff in which the Plaintiff had inquired whether Merriott could confirm that the liability for the matter was not in dispute, Merriott indicated that there was no need to discuss responsibility for the crash and that there only needed to be a concentration on the extent of the Plaintiff's injuries and the claim values.
20. The Plaintiff's contention is that this aspect of the discussion was now not part of any negotiation relating to liability. He asks the Court to find that the Defendants had accepted responsibility by their response, which was a very clear indication without caveat. The Plaintiff contended that there was a concluded agreement on the issue of liability thereafter, such that any ensuing negotiations would concern only quantum.
21. Counsel for the Plaintiff argued further that the emails under scrutiny are "...*exchanges that, while marked without prejudice, do not indicate any process of negotiation. Instead, several of them consist of Mr. Merriott requesting, and Mr. Balls providing, periodic updates about his treatment, together with Mr. Merriott offering to meet with Mr. Balls prior to him choosing an attorney. This indicates that Mr. Merriott uses the 'without prejudice' heading indiscriminately.*" Counsel expanded on this point by stating that when the Plaintiff had sought an answer to his question, (the email dated 2nd September 2016) his inquiry was made openly and the unilateral insertion by Merriott of the words "without prejudice" meant that the email did not have the character of without prejudice communications. It was submitted that: "*Mr. Merriott gave an affirmative response to an open enquiry made in order to ascertain what was in dispute.*"



This might have led to negotiations to resolve quantum (which would have been privileged) but no such negotiations are contained within this email."

22. Counsel for the Plaintiff also submitted that even if the Court were to find that the email had been made without prejudice that it would still be admissible because it was evidence of a concluded agreement upon the question of liability, and evidence to ground an estoppel and prevent the Defendants from denying their statement, as the Plaintiff had suffered detriment by the Defendants having resiled from their representation on liability.
23. The Plaintiff stated that there were three matters which he identified at paragraph 32 of the First Affidavit which also led to his firm belief that liability had been admitted. This belief was based on the vehicle damage payment made by the Defendants for the motorcycle damaged in the accident, the conviction for careless driving of the First Defendant and a report to which the Plaintiff's father had alerted him that an accident reconstruction expert had determined that the First Defendant was liable for the accident.

The cheque

24. The Plaintiff relies on the cheque as being evidence of a concluded agreement with respect to the damage to the motorcycle. Counsel for the Plaintiff in skeleton submissions argued that the Final Release and Discharge agreement which accompanied the payment for the motorcycle "*does not contain any statement of non-admission of liability for the crash. On the contrary, the agreement also states: 'injury claims to be settled separately' which is consistent with liability (but not quantum) having been accepted.*"
25. Counsel for the Plaintiff also stated in submission that "*there is no inference that the cheque was paid on a 'without prejudice' basis and it was not the subject of any negotiation.*" The Plaintiff asserted that all discussions between himself and the insurance company after the production of the cheque on the 24th September 2014 for the damage to the motorcycle arising from the accident related solely to quantum.
26. The Defendants' submission on this matter of the cheque is that the Release which accompanied the cheque speaks for itself. The Defendants submit that the release clearly excludes any claim

arising out of the Plaintiff's injuries by the statement, *"Injury claims to be settled separately."* The Defendants also point to the affidavit of Timothy Balls filed by the Plaintiff which details his receipt of the cheque on the Plaintiff's behalf and that the cheque was for the value of the Plaintiff's motorcycle only.



"9. Towards the end of September 2016, Mr. Redden arranged to meet me in Café de Sol in Marquee Plaza. He gave me a cheque to take on behalf of Alex, since he was still recovering from surgery for injuries sustained in the accident.

10. The cheque was in the sum of KYD2,000.00 and a copy was exhibited by Alex as AWB2.

11. Our meeting was very brief. I simply asked Mr. Redden what the cheque was for. He replied that it was for Alex's motorcycle only. He said it represented the full amount of the value of the motorcycle referred to in my son's insurance policy (which was also with SaxonMG).

12. When Mr. Redden gave me the cheque, he did not say anything to the effect that it was being provided on a "without prejudice" basis."

27. The Defendants submit that this payment and the correspondent release can offer no support to the Plaintiff's claim that they represented an agreement to liability generally. The Defendants point to the Plaintiff's continued engagement with Merriott after the payment and release to lend support to their argument.

28. The Defendants assert that the payment for the Plaintiff's motorbike was not conclusive of the Defendants admitting liability on the entire claim. The Merriott affidavit set out the Defendants' position on those paragraphs as follows:

"I am aware that SaxonMG had within two months of the accident paid Mr. Balls \$2,000.00 by cheque on account of the loss of his motorcycle, with SaxonMG acquiring the salvage in the motorcycle. This is quite common within the industry. The sum involved was relatively minor and not worth arguing over.



This was a commercial decision by SaxonMG. As the cheque stub dated 24 September 2014 indicates, this was the "Claimants Property damage settlement payment". This was a settlement on account of the loss of his motorcycle only, and to seek to suggest that this could constitute anything more is in my view unsustainable."

The report of the accident reconstruction expert

29. Apart from the issue of the cheque the Plaintiff also asserted that he believed that liability was agreed because of *"a report that the Plaintiff's father had alerted him to that an accident reconstruction expert had determined that the first defendant was liable for the accident."*

30. The relevant paragraphs of the affidavit of Timothy Balls are paragraphs 5-8 of the affidavit filed on 11 October, 2017.

"5. Approximately one week after the accident, Mr. Redden attended at our property and said that he had been instructed by SaxonMG to take photographs of Alex's damaged motorcycle.

6. At that time, I had known Mr. Redden for more than 15 years. I worked with him during my career as a Police Officer in the Royal Cayman Islands Police Service (RCIPS), from 1996 until 2014. We were both Traffic Officers.

7. During Mr. Redden's visit, he told me that he had been to the accident scene. He said it was obvious what had happened and that it was clear that Mrs Shewraj was at fault.

8. Mr. Redden did not inform me that he had prepared a report about the accident, but I anticipated that he would be doing since that would be normal practice where an insurer has instructed an accident investigator such as Mr. Redden. I am not aware of whether he has in fact produced such a report."

31. In the Plaintiff's second affidavit of the 11th October 2017, he stated as follows:



“5. Paragraph 31 of my first affidavit accurately reflected my understanding at the time I swore my that [sic] affidavit. However, I did not appreciate that my father was inferring that Mr. Redden would produce an accident report for SaxonMG, rather than Mr. Redden having actually informed my father that he had produced such a report. However, that distinction is now academic because the RCIPS have stated that Mr. Redden confirmed to them that he has submitted an accident reconstruction report to SaxonMG (see page 2 of the letter from the RCIPS to Stenning & Associates dated 5 September 2017, exhibited as “AWB-12”).”

32. On this matter Counsel for the Plaintiff asserts that the inference to be drawn from the statement is that Mr. Redden’s report would reflect the opinion that he had initially expressed to Tim Balls. That report has not been produced upon this application.

Court’s considerations

33. The without prejudice rule is widely used in the course of negotiations surrounding claims for injuries/damages arising out of motor vehicle accidents. The utility of the rule cannot be overlooked as it allows for the mutual satisfaction of these claims without recourse to the courts. As stated in the judgment of Oliver J in *Cutts*⁷: “The public policy justification..., essentially rests on the desirability of preventing statements or offers made in the course of negotiations for settlement being brought before the court of trial as admissions on the question of liability.”
34. In *Walker v Wilshire*⁸ Lindley LJ stated: “What is the meaning of the words ‘without prejudice’? I think they mean without prejudice to the position of the writer of the letter if the terms he proposes are not accepted. If the terms proposed in the letter are accepted, a complete contract is established, and the letter, although written without prejudice, operates to alter the old state of things and to establish a new one.”

⁷ [1984] Ch. 290, 306

⁸ [1889] 23 QBD 335 at 337

35. In *Tomlin v Standard Telephones and Cables Ltd*⁹, it was held that letters marked without prejudice were admissible in order to determine whether there was a concluded agreement. “...as it was not possible to determine without looking into the correspondence whether there was a binding agreement.” Danckwerts LJ stated in his judgment in *Tomlin*:



“A point that arises is that all the letters written by the agent of the insurance company bore the words “Without Prejudice”. The point is taken that, by reason of those words, there could not be any binding agreement between the parties and it was said, indeed, on behalf of the defendants that the letters were not admissible. I feel no doubt, as the learned judge felt no doubt, that the letters were admissible, because the point was whether there had been a concluded agreement of any kind between the parties in accordance with that correspondence, and it would be impossible to decide whether there was a concluded agreement or not unless one looked at the correspondence.”¹⁰

36. The presence of a binding agreement is alleged by the Plaintiff on this application. Therefore the first task for this Court is to examine the email exchanges which lie at the heart of this application and ascertain, on an objective basis, whether the parties were involved in negotiations that were genuinely aimed at settlement of the Plaintiff's claim.
37. The email correspondence between the Plaintiff and Merriott commenced after an initial meeting with Merriott, the Plaintiff and his mother, after which according to the Plaintiff “*everything was said by email.*” Thus, on the 18th of August 2014 Merriott sent the first email to the Plaintiff seeking information as to the progress of the Plaintiff's treatment for his injuries. That correspondence is headed “without prejudice”. All of the other pieces of email correspondence, with one exception, attached as Exhibit AWB3 from Merriott are headed “without prejudice”. The matters that are discussed are all related to the Plaintiff's claim.
38. The exception is an email dated 15th October 2015. In reply to two previous emails from Merriott seeking updates on the Plaintiff's condition, both of which were marked “without prejudice” the Plaintiff stated that he was seeking legal advice. Merriott's answer acknowledged the Plaintiff's

⁹ [1969] 3 All ER 201

¹⁰ Per Danckwerts LJ at page 203



right to seek such advice and amongst other matters stated that: *“your claim will be considered fairly on its merits”*.

39. Further emails passed between the two and in August 2016 the Plaintiff, by emails, sought confirmation *“that liability for this matter is not in dispute.”* The response from Merriott on the 2nd September 2015 was to the effect that there was no need to discuss responsibility for the crash, that the extent of the Plaintiff’s injuries and the claim values should be considered. This email was sent under the “without prejudice” cover. Merriott’s response to the inquiry whether liability was admitted was not a direct reply to the inquiry but rather to state that there should be a concentration only on quantum. It is this email exchange that the Plaintiff rests the main plank of his submission that liability was agreed.
40. Subsequent to this email was the letter before action, dated the 12th October 2016, the first page of which is objected to by the Defendants as it referenced the email correspondence between Merriott and the Plaintiff.
41. The case of *Tomlin v Standard Telephones and Cables Ltd*¹¹ referred to above was relied upon by the Plaintiff as being an instance in which the “without prejudice” cover did not avail a defendant’s insurers. In *Tomlin* the main issue before the court related to a letter written to the plaintiff’s solicitors, marked “without prejudice” in which the defendant’s insurers stated that they were prepared to deal with the Plaintiff’s claim on a 50-50 basis. The plaintiff’s solicitor replied agreeing to settle on a 50-50 basis as proposed. All subsequent letters between the parties were marked “without prejudice”. The discussions continued and in further correspondence solicitors for the plaintiffs stated that a 50/50 basis has been agreed as proposed by the insurance company on behalf of the defendants *“and accordingly this leaves only the question of quantum to be disposed of”*.
42. The Court of Appeal found that such statement was *“never contradicted or rejected on behalf of the defendants”* and *“In four letters at least the defendants’ representative, the insurance company’s claims manager, had referred to the agreement for 50/50 as an ‘agreement’, and there*

¹¹ [1969] 3 All ER 201



is no suggestion that it was merely a step in an eventual settlement to be reached.”¹² On this view of the correspondence, the Court of Appeal came to the conclusion that the proper construction is that there was a definite and binding agreement on a 50/50 basis and found that the plaintiff was entitled to seek damages based on that concluded agreement. The insurers were precluded, in those circumstances from reliance upon the ‘without prejudice’ cover.

43. The instant case differs from *Tomlin* in one significant aspect. The Plaintiffs cannot point to a positive acceptance of liability. This Court finds it difficult to conclude from a consideration of the emails that there was an admission of liability on the part of the Defendants. There is no question for this Court that the communications between Merriott and the Plaintiff were genuinely aimed at settlement with a view to the Plaintiff’s claim being settled without the need for court action. Once the Defendants knew that attorneys were involved nothing changed in terms of their interactions with the Plaintiff’s attorneys and the issue of liability, there was no confirmation of liability being admitted. There is nothing in the emails which shows or from which this Court could infer that Merriott confirmed that there was an agreement for or settlement of the Plaintiff’s claim.
44. The presence of one email which appears in the middle of all the other correspondence on the 15th October 2015 which does not contain the words ‘without prejudice’ cannot take away from the nature of the communications between the Plaintiff and Mr. Merriott. In any event, the email of the 15th of October 2015 was sent after there had been a lapse in communications between the two while the Plaintiff was receiving treatment for his injuries and the nature of the inquiry made by Merriott followed on from the earlier discussions.
45. Further with regard to the exchange on the August 2016, there was no direct response to the Plaintiff’s inquiry of whether liability was admitted. This factor alone cannot equate to liability being admitted and is not an unequivocal admission of liability. It was not unreasonable for Merriott to leave this matter aside and to seek the further information on the Plaintiff’s treatment and the costs thereof in the context of negotiations, which were stated on the emails to be ‘without prejudice’. The email correspondence displays genuine attempts to reach settlement. They do not display evidence of a binding agreement between the Plaintiff and the Defendants on liability.

¹² Per Danckwerts LJ at page 203

46. Apart from the emails themselves, there were other matters raised by the Plaintiff to support his view of there being a concluded agreement. The first of these related to the circumstances surrounding the cheque as related above. Having considered the submissions on this point, they do not take away from this Court's view that these communications were all made genuinely within the "without prejudice" umbrella. Whatever may have been the Plaintiff's belief, the release that the Plaintiff signed at the time that the cheque was presented was clear in its terms. It related to the motorcycle and was a payment for that only. There is nothing flowing from the release from which this Court could find that there was a concluded agreement that the Defendants were liable for the Plaintiff's personal injuries. I agree with the Defendants' position that the final phrase on the Release is conclusive of that point. The Release states, inter alia:

"In consideration of payment in the amount of KYD\$2,000.00 by SaxonMG Insurance Company LTD; receipt of which I hereby acknowledge, I forever release and discharge SaxonMG Insurance Company Ltd; and Ragindranand Shewraj from all claims, actions, suits and proceedings for all losses or damages sustained by me in the respect of an accident which occurred on or about 13/8/2014 in the vicinity of Northward Road.

.....
This relates to Yamaha XTZ 125cc. TP will not keep salvage.

.....
Injury Claims to be settled separately."

47. On the second matter of the report of the accident reconstructionist, the views of the Plaintiff's father and whether or not the Plaintiff inferred from what his father told him what the report of the accident reconstructionist would be, also do not have much bearing on whether or not there was a concluded agreement between the parties. Even if such a report was available it was not something that had been formally provided to the Plaintiff and upon which he could seek to infer that the Defendants had admitted liability for the accident. As counsel for the Defendants noted in his submissions on this issue, the fact that an accident investigator may have been instructed could support the opposite conclusion that liability for the accident was still under investigation and had not been admitted by the insurer.



48. The addition of the fact of the First Defendant having pleaded guilty to careless driving without more does not advance the Plaintiff's submission that there was a concluded agreement on liability or that liability had been admitted.
49. The Plaintiff's assertion of estoppel does not arise on the facts of this case. Without there being evidence of a concluded agreement the matters raised within the context of the without prejudice discussions or negotiations cannot be relied upon by the Plaintiff as admissions of liability. There is therefore no statement of admission upon which the Plaintiff can state that he relied. The matters that the Plaintiff relied upon were his own assumptions of what various facts could mean for his case but cannot be attributed to the Defendants, and do not cause this Court to find that there had been reliance by the Plaintiff to his detriment on the Defendant's statement.
50. In this instance, all the surrounding circumstances support the conclusion that the parties were seeking to compromise the action. The result is that the content of those negotiations are covered by the "without prejudice" umbrella and are not admissible and cannot be used to establish an admission or partial admission in this case.
51. For these reasons the Court makes the following orders:
- (i) The application to strike Paragraph 33 and Exhibit AWB 3 of the First Affidavit and the first page of Exhibit AWB 5 is granted, and that the said paragraph and Exhibits be expunged from the record.
 - (ii) The costs of the instant application shall be borne by the Plaintiff. Such costs to be assessed if not agreed.



**THE HON. JUSTICE MARLENE CARTER
ACTING JUDGE OF THE GRAND COURT**

