

GRENADA

IN THE COURT OF APPEAL

CIVIL APPEAL NO.24 OF 2004

BETWEEN:

MICHAEL BRIDGEMAN

Appellant

and

KENWYN MAITLAND

Respondent

Before:

The Hon. Michael Gordon, QC

Justice of Appeal

The Hon. Denys Barrow, SC

Justice of Appeal

The Hon. Hugh A. Rawlins

Justice of Appeal

Appearances:

Mr. Archelaus Joseph for the Appellant

Mrs. Celia Edwards for the Respondent

2006: February 21; 22;
July 3.

JUDGMENT

[1] **BARROW, J.A.:** When this appeal against the quantum of damages and the costs that were awarded came on for hearing it was clear that the material on damages that had been placed before this court was incomplete. The court invited counsel to agree but no agreement was reached so counsel were directed to make written submissions upon which the court would determine the appeal. The submissions were duly made.

[2] Both parties owned trucks that hauled goods at the port of St. George's. One day the trucks collided. The judge found that the appellant drove negligently and found him liable for causing the accident. The claimant's truck was a total loss. The judge awarded the respondent the total sum of \$465,000.00 for loss of earnings

for one year and a half and for the value of the truck. The judge expressed the view that that time was sufficient time for the respondent to mitigate his loss by purchasing a new truck. In addition, the judge ordered the appellant to pay interest on that sum at the rate of 4% per annum from the date of the filing of the writ up to the date of trial and thereafter at the rate of 6% per annum until the date of payment. The judge also awarded costs of \$46,500.00 to the respondent. The appellant appealed against the awards of damages and costs.

- [3] Two of the six grounds of appeal were pursued. These were: (i) no evidence was adduced by the respondent that he could not source a replacement vehicle for 18 months and was therefore acting reasonably, and (ii) no evidence was adduced by the respondent that the loss of income was a net loss.
- [4] As to the first ground, neither in his witness statement nor in oral testimony did the respondent give any evidence about steps that he took to replace the vehicle or about the time that it was taking to replace it. However, counsel for the respondent argued that in the writ of summons it was pleaded that 5 months after the accident the respondent had not replaced the truck. Counsel also argued that in his witness statement, which was filed 1 year after the accident, the respondent indicated that he was still suffering loss of use. At the time of trial, some three and a half years after the accident, the respondent testified that his insurers paid him for his truck and that if he got judgment his insurers “would have to pay themselves.” There is no evidence as to when the respondent replaced the truck or, indeed, that he ever did.
- [5] Counsel for the appellant relied on the well established proposition, stated in **McGregor On Damages**,¹ that the onus of proving loss is upon the person alleging loss and in the absence of such evidence the claim must fail. In a footnote to the passage upon which the appellant relied the author quotes the observation of Lord Goddard C.J.: “Plaintiffs must understand that if they bring actions for

¹ 15th edition, paragraph 1779

damages it is for them to prove their damage; it is not enough to write down particulars, and, so to speak, throw them at the head of the court, saying: 'This is what I have lost, I ask you to give me these damages.' They have to prove it."²

[6] Though slight, the respondent did provide evidence of the loss of use up to the date of his witness statement – 11 months after the date of the accident. He stated in that document that he was continuing to suffer loss of use and that document was treated at the trial as his evidence in chief. What the respondent did not do was explain why it took so long to replace his truck and to put an end to his loss of use.

[7] In the passage following the one on which the appellant relied from **McGregor On Damages** appears³ another well-established proposition: that the burden of proof is on the defendant to show that the claimant should have taken certain steps to mitigate his loss. The author cites **Roper v Johnson**⁴ as establishing that the normal measure of damages will not be cut down unless the defendant succeeds in showing that the claimant ought reasonably to have taken the suggested mitigating steps. In this connection the author refers⁵ to **Geest plc v Monica Lansiquot**⁶ in which "the Privy Council took the opportunity to reassert the proposition that if a defendant intends to argue that a claimant has failed to act reasonably to mitigate his or her damages, notice of such contention should clearly be given long enough before the hearing to enable the claimant properly to prepare to meet it. In a case where there are pleadings directed to such issues, it was said to be the defendant's clear duty to plead any allegation of failure to mitigate in the defence."

² *Bonham-Carter v Hyde Park Hotel* (1948) 64 T.L.R. 178, 179

³ at paragraph 1780.

⁴ (1873) L.R. 8 C.P. 167

⁵ In the 17th edition at paragraph 44-002, footnote 3

⁶ [2002] Lloyd's Rep. Med. 482

- [8] The appellant's specific ground of appeal was that the respondent did not adduce evidence that he could not source a replacement vehicle for 18 months. As the authorities show it was not for the respondent to have raised the issue and adduced the evidence; it was for the appellant. The burden was on the appellant first of all to have asserted and proved that 18 months was an unreasonable period to take before replacing the vehicle *in the circumstances of this case*. This may well have been so but it was not for the court to have presumed that it was so. Not having taken even that first step in the court below the appellant cannot get off the ground with his appeal on this issue. I would dismiss this ground of appeal.
- [9] The appellant has succeeded, however, in drawing attention to the fact that there was no evidence before the judge to support an award of loss of use for a year and a half but that the evidence supported an award of loss of use for 11 months.
- [10] The other ground of appeal, that the respondent did not adduce evidence that his loss of income was a net loss, suffers a similar problem. The respondent stated that he lost income at a certain rate. The notes of evidence do not suggest that the appellant ever challenged that rate. There is no suggestion that the appellant raised in the court below any issue as to whether the respondent's stated loss of income was net or gross. I do not see how the appellant can now ask this court to interfere with the award.
- [11] The decision in **Bibi Shamina v Sampat Dyal**⁷ supports the case for the respondent rather than the appellant who cited it. That case is cited for the proposition stated in the headnote that "in a claim for damages for loss of earnings the claimant must adduce evidence as to the incidence of taxation if such is to be taken into account in the assessment of such damages." What the judgment establishes is that if the plaintiff does not include in his particulars of special damage any anticipated tax the defendant would be entitled to require the relevant

⁷ (1993) 50 WIR 239

particulars.⁸ But the case also shows that if there is no evidence as to taxation the court will be right to disregard the incidence of tax.⁹ It follows that if the defendant does not prove that the loss of income claimed by the claimant should be reduced by the expense of earning that income the court must disregard the contention that it should be reduced, especially if it is not made until the appeal stage. I would, therefore, dismiss this ground of appeal, as well.

[12] In summary, I would dismiss the appeal except that I would alter the award by reducing the damages to compensate for loss of use for 11 months as opposed to 18 months. Using the rate of \$5,000.00 per week for 44 weeks that produces an award for loss of use to the respondent of \$220,000.00. The respondent is of course also entitled to the award of \$75,000.00 as the replacement cost of the truck, which was not challenged. That makes for a total award of \$295,000.00 instead of \$465,000.00. I would order that the respondent recover prescribed costs on that sum both in the High Court and in this court, which I calculate at \$51,000.00 and \$34,000.00 respectively. The appellant did not challenge the award of interest at the rate of 4% per annum from the date of the filing of the writ (26 March 2001) to the date of trial (6th April 2004) and thereafter at the rate of 6% per annum until payment.

[13] I should note before concluding this matter that the appellant did not challenge the basis of the award of damages in this case – that damages for loss of a profit-earning chattel should comprise the replacement cost of the item destroyed and the income lost from the loss of use until it is replaced. This court is therefore not called upon to reconcile this award with the proposition that the normal measure of damages for the destruction of a profit earning chattel is the market value of the chattel destroyed at the time and place of destruction and that in assessing that value regard would be had to the profitability or otherwise of the chattel.¹⁰

⁸ p 245 C

⁹ p. 245 F

¹⁰ See McGregor 17th Ed. at 32- 052 to 32-057.

Accordingly, I would not wish to be taken as deciding that the measure of damages is the former and not the latter.

Denys Barrow, SC
Justice of Appeal

I concur.

Michael Gordon, QC
Justice of Appeal

I concur.

Hugh A. Rawlins
Justice of Appeal