

**IN THE EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF ANTIGUA AND BARBUDA**

IN THE HIGH COURT OF JUSTICE

CLAIM NO: ANUHCv2019/0245

BETWEEN:

LIVERSON SANDY

Claimant

and

[1] TAMARA VALERIE

[2] LEON DAVIS

Defendants

APPEARANCES:

Saska Diamond, Counsel for the Claimant

Leslie Anne Brissette, Counsel for the Defendants

2021: October 5th, 26th

DECISION

- [1] **GARDNER-HIPPOLYTE, M.:** This is an assessment of damages stemming from a vehicular accident on the 22nd August, 2018. Judgment on liability was entered on the 11th November, 2020 and mediation having failed, the assessment focused on the following areas; damage to property (vehicle), loss of income and loss of use.

Background

- [2] The Claimant is the owner of a Motor Taxi Bus TX1144 and the second Defendant was driving the vehicle A51744 belonging to the first Defendant, on the 22nd August, 2018 when they collided. The Claimant gave evidence in the form of a witness statement and oral evidence on the day of the assessment. The Claimant was tested by cross examination.
- [3] The prayer of the claim highlighted the cost of repairs to the vehicle at \$16,143.08, loss of Income in the sum of approximately \$129,600.00 and loss of use of vehicle for \$21,600 (for the period 22nd August, 2018 to February 2019). In his witness statement and on the day of Court, the Claimant expanded on his loss of income – as approximately \$26,000.00 a month in the high season and \$16,400.00 in the low season. He stated that he got a loan for a replacement bus in December 2018 and was without a bus from August to December. Mr. Liverson Sandy – stated that Noel Denton is not a mechanic but only a body man. The Claimant stated that after he took

the vehicle from Mr. Denton's yard, he still had work to do as another part was broken and Mr. Denton had only replaced one or two parts on his vehicle.

- [4] The Defendants led two witnesses, the mechanic - Noel Denton and the second defendant – Leon Davis. It is noted that the first defendant – Tamara Valerie did not participate in the proceedings.
- [5] Noel Denton stated he is a mechanic and body repair man for over eighteen - twenty years. At the request of the Claimant, Noel Denton prepared the invoice to repair the vehicle for the Claimant, and he also stated in Court that he fixed the vehicle, except for finishing the body work. He also stated that the Claimant brought him all the parts on the invoice for him to repair the vehicle, however he referenced the parts as being second-hand parts. This witness also stated that he saw the vehicle being driven two to three months after the accident.
- [6] The second Defendant also led evidence stating that he remembers the 22nd August, 2018 well as it was the day his daughter was born. Additionally, that he did not know the Claimant prior to the date of the accident. He said that his vehicle was not able to drive away from the scene of the accident but Mr. Sandy was able to drive away. He gave very brief evidence and he said he saw the Claimant's bus after the accident "by Harney Motorslike filler on the front of the car.....maybe a month or two after the accident." Mr. Davis was tested very briefly in cross examination. He stated he does not know who fix the bus he only met the person today.

Special Damages

- [7] Special damages must be specifically proved.¹ As a general rule the law requires for example medical expenses, loss of earnings, and damage to property must all be strictly proven.² However case law suggests that there can be a small departure from this basic rule.

"Documentary proof is the best evidence; however, in **Central Soya of Jamaica Ltd v Freeman**³, Rowe P intimated that there may be instances where the court might be forced to assess special damages on the basis of purely oral evidence"⁴

- [8] **Central Soya** indicated that with casual work cases it would be challenging to obtain and present an exact figure for loss of earnings. Further in the **Desmond Walters v Carlene Mitchell**⁵ case it was stated by Wolfe J.A. (Ag) that the Court should use its own experience in determining an appropriate award for special damages considering the facts of the case.

¹ **Murphy v Mills** (1976) 14 JLR 119

² Ibid and **Commonwealth Caribbean Tort Law**, 4th Edition Gilbert Kodilinye at page 368.

³ (1985) Court of Appeal Jamaica Civ Appeal no 18 of 1984

⁴ **Commonwealth Caribbean Tort Law**, 4th Edition Gilbert Kodilinye at page 368 and 369

⁵ (1992) 29 JLR 173

- [9] Alternatively in **Thomas v AG**⁶, Justice Sykes opined that “**judges should only depart from the well-established principle if an only if there is a sound and proper basis in law and in fact for such a departure.**” (My Emphasis)

Damage to Property – Nissan Urvan 2004

- [10] The evidence of the Claimant indicates that he owned a bus that he used to ply his trade. The bus was damaged because of the accident and the cost to fix the bus was submitted in the invoice of Glen’s Auto Body repairs with the attached invoice from Hadeed Motors. The invoice indicates the cost for replacement parts was \$10,365.08 and body work and spraying material cost \$978.00 and overall labour \$4,800.00.
- [11] The Defendant has not disputed the invoice on the face of it. His supporting witness in the assessment was the mechanic who prepared the invoice – Noel Denton. The mechanic indicated he completed and fixed everything on the bus, except the body work which he had only just started when the Claimant took the vehicle from his yard on the 11th September, 2018.
- [12] Noel Denton in his witness statement and oral evidence indicated that he assessed the value of the vehicle at \$13,000.00 pre accident and a value of \$3,000.00 post-accident. This assessment was done after he received a call from the insurance company. The Court noted the lengthy arguments from Counsel for the Claimant about not receiving this evidence before hand in a second invoice from Noel Denton, however this information was contained in his witness statement. The Court however choose not to rely on this sum to award a figure for damage to property as the bus was fixed for the most part - according to the evidence of Noel Denton – the mechanic, and accordingly the Claimant is entitled to the cost provided under the invoice. There was no further documentary evidence submitted from the Claimant referencing any further damage or cost to fix the vehicle and I will therefore disregard this component of the Claimant’s evidence.
- [13] Additionally, the Court found the witness Noel Denton to be forthright and on the issue of the damage to property and repairs to the bus the Court makes the following finding:
- (a) That the bus was repaired by Noel Denton except for the completion of the body work;
 - (b) The claimant brought all the materials for the mechanic – Noel Denton to repair the vehicle;
 - (c) That the two invoices reflected a cost of parts in the sum of \$10,365.08
 - (d) The total sum on the invoice prepared by Noel Denton is \$16,143.08

⁶ (2006) Supreme Court, Jamaica NO CLT 095 (unreported)
<https://www.supremecourt.gov.jm/sites/default/files/judgments/Thomas%2C%20Owen%20v%20Constable%20Foster%2026%20Attorney%20General.pdf>

[14] Accordingly, I am awarding the sum of \$16,143.08 as the cost to fix the vehicle.

Loss of Income

[15] The Claimant submitted in his witness statement and evidence that he earned approximately \$900.00 - \$1,500.00 per day in the tourist season. In the off season he earned \$700.00 - \$800.00 per day during the week and on weekends \$400.00 to \$500.00. However, the Claimant provided no documentation in relation to this statement.

[16] The Claimant indicated he is a member of the West Bus Station 24hrs Taxi Association and this is where the evidence could have been found but the books are missing. He also indicated he tried to get copies of his bank statements for the period to submit to the Court, but none were available because of the passage of time, and the bank did not keep such records from 2018/2019. He said – “they don’t go back that far”. No records were supplied for any period before the accident. Additionally, in his witness statement he referred to supplying his current book records⁷ but this information is not part of the Court’s file.

[17] Under cross examination, the Claimant said on a monthly basis he made \$6,000.00 to \$7,000.00 – weekly or \$26,000.00 a month in the tourist season. In the off season he makes approximately \$16,400.00 a month. The Claimant was tested under cross examination in this area, and he stated he earned this amount of money from about 2015/16.

[18] Counsel for the claimant in her submissions has referred to case law⁸ suggesting that the court can award a sum for loss of earnings using the oral evidence of the claimant to reach an amount that is not out of scale.

[19] However I must agree with Sykes J, **that we must not conjure some appropriate figure in the name of justice where a claimant has a legal obligation to prove his case**⁹ (My Emphasis). Whilst the Claimant has provided an explanation for not;

- a)being able to provide bank records for the period 2018/19,
- b)being able to provide records for the taxi fares/trips he did during the same period.

[20] The Court finds that if a person was making approximately \$26,000.00 in the tourist season and \$16,400.00 in the off season that there must be some paper trail to support the financial circumstances of the Claimant. I am not convinced of the amounts proffered by the Claimant with no documentary evidence to support. As highlighted in the same case by Counsel for the Claimant,¹⁰ an independent witness from the taxi association to substantiate the income of Taxi

⁷ At paragraph 7

⁸ Dale James and Eamon Gibbons DOMHCV2014/0236

⁹ Thomas v AG ibid at paragraph 17

¹⁰ Ibid at 8 paragraph 23

drivers perhaps even providing comparable evidence would have greatly assisted the Court in making a determination under this head.

[21] There was also no paper trail exhibited to show his expenses during the period. He stated in his witness statement and cross examination that he had just spent a considerable amount of money fixing his home, preparing for a new baby, upgrading his bus, buying school items for two children and therefore he had no savings to buy a new bus. However, no evidence was provided to support this testimony. I am then left to speculate as to how much this amount was or could have been to assist the Court in possibly validating or determining an amount that is not out of scale. Accordingly, I find that there is “no sound and proper basis in law and fact for such a departure¹¹” from a well-established principle to require strict proof of and award loss of earnings with no documentary evidence to support.

[22] Therefore, I make no award under this head.

Loss of Use

[23] The Claimant claimed loss of use of his vehicle for five months. The accident happened on the 22nd August, 2018 but there is no evidence stating the exact date the Claimant started using another vehicle. He did however state that a loan was approved by the bank in December and in his witness statement he said “During the period August to December when I was without the bus.¹²”

[24] Blenman J (as she then was) in **Tropical Builders v Gloria Thomas** stated that “the general principle is that the court seeks to compensate the claimant for the use which, but for the wrong, he would have had of the motor car.¹³” The Claimant stated he did not work during the period that his vehicle was not operating. The Defendant has challenged this evidence by bringing a witness, a mechanic of over 20 years, who fixed the Claimant’s vehicle. The mechanic stated that the Claimant brought him all the parts to fix the vehicle and he did fix it except for some of the body work, he only had time to weld, put filler and primer. Further, he subsequently saw the vehicle on the road some two or three months after the vehicle was removed from his yard. The Defendant also stated in his evidence that he saw the Claimant driving the vehicle some two months after the accident.

[25] However, the case law implies¹⁴ that the loss of use of the vehicle does not have to be strictly proven by way of receipts of a rental car but it is permissible for the owner to be compensated for being deprived of its use during the period that he was without a vehicle. McGregor on

¹¹ Thomas v AG ibid at paragraph 17

¹² Paragraph 8 of the claimant’s witness statement

¹³ Tropical Builders v Gloria Thomas ANUHCv 2004/0228 at paragraph 31

¹⁴ Ibid at paragraph 31, 32.

Damages¹⁵ stipulates that the Claimant can recover for loss incurred in a reasonable attempt to avoid loss.

[26] I believe the evidence of the mechanic when he indicated that he fixed the vehicle within 4 days, but it was in a bad shape as the undercarriage was “rotten/rusty”. I further believe him when he stated he saw the vehicle driving on the road some two to three months after the accident. I found the mechanic, Noel Denton to be a forthright witness.

[27] Accordingly, using the case law above as guidance¹⁶, I will award an amount of \$150.00 per day at the outside period of three months – 90 days. This period was considered a reasonable length of time in the case of **Edlyn Francis v Anthony Chasteau et al.**¹⁷ Therefore the amount awarded is \$13,500.00 under loss of use of the vehicle.

Conclusion

[28] Damages are assessed in favour of the Claimant as follows;

1. Special damages in the sum of \$ 29,643.08 under the heads –
 - a. Damage to property - \$16,143.08
 - b. Loss of use of vehicle - \$13,500.00

Along with interest at the rate of 2.5% from the date of the filing of the claim to the date of judgment;

2. Interest on the global sum at the rate of 5% from the date of the judgment to the date of payment.
3. Prescribed costs in accordance with rule 65.5 of the Civil Procedure Rules 2000.
4. The Claimant to draw, file and serve this Order.

Charon Gardner-Hippolyte
High Court Master

By the Court

Registrar

¹⁵ Chapter 7 page 168 paragraph 275

¹⁶ Tropical Builders v Gloria Thomas ANUHCv 2004/0228

¹⁷ GDAHCv2018/0097 at paragraphs 12 and 13.