

**IN THE SUPREME COURT OF GRENADA
AND THE WEST INDIES ASSOCIATED STATES
HIGH COURT OF JUSTICE
(CIVIL)**

GRENADA

GDAHCV2020/00040

BETWEEN:

TWAIN STRAKER

Claimant

and

JEFFERSON GRIFFITH

Defendant

Before:

Mrs. Michelle John-Theobalds

Master [Ag.]

Appearances: (Via Zoom)

Mr. Francis Williams of counsel for the Claimant

Ms. Sheila Harris of counsel for the Defendant

Parties:

The Claimant being present

The Defendant being absent with excuse

2021: March 22;
June 10

JUDGMENT

[1] **JOHN-THEOBALDS M [AG.]:** On 22nd January 2019 at approximately 8 a.m., the claimant parked his motor vehicle bearing registration number P8524 in the yard of

the Bonaire Primary School. As he attempted to open the door on the driver's side of the car, the defendant who was driving a motor vehicle bearing registration number PAG212, collided into the right front door of the claimant's parked vehicle. As a result of the collision, the claimant's vehicle suffered damage.

- [2] At the scene of the accident, the defendant signed a document taking responsibility for causing the accident and undertaking to pay for the repairs to the claimant's vehicle. Consequently, the police was not called to the scene of the accident. The defendant however failed to pay for the repairs to the vehicle.
- [3] On 7th January 2020, the claimant filed a claim in negligence for damages in respect of loss and damage caused to his vehicle by the defendant. In his statement of claim, the claimant claimed general damages, special damages in the sum of EC\$38,072.25, interest, costs and such other relief as the court deems fit.
- [4] The defendant filed an acknowledgment of service on 21st January 2020 but failed to file a defence within the time prescribed by the **Civil Procedure Rules 2000**. As a result, judgment in default of defence was entered in favour of the claimant on 17th February, 2020. The matter now comes up for the assessment of damages.
- [5] At the hearing of the assessment of damages, the parties informed that they each intended to rely on their witness statements and written submissions filed in relation to the assessment. This court now renders its decision based on these written submissions.

Special Damages

- [6] The claimant seeks to recover special damages comprised as follows:
- | | |
|--|------------|
| Costs of repairs to motor vehicle | \$9,277.25 |
| Legal fees | \$2,000.00 |
| Cost for preparation of estimate of damage | \$120.00 |

Cost of the report of damage to motor vehicle	\$300.00
Transportation Costs	\$125.00
Interest on Loan	\$1.53 per day

[7] It is settled that special damages must be pleaded, particularised and proven. I note that the sum claimed as the costs of repairs to the claimant's motor vehicle have been proven by a paid invoice and receipt from Pegs Enterprises Ltd., the garage which repaired the claimant's vehicle. The sum of \$2,000.00 claimed as legal fees has also been proven by an invoice from counsel in the matter.

[8] It is noteworthy that the defendant's written submissions do not address the claimant's claim for special damages. However, he avers in his witness statement [filed on 29th January 2021 for the purposes of the assessment of damages] that the claimant should not be awarded the sum claimed as special damages for the following reasons:

- (i) The claimant took it upon himself to have his vehicle repaired without further consultation with the defendant despite admitting that the owner of Pegs Enterprise Ltd. informed him that the defendant had not had any contact with him about covering the costs of the vehicle.
- (ii) The claimant admitted that during the repair of the vehicle the wrong door was ordered from Japan and had to be re-ordered. The period it took to re-order this door should not be counted in the loss of use calculation presented as this was not due to any fault of the defendant. In other words, the period of loss claimed from 22nd January 2019 to 18th August 2019 is not fair.
- (iii) The claimant is partly responsible for the accident and contributed to the accident by being negligent.

- [9] I will deal with the first issue under this head as it is directly relates to the issue of special damages.
- [10] At paragraphs 5 and 6 of his witness statement, the defendant acknowledged that he agreed to accept liability and that a document was signed to that effect. However, he stated that the document produced by the claimant was not the document which he signed. The defendant has not proffered any evidence to support this contention. He merely states that the document produced by the claimant was a different document. On that basis, and considering the evidence cumulatively, I am satisfied that the defendant did in fact accept liability for the accident and agreed to pay for the repairs to the claimant's damaged vehicle.
- [11] The defendant further states that he was of the opinion that his insurance would cover the costs of the repairs and that he suggested that the claimant take his vehicle to Pegs Enterprises Ltd. I am satisfied that the claimant acted on the defendant's instructions and took his vehicle to Pegs Enterprises Ltd. It is immaterial whether the defendant accepted liability because he thought that his insurance would have covered the damage to the claimant's vehicle. Having been subsequently informed that his insurance company would not, the defendant ought to have continued to act on the agreement that he made when he accepted liability at the scene of the accident. Instead, he did nothing until he received a letter from the claimant's attorney in October 2019, some 9 months later. The defendant did not even make contact with the garage as he said he would to make arrangements for the repairs or to even put a stop any arrangements which he may have made for the repairs. The defendant has given no evidence to state when he was informed by his insurers that the company would not honour the claim or whether he contacted the claimant during that 9-month period to inquire about the status of the repairs to the vehicle.
- [12] Taking all the evidence presented into consideration, I am satisfied that the claimant is entitled to the special damages claimed for the costs of repairs and legal fees. I

therefore award the sum of \$9,277.25 for the costs of repairs and \$2,000.00 for legal fees.

[13] While the claimant has not provided any receipts evidencing payment of the costs for the preparation of the estimate of damage and the costs of the report on the damage to his motor vehicle, , I note that he has exhibited to his witness statement a document from Pegs Garage Enterprises Ltd. which outlines the estimate to be done on the vehicle. In that document, there is a clause which speaks to a non-refundable sum of \$120.00 for the estimate of repairs and a collision damage report of \$300.00.

[14] Notwithstanding that the claims for the costs of the estimate of damages and the report on the damage to the vehicle have not been strictly proven, the court may make an award of nominal damages where loss has clearly been suffered but the necessary evidence as to its amount has not been provided. In **Econo Parts Ltd v The Comptroller of Customs & Excise**¹ Pereira CJ opined:

“Where loss is undoubtedly suffered but unquantified, it is the duty of the court to recognise the loss by an award that is not out of scale. Reference need be made only to **Charlton Greer v Alstons Engineering Sales and Services Limited**, a decision of the Privy Council, for the authoritative pronouncement on the approach to be adopted by the Court where there is an unquantified but undoubtable loss. In Greer, Sir Andrew Leggatt, who delivered the opinion of the Court, quoted with approval from McGregor on Damages:

‘Nominal damages may also be awarded where the fact of a loss is shown but the necessary evidence as to its amount is not given. This is only a subsidiary situation, but it is important to distinguish it from the usual case of nominal damages awarded where there is a technical liability but no loss. In the present case the problem is simply one of proof, not of absence of loss, but of absence of evidence of the amount of loss’.”

[15] Being guided by the principle in the above case, I find that from the evidence adduced by the claimant that he obtained a report from the garage on the extent of

¹ SLUHCVP2017/0019 (delivered 30th July 2019, unreported). at para. 20.

the damage to the vehicle as well as an estimate of the repairs, which is further confirmed by the receipt which states that repairs were done in accordance with the estimate prepared for the work which needed to be done on the vehicle. It is therefore necessary to recognise these losses by an award that is not out of scale. Accordingly, I award the sum of \$120.00 for the preparation of the estimate of damages, and \$300.00 for the cost of the report on the damages as nominal damages to the claimant.

- [16] In relation to the sum of \$125.00 claimed for transportation costs for trips by bus to the garage, I am of the view that this amount would be subsumed in the award for loss of use and therefore make no award for this amount claimed under this head.

Loss of Use

- [17] The claimant claims for loss of use of his motor vehicle from the 22nd January 2019 to 18th August 2019 being 209 days. The claimant contends that the delay in repairing his vehicle was due to the defendant not making financial arrangements with the operator of the garage for the repair of the motor vehicle. The claimant further contends that he brought his motor vehicle to Pegs Garage Enterprises Ltd. as the defendant instructed and after a few weeks made inquiries as to whether the defendant had made financial arrangements for its repair. He was told that the defendant had not made any arrangements. These financial arrangements included the purchase of the other replacement parts, which included ordering the replacement door from Japan since one was not available in Grenada and payment for the repairs. After what can only be described as an ordeal, the claimant was left with very little choice and had to make arrangements for the payment for the repair of his motor vehicle himself, which included ordering a replacement door from Japan and purchasing parts for the vehicle. To this end, the claimant submits that he had to approach his credit union to get a loan to fix the vehicle. The garage did not commence the repairs to his vehicle until he obtained the loan.

[18] The claimant contends that he left his motor vehicle at the garage and awaited the arrival of the replacement door from Japan. When the door arrived, it turned out to be the wrong one and so another door had to be ordered. All of this contributed to the delay and the extended period of time for which the claimant was without his vehicle. During this time, the claimant submits that he did not hear from the defendant. The claimant states that he was without the use of his vehicle for 209 days.

[19] The claimant therefore claims for the loss of use of his motor vehicle for a 209-day period at the rate of \$125.00 per day. He states that this sum is reasonable and that the delay in the claimant's motor vehicle being repaired was not as result of his actions.

[20] As indicated above, the defendant submits that the sum and the period claimed by the claimant is excessive and unreasonable as the claimant admits that the wrong door arrived from Japan and that it had to be re-ordered. The defendant avers that it is not reasonable for him to be held responsible for any delays that occurred. The defendant further submits that he had no control over the ordering of the parts and therefore could not be held responsible for the timeframe it took to obtain the correct replacement door.

[21] The claimant relies on **Tropical Builders v Gloria Thomas**.² In that case, the claimant claimed loss of use at the rate of EC\$150.00 per day for 73 days. This was challenged by the defendant in that case. The finding of Blenman J (as she then was) is instructive on this issue. Her Ladyship held:

“It is the law that the owner of a motor car that is damaged ... is entitled to recover for being deprived of its use during the period that he was without a motor car. 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.”³

² ANUHCv2004/228 (delivered 22nd May 2007, unreported).

³ Ibid at para 31.

[22] The claimant relies on the **Law of Damages**⁴ that where repairs are delayed by extraneous factors such as strikes, those delays are generally for the wrong doers account. The claimant contends that he mitigated his losses, by ordering the parts and paying for the repairs after the defendant failed to do so. The claimant submits that he was within his right to mitigate his loss in this regard.

[23] The decision of **Malcolm Joseph and Doris Joseph v Alison Charles**⁵ is instructive as to the consideration to be given to the claimant's role in mitigating the damages. Barrow J [Ag.] (as he then was) opined:

"It is unquestionably the obligation of the victim of a tort to take steps to mitigate his loss as are reasonable in the circumstances. What is reasonable, however, is a question of fact to be considered in light of the particular circumstances of a given case. ... The primary obligation ... was on the wrongdoer to pay compensation for the damage that he had caused. It was the defendant who had the primary duty to act promptly."

[24] The defendant contends that the court must be guided by the timeframe it would ordinarily take such a damaged door to be repaired and discount the timeframe it took to re-order and secure the door used to repair the vehicle. The defendant further contends that in the circumstances of this case, the period taken to repair the vehicle was unreasonable due to the error in ordering the wrong door. It is noteworthy however that the defendant has not offered any evidence as to what a reasonable period might be.

[25] The claimant has explained the delay in repairing his motor vehicle and I am of the view that he has done so satisfactorily. I note that the estimate for the motor vehicle is dated 3rd February 2019. It shows that the claimant did not delay in bringing the vehicle to the garage as he was instructed to by the defendant. I also find that the defendant was non-responsive after the accident, in that the claimant heard nothing further from him on the repairs. I accept that after the claimant had inquired from the owner of the garage whether the defendant had contacted him and he realised

⁴ 2nd Edn. at p. 354 para.14.93

⁵ GDAHCV2002/0077 (delivered 6th February 2003, unreported) at para 14.

that the defendant had made no arrangements for the repair of the vehicle, he took matters into his own hands and approached the credit union to take a loan to repair the vehicle. I also accept that ordering a part from Japan can take some time and that persons sometimes do not receive the correct goods that they ordered, mistakes being very prevalent in that line of business.

[26] In my view, taking the evidence in its totality, I find the delay in relation to the door to be an extraneous factor which was no fault of the claimant. I am also satisfied that the claimant's actions in mitigating his loss are reasonable under the circumstances. There is no doubt that the claimant was inconvenienced by the damage done to his vehicle and the defendant's failure to cause it to be repaired in a timely manner. The claimant submitted as much in his witness statement when he said that he was in dire need of transportation for himself and his family.

[27] It was incumbent upon the defendant, as the wrongdoer, to pay compensation for the damage which he has caused and to do so promptly. I will reiterate that not only did the defendant not act promptly, but he failed to make the necessary contact with the claimant to deal with the repairs to the damaged vehicle. The defendant cannot therefore properly contend that the claimant failed to mitigate his loss as he can offer no evidence countering the claimant's account of what had transpired, including whether the claimant satisfactorily mitigated his loss.

[28] I therefore award the sum of \$26,125.00 as damages to be recovered by the claimant for loss of use for a period of 209 days from 22nd January 2019 to 18th August 2019 at \$125.00 per day.

Contributory Negligence

[29] The defendant has raised the issue of contributory negligence. He invites the court to consider the contents of his witness statement wherein he disputes the fact that he simply collided with the claimant's parked vehicle. The defendant has therein asserted that it was the claimant who opened the door of his motor vehicle as the

defendant was driving past him. This, the defendant avers, makes the claimant contributorily negligent in failing to observe whether it was safe to open his door, thereby causing the accident. The defendant submits that the court should find the claimant 50% contributory negligent.

[30] The claimant has not addressed the issue of contributory negligence in his written submissions.

[31] It is settled that on an assessment of damages based on a default judgment, the defendant may raise issues relating to the quantification of damages, such as contributory negligence, provided that these are not inconsistent with the liability alleged in the statement of claim. In **Keith Claudius Mitchell et al v Capital Bank International Limited**,⁶ Blenman JA stated:

“[36] Turning to the default judgment, I agree that it is incumbent on the judicial officer at the assessment hearing based on a default judgment to scrutinize the pleadings in order to determine what the default judgment represents. I have no doubt that as a general rule the default judgment does not represent a decision that all of the loss or damage alleged by the claimant was indeed suffered by him or attributable to the defendant.

[37] The Court in **Lunnan v Singh** highlighted that on an assessment of damages all questions going to quantification of damage, including the question of causation in relation to particular heads of loss claimed by the claimant, remain open and could be raised by the defendant provided that they are not inconsistent with liability alleged in the statement of claim.”

[32] More recently, the Court of Appeal in **Saffron Limited v Angel Estates Limited**,⁷ considered the decision in **Lunnan v Singh**⁸ and observed that, on an assessment of damages flowing from a default judgment, the court can consider the issue of contributory negligence. At paragraph 63 of the judgment, the Court of Appeal stated:

⁶ GDAHCVAP2015/0034 (delivered 22nd September 2017, unreported).

⁷ ANUHCVP2012/0045 (delivered 1st February 2019, unreported).

⁸ [1999] CPLR 587.

“The relevant law governing what matters can be taken on an assessment of damages is set out in **Lunnan v Singh**. The law is that a default judgment is conclusive on the issue of liability of the defendant as pleaded in the statement of claim. On an assessment of damages, the defendant might not take any point inconsistent with the liability alleged in the statement of claim. It is open to a defendant, however, to take points relevant to the assessment. Matters relevant to the assessment of damages include: contributory negligence, failure to take reasonable steps to mitigate, and causation, to the extent that the defendant’s acts were not causative of any particular item of alleged loss.”

- [33] It is clear from the authorities that where a claimant obtains default judgment, the issue of contributory negligence can be raised at the assessment of damages as it relates to the quantum of damages to be awarded as long as it is not inconsistent with the liability alleged in the statement of claim. The question becomes therefore how is the court to assess that the claimant is contributorily negligent?
- [34] In this case, judgment was conclusive on the issue of the defendant’s liability as pleaded in the statement of claim. The issue of contributory negligence does not arise from the statement of claim. There has been no admission by the claimant of any act or omission which would amount to negligence on his part. In fact, the claimant has produced a document where the defendant has accepted liability, saying that he caused the accident and although the defendant disputes that the document produced by the claimant was the document which he signed, he does not dispute that he accepted liability at the scene of the accident and that he took steps thereafter to have the claimant’s motor vehicle repaired.
- [35] There is nothing which the defendant has presented, except an assertion in his witness statement that the claimant opened his door when it was not safe to do so, for me to find that the claimant contributed to the accident. There was no evidence of any other person on the scene to support this assertion. Further, at the assessment of damages, the parties opted to rely on their written submissions and as such there was no cross examination of the claimant to explore the assertion of contributory negligence made by the defendant in his witness statement. Certainly,

in the absence of more, cross examination of the claimant would have assisted the court in its consideration of this issue.

- [36] The defendant had the opportunity to raise the issue of contributory negligence by filing a defence and other evidence to support this assertion. Had he done so the issue would have been ventilated at trial. Therefore, not having done so, the defendant cannot now ask the court to find the claimant contributorily negligent when there is not a scintilla of evidence to so find. Accordingly, the defendant fails on this issue.

Interest on Loan

- [37] The claimant has also made a claim for interest on the loan which he took from a credit union to repair the vehicle. The interest claimed is at the rate of \$1.53 per day. However, the claimant does not provide any further details on this point in his witness statement or written submissions. When asked at the hearing, counsel for the claimant was unable to provide an explanation for this omission.
- [38] In my view, apart from the assertion made by the claimant in his witness statement that he had to refinance a prior loan at credit union to repair his vehicle, the claimant has adduced no further evidence to show that he did in fact take a loan, or any evidence of when he took the loan, what the interest period was and how long for. I am therefore not satisfied that an award should be made in respect of the interest claimed.

Conclusion

- [39] Accordingly, I award the following on the assessment:
- (i) Special damages in the sum of \$ 11,697.25 with interest at the rate of 3% per annum from the date of the accident to the date of this judgment.

- (ii) Loss of use from 22nd January 2019 to 18th August 2019 at \$125.00 per day, in the sum of \$26,125.00 with interest at the rate of 3% per annum from the expiration of the period for loss of use to the date of this judgment.
- (iii) Post-judgment interest on the global sum at the rate of 6% per annum from the date of this judgment to the date of payment.
- (iv) Prescribed costs to the claimant on the assessment of damages to be calculated on the global sum in accordance with CPR 65.5.

[40] I am grateful to counsel for their assistance in this matter.

Michelle John-Theobalds
Master [Ag.]

By the Court

Registrar