

**THE EASTERN CARIBBEAN SUPREME COURT
GRENADA**

**IN THE HIGH COURT OF JUSTICE
(CIVIL)**

Claim Number: GDAHCV2018/0436

BETWEEN:

Tedgra Mendes

CLAIMANT

AND

Thomas Alexander

DEFENDANT

Appearances:

Mr. Alban John and Ms. Alicia Lawrence for the Claimant
Ms. Daniella Williams Mitchell for the Defendant

2019: October 17
2020: June 5
[Re-issued on June 23rd 2020]

JUDGMENT

Burnett, M. (Ag.):

- [1] This is an application by the claimant for Assessment of Damages after a judgment in default of defence was given against the defendant on 18th day of January, 2019.
- [2] The claimant's case is that on Saturday 27th February, 2016, the claimant was driving her vehicle along the Kirani James Boulevard in the Parish of Saint George.
- [3] As the claimant approached the Bryden and Minors entrance she came to a stop in the left lane in her direction of travel opposite the said entrance. The claimant was about two-thirds into the right half of the road when her vehicle was impacted squarely on its right side by the defendant's vehicle travelling from the direction of Grand Anse.
- [4] In consequence of the collision both doors on the right side of the claimant's vehicle were severely dented and the right front door handle broke and fell to the ground.

- [5] The claimant claims compensation for loss and damage, interest and costs.
- [6] No defence having been filed by the defendant a judgment in default of defence was entered for the claimant on the 18th January, 2019.
- [7] The claimant claims the following:

Special Damages – Loss of use	\$ 6,000.00
Cost of parts	\$16,304.70
Excess paid in Insurance	\$ 1,250.00
Legal fees	\$ 2,012.50
Vehicle report	<u>\$ 350.00</u>
Total	<u>\$25,917.20</u>

COSTS OF PARTS

- [8] In her affidavit the claimant contends that she relies on an invoice of Mc Intyre Bros Ltd dated 21st March, 2016. This invoice was exhibited and marked “TM1”. The invoice shows a total of \$16,304.70 for labour and materials.
- [9] The claimant also exhibited a copy of cheque payable to Mc Intyre Bros Ltd for Tedgra Mendes by the claimant’s insurer in settlement of the claimant’s invoice.
- [10] Counsel Ms. Danielle Williams on behalf of the defendant submits that the claimant is claiming for new parts to replace the damaged parts. Counsel submits that at the time of the accident the claimant’s vehicle was approximately two (2) years old as is stated in the letter from claimant’s attorney attached to the affidavit of defendant and marked “A”.
- [11] Counsel for the defendant further submits that no report was provided which stated the condition of the vehicle prior to the accident on the 7th February, 2016.
- [12] The defendant relies on the case of **Kate Morris v Alphaeus Anthony & Local Oils Ltd**¹.
- [13] In the **Morris** case (supra) the claimant’s vehicle was either eight (8) years old or ten (10) years old at the time of the collision, if the claimant was compensated based on the cost of new parts for an eight (8) or ten (10) years old vehicle, she would be over compensated for her loss. The Court in this case deducted one third of the cost of the parts from the amount to be awarded to the claimant in damages for the repair of the motor car, because she would otherwise be over compensated for the replacement cost of old parts based on the cost of new parts.
- [14] The Court is minded to distinguish this case from that of Morris.

¹ [2010] ANUHCv 0587/2010

- [15] It is trite law that Special Damages which are generally capable of exact calculation have to be specifically pleaded and proved.
- [16] It is also a well established principle that the measure of damages is intended to place the claimant in the same position as she would have been but for the occurrence of the tortious act by the defendant.
- [17] Where chattels have been damaged the measure of loss is the cost of repairing the chattel or, in the instance where this is not possible, whether it is unreasonable from a business perspective or the chattel is damaged beyond repair, the replacement cost of the chattel; in an available market may be a justified alternative consideration.
- [18] In instances where the claimant executes repairs then the expenses and overheads incurred as a result of the accident are coverable.
- [19] The sum of \$16,304.70 relating to invoice dated 21st March, 2016 for labour and material have been properly pleaded, particularized and proved and the Court shall grant an award of Special Damages in respect of that sum.
- [20] The vehicle before this Court even if it is accepted that it was two (2) years could be deemed a relatively new vehicle. Even if the claimant were to opt for new parts to replace the damaged parts having regard to the area of the vehicle that was damaged ordering new parts was reasonable in the circumstances. The amount that is claimed by the claimant is the actual cost to repair the damage to the vehicle.

LOSS OF USE

- [21] The claimant claims the sum of \$6,000.00 for loss of use for the period 27th February, 2016 to 6th April, 2016 a total of 40 days at \$150.00 totaling \$6,000.00.
- [22] Learned Counsel, Ms. Daniella Williams Mitchell for the defendant submits that the claim for 40 days is excessive that there was no evidence to suggest that the vehicle was not able to be driven for that period. The defendant submits that the claimant's vehicle could have been driven from the scene of the accident as no towing or wrecking fees was claimed.
- [23] Counsel reasoned that the claimant choose to use her vehicle for 24 days after the accident before submitting same to be repaired on 21st March, 2016.
- [24] The defence relied on the Halsbury's Laws of England (Volume 29) paragraph 377 which state that "the claimant must take all reasonable steps to mitigate the loss which she has sustained consequent on defendant's wrong but the claimant's reasonable behavior."
- [25] In this regard, the defendant ask the Court to reduce the loss of use from 40 days to 17 days to cover the period 21st March, 2016 to 6th April, 2016, which was the period the vehicle remained in the possession of Mc Intyre Bros Ltd as shown in VAT invoice marked "TM1".

- [26] The claimant submits that there is nothing in the claim to suggest that the claimant delayed in mitigating her loss.
- [27] Counsel for the claimant submits that the date of the invoice was the date Mc Intyre Bros was able to get a cost for the materials, and was no indication of what date the vehicle got to Mc Intyre Bros.
- [28] Counsel submits that it is not correct for the defendant to submit that the claimant sat on the vehicle for 24 days before taking same to Mc Intyre Bros.

ANALYSIS

- [29] It is trite law that every claimant is required to mitigate his or her loss arising from a breach of duty of care by another, the claimant is entitled to general damages for inconvenience due to loss of use of her motor vehicle only for the time that it reasonably would have been taken for her to have her vehicle repaired.
- [30] The defendant submits that the claimant gave no evidence that the vehicle was not able to be driven and that no towing or wreckage fee was claimed.
- [31] The claimant relies on **Martindale v Duncan**². In this case a taxi driver whose taxi met with an accident found himself unable to pay for the repairs and so had to wait till the repairs were carried out at the expense of the insurer.
- [32] He brought an action for hire he paid for a car hired to be used as a taxi. However, he succeeded, since he was seeking in the first instance damages from the defendant (insurer) rather than from his own and until the repairs were authorized by the defendant (insurer) and until the repairs were okayed, he could not stand in a good position vis-a-vs insurer.
- [33] Counsel for the defendant urges the Court to distinguish the **Martindale** (supra) case from the case at bar. Because the claimant in the case at bar did not provide the Court with any evidence to support why it was reasonable in all the circumstances to wait 24 days to submit her vehicle for repairs.

THE PERIOD OF LOSS

- [34] Both parties have proffered a different interpretation of exhibit TM1:

The claimant submitted that the date of the invoice bears no relation to the date the vehicle was taken to Mc Intyre Bros Ltd.

While the defendant submitted that the date of the invoice is the date the vehicle was actually taken to Mc Intyre Bros Ltd.

² [1973] WLR 574

- [35] I do not agree with Counsel for the defendant that the date 21st March, 2016 should be interpreted that the claimant held on to the vehicle for 24 days before submitting it for repairs.
- [36] “TM1” in my respectfully view does not show the date the vehicle was submitted to Mc Intyre Bros Ltd.
- [37] A more reasonable interpretation and the one that this Court holds is that by the 21st March, 2016 Mc Intyre Bros Ltd. was in a position to bill the claimant for the repairs both material and labour.
- [38] The accident occurred on the 7th February, 2016. The claimant was indemnified by her insurer, Massy United on 6th April, 2016 and it was only then that the vehicle was returned to her by Mc Intyre Bros Ltd. This is accepted by this Court as the evidence in this matter.
- [39] While the claimant had a duty to mitigate her loss. This does not mean that the claimant is required to minimize her loss at all costs; rather she must take all reasonable steps to do so. The question for determination by this Court was whether it was reasonable for this claimant in all the circumstances to be awarded loss of use for 40 days at \$150.00 per day.
- [40] Taking into account the totality of the evidence, it is held that it was reasonable in all the circumstances to award the sum of \$6,000.00 and I also award the claimant.

EXCESS

- [41] Counsel Mr. John contends that when the claimant’s loss was settled by her insurer, the sum of \$1,250.00 was deducted from the settlement as excess and claims that sum from the defendant. A copy of the receipt was submitted and marked “TM3” dated 8th April, 2016.
- [42] Excess of \$1,250.00 – the defendant submits that the excess sum \$1,250.00 paid by the claimant to the claimant’s insurance, the sum is based on the contractual relationship between the claimant and the claimant’s insurance and is a portion of the claimant’s claim from the insurance company and is therefore already in the claim Counsel relied on the case of **Ken Dabreo v Williams Cuffy and Wendell Cuffy**³.

- Halsbury’s Laws of England (Volume 60(2018) paragraph 675, **Fancy Rotary Corporation and Garnet Henderson**⁴ consolidated with **Garnet Henderson and Fancy Rotary Corporation and Lennox Jackson**⁵.

³ St. Vincent High Court Claim 375/1997

⁴ St. Vincent High Court Claim 247 of 2002

⁵ St. Vincent High Court Claim 33 of 2003

DISCUSSION ON EXCESS

- [43] Counsel Mr. John for the claimant argued that excess is payable regardless, Counsel reasoned that if a claim is for \$10,000.00 the insured would have to pay the excess to the insurance company the company would pay whatever the claim is.
- [44] He submitted that in the case at bar, the entire claim is before the Court, excess is not being claimed from the insurance company but a claim by the claimant. The excess was deducted from the claimant's claim with the insurance company; the insurance company withheld same so it is a penalty that is imposed on the claimant for bringing that claim to the insurance company.
- [45] The defendant submits that excess is a contractual agreement between the claimant and her insurer. Excess is deductible whenever an accident occurs which is not something you pay in the ordinary course of your contractual obligation. What one pays is a premium, when you have an accident whether or not you are at fault, until it is establish that you are not at fault, when the insurance settles your claim.
- [46] Counsel relies on Halsbury's Law of England (Volume 60(2018) paragraph 675 and further submitted that since the excess is already included in the payout by the insurance company, the claimant would be doubly rewarded if the claim is allowed.

ANALYSIS

- [47] Halsbury's Laws of England "In order to avoid a multiplicity of claims for minor damages to the insured vehicle two devices are usual among motor insurers. One device is to provide that the liability for damage up to a specified amount must be borne by the insured himself. The result is that the insured is deterred from making claims for any trivial mishaps and, given in the case of a major mishap, the insurers are entitled to call on the insured to bear the amount which he has agreed to bear himself, and to recover it from him if they have paid it⁶.
- [48] However, I understand the argument of the claimant to be arguing:
1. Damages in tort are compensatory in nature and are designed to put the claimant into the position he or she would have been in had the tort not been committed.
 2. This means that a claimant may prime facie receive damages both in respect of any loss directly caused by the tortious act and in respect of any consequential loss provided the rules of causation and remoteness are satisfied.
- [49] The claimant claims the sum of \$1,250.00 which represents his actual pecuniary loss shown in Exhibit T.M.3.
- [50] There is in principle no limit to the range of items that can be recovered as Special Damages, provided they are within the rules of causation, remoteness and the duty to mitigate.

⁶ Beacon Insurance Co Ltd v Langdale [1939] 4 AllER 204 DC.

- [51] Counsel for the claimant claims the sum of \$1,250.00. The claimant, in the witness statement, avers that when her loss was settled by her insurer, this amount was deducted as excess and claims the said sum.
- [52] Counsel for the defendant submits that the excess sum paid by the claimant to the claimant's insurance in the sum based on the contractual relationship between the claimant and the claimant's insurance company and is a portion of the claimant's entire claim from the claimant's insurance company and is already included.
- [53] In the premises the Court is of the view that since Special Damages represents the claimant's quantifiable financial loss and the claimant having prove same and the item of expenditure being deemed a reasonable one, the claimant should be put in the position she was but for the defendants', **tortious** act. Consequently, this award is granted.

LEGAL FEES

- [54] The claimant further contends that she was charged by the Commissioner of Police for driving without due care and attention and had retained Counsel through her insurer Massy United, who paid fees to her Attorney's in the sum of \$2,012.50. A copy of invoice was submitted and marked "TM4".
- [55] Counsel for the defendant submits that no reason was provided to justify why the defendant should be made to pay the legal fees to the claimant's Attorney, to defend the charge brought by the Commissioner of Police for driving without due care and attention.
- [56] Counsel for the defendant submits that the claimant's claim was unsupported by evidence justify to the reason for payment of this amount by the defendant.
- [57] Counsel posits that the Criminal Procedure Code Chapter 72.B of the 2010 Revised Laws of Grenada, section 33 reads: "whenever a complaint is dismissed, the Court may order that the complainant shall pay to the defendant such costs as the Court shall deem just and reasonable and, if the Court is of the opinion that the complainant was frivolous or vexation it may order that the complainant shall pay to the defendant a sum, not exceeding nine dollars and sixty cents, as compensation for any trouble or expense to which, the defendant may have been put by reason of such complaint in addition to his or her costs."
- [58] The claimant did not provide any legal authorities to justify the payment of this award. I am therefore, not persuaded that the claimant should be awarded legal fees in proceedings which are separate and distinct. Provisions are in the Criminal Statute for costs. Until the Parliament amends this legislation, that is the state of the law.
- [59] For these reason, this item is denied.

ORDER

1. The defendant to pay the claimant \$16,304.70 in damages for cost of parts.
2. ***The defendant to pay the claimant the sum of \$1,250.00 as excess.***
3. The defendant to pay to the claimant loss of use for 40 days at \$150.00 = \$6,000.00.
4. The defendant to pay interest of 3% per annum from date of filing to date of judgment and 6% per annum from date of judgment until debt is fully paid.
5. The defendant to pay the claimant prescribed cost pursuant to Part 65.5 of the C.P.R. 2000.

**Rickie Burnett
MASTER (Ag.)**

By the Court

Registrar