

**EASTERN CARIBBEAN SUPREME COURT
SAINT LUCIA**

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

Claim Number: **SLUHCV2018/0542**

Between

Errol Lebrun

Claimant

and

Tony Polius

Defendant

Before: MASTER Ricardo Sandcroft [Ag]

Appearances

Mr. Anwar Brice of Counsel for the Claimant
Mr. Vern Gill of Counsel for the Defendant

2020: January, 22nd
2020: February, 17th

JUDGMENT ON ASSESSMENT OF DAMAGES

[1] **R. SANDCROFT, M. [Ag.]**: This is an application for an assessment of damages. On the 25th day of January, 2017 at approximately 4:30 a.m., the Audi bearing registration number of PE2623 and belonging to the Claimant, was parked off the main road near a business place at La Feuillie, Monchy. At the said time, the Defendant who was driving a Chevrolet along the main road in La Feuillie lost control of the said vehicle, ran off the road and collided with the parked Audi. There are particular aspects of the facts that I will be alluding to in the discussion and findings section.

[2] The Claimant applied to have the damages assessed and costs taxed. He supported his application with two affidavits.

- [3] Mr. Alvin Saiwak, a Motor Vehicle repairman at the NOM's Auto Body Repair Ltd. swore that about February, 2017, there occurred a collision between the claimant's motor vehicle, PE2623, and the defendant's vehicle. As a result of that accident the claimant's vehicle was a write-off or complete loss. Mr. Alvin Saiwak also inspected the vehicle and provided a report. Mr. Saiwak recommended that the Insurance Company thereupon pay out the value of the vehicle, which he represented as approximately \$166,000.00 as the pre-accident value less the salvage value of \$30,000.00. It is noted that this said motor vehicle is a 2010 vehicle and would have been approximately seven (7) years old at the time of the accident.
- [4] The second affidavit on which the claimant relied at the assessment of damages was that of Mr. Alvin Saiwak. Mr. Saiwak deponed that he had some seven (7) years of experience in inspecting, maintaining and repairing vehicles. He further added that as the owner and operator of NOM's Auto Body Repair Ltd, he had worked with a wide variety of vehicle makes and models. Mr. Saiwak examined the Audi vehicle with registration no. PE2623 and indirectly swore that he considered himself competent to provide an accurate and reliable estimate of the value of the Audi vehicle PE2623 prior to the accident. It is to be noted that the affidavit which is deposed on the 22nd day of October, 2019 is substantially different in some respects to the damage report of February 14, 2017, first provided by Mr. Saiwak.
- [5] Mr. Saiwak explains that when considering whether a vehicle should be recommended as repairable or deemed a write off, key considerations are the extent of the damage sustained by the vehicle and the type of vehicle damaged. He further stated that as a result of the impact on both sides of the vehicle, its structural integrity was compromised. However, in his previous damage report of February 14, 2017 and when cross-examined by Counsel Mr. Gill, he accepts that the word structural was never used, in fact his assessment of the damage at the time in 2017 spoke to "taking into consideration the severity and extent of damage sustained, the high cost of parts and their unavailability, the vehicle was deemed a write-off". He put the value of the vehicle PE2623 at pre-accident value of One Hundred and Fifty-Seven Thousand Five Hundred Dollars (\$157,500.00EC) and salvage value of Thirty Four Thousand Five Hundred Dollars (\$34,500.00EC)." It is noted that the aforesaid report produced by Mr. Saiwak mentioned nothing of the depreciating value of the vehicle which was a 2010 vehicle.

[6] The Claimant did not provide any material evidence as to the value of the Audi vehicle PE2623 prior to the accident. However, Mr. Saiwak on behalf of the Claimant also went onto to state that the Audi's structure even if restored, the expense of doing so would not be justified and further explained more about the computer systems of the Audi and how if a repair is not managed correctly, the Audi's computer systems would not function properly. It was at that time that Mr. Saiwak introduced a new element which I would consider goes towards structural damage; the extent of the damage sustained by the Audi would have made it very challenging to restore the Audi's electronic systems properly. It is to be noted that in the damage report of February 14, 2017 that there was no mention of the computer systems or the electronics systems of the Audi vehicle under examination. Nor is there a nexus between the damage sustained to the body and its computer systems in the said damage report.

[7] Mr. Andrew Saiwak was cross-examined by Counsel for the Defendant; Mr. Gill, and he accepted that he did not mention in his damage report of February 14, 2017 the phrase structural damage and that was not the basis on which he deemed the Audi vehicle to be written off. There is also no evidence before the Court as to why the Audi was deemed to be a write off. Mr. Saiwak only stated that when he did the assessment, because the vehicle is a mono structure, the items which he listed: the centre door post and running board; are part of the structure of the vehicle. Hence, omission of the word structure is rendered otiose (my expression). Mr. Saiwak, in answer to the Court explained that when he said centre door post and running board, he was in fact speaking to the structure of the motor vehicle.

[8] The Defendant relied on the affidavit of Mr. Antoine Montrose who stated that he was a certified Mechanic and Auto Motor Assessor by the Insurance Council of Saint Lucia to carry out inspections, valuations and appraisals for over eighteen (18) years. Mr. Montrose also stated in his professional opinion there was no structural damage to the main frame or sub-frame of the said Audi Q7 vehicle. The damaged parts could have been replaced and the body work done to restore the vehicle to its pre-accident condition.

[9] It was unfortunate that, the affidavit of Mr. Antoine Montrose did not delve further into what were his considerations for his aforesaid determinations; his affidavit and his subsequent cross-

examination are devoid as to why there was no reasonable basis to determine the vehicle a complete loss.

[10] The Court was presented with controverted evidence of value from both Mr. Saiwak and Mr. Montrose. The amounts given by both gentlemen are irreconcilable as day is from night and therefore, it now falls to the Court to assess the quantum it should award in the circumstances.

Analysis & Findings:

[11] **Write-off is a term commonly used when the insurance industry determines your vehicle to be a total loss. In other words, the cost to repair your vehicle after a collision is more than its value after subtracting the recycle or salvage value. Write-off of a motor vehicle in insurance language alludes to a vehicle that is too badly damaged to be repaired to a standard that is considered safe for road use. These vehicles are suitable only for use as parts or scrap metal. A repairable write-off refers to a vehicle that technically can be repaired, but it is decided it would be uneconomical to do so. This usually occurs when the cost of repairing the car is higher than its market or economic value.¹**

[12] There was a dearth of evidence on both sides as to the consideration or economic value that they would assign in writing-off or not writing-off the Audi Q7 vehicle with registration no. PE2623. The Claimant's witness, Mr. Saiwak only stated in his damage report that taking into consideration the severity and extent of damage sustained, the high cost of parts and their unavailability, it was recommended that the said vehicle be deemed a write-off. However, there is no value or economic costs to assist the Court any farther. That is there is no quantitative evidence that shows the extent to which the salvage value as a written-off vehicle plus the cost of repairing the vehicle for use for use on a road would be more than:

- (i) the market value of the vehicle before the accident; or
- (ii) the sum the vehicle is insured for.

¹ Insurance Law Dictionary

[13] **An appraiser calculates how much your undamaged vehicle was worth immediately prior to the collision and compares the repair costs to your vehicle's actual cash value, less its salvage value. They then determine if repairs are feasible.**

Appraisers use several factors to help determine a vehicle's value. Primarily:

- (i) The year, make, model, and odometer reading.**
- (ii) The type of engine, options, and overall condition, noting unrelated damage and aftermarket equipment added to the vehicle; careful consideration determines if these additions really add value to the vehicle.**
- (iii) Independent market survey reports, indicating sales of similar vehicles of the same year, make and model.**
- (iv) The value listed in industry-standard publications, websites like AutoTrader.ca, and dealer and classified ads.²**

The Court is therefore left in the unenviable position to assess the quantum of damages in light of the sparse evidence that has been presented on both sides.

[14] The Court finds that the Claimant on a balance of probabilities has provided more cogent evidence to support its claim, though I do not accept that the vehicle should have been written-off based on what was presented by the appraiser and will adjust the sums claimed accordingly. Equally, the Defendant did not present to this Court a quantitative basis on which the Claimant's claim should be rejected and or reduced and why they should have gone with the option of repairing the vehicle over that of writing-off.

[15] Generally, the practical way that the courts have calculated this diminution in value is to ask how much would be the reasonable cost of replacement in a write-off scenario as against putting the chattel back in the state it was in before it was damaged. It was stated that, in general this is a

² Blacks Law Dictionary 8th Edition

convenient practice which the courts should continue to follow. Only if the sum claimed appears to be clearly excessive will the court be justified in investigating whether that sum exceeds the cost that the claimant would have incurred in replacement of the vehicle versus having the repairs carried out by a reputable repairer.

Loss of Use

[16] The common law provides that a claimant may claim for loss of use where he has been denied the use of his motor vehicle, possibly due to breach of a duty by another e.g. a collision, or negligence, dropping the motor vehicle whilst on a lift-out, breach of contractual duty or statutory duty e.g. negligent repair, delayed delivery, etc.

The owner will be entitled to more than merely nominal damages, the loss of pleasure being a ground for an award even though this is not accurately measurable.

The recent case of Henry Broughton-Leigh v Geoffrey Hunton QBD (Mercantile Court) 17 March 2010 acts as useful guidance on this. The claim involved damage to a motor yacht arising out of a partial flood. The vessel was not used commercially i.e. it was a private pleasure vessel. The owner was deprived of her use between 21 August 2005 and 21 June 2006. The Defendant argued that as the vessel was laid up between 1 November and 1 April every year the Claimant should only recover damages for loss of use from 21 August to 1 November and 1 April to 21 June. His Hon. Judge Pelling QC rejected this and found that the Claimant was entitled to succeed in the full value of his claim over the full period.

[17] The Claimant under cross-examination accepted that he had shown no proof that his vehicle was for hire or rent and in light of that, he has not shown to this Court that he had suffered from a substantial loss of use of his motor vehicle.

[18] I have taken into consideration the estimate of approximately \$166,000.00 as the pre-accident value less the salvage value of \$30,000.00. However, I find that the sum claimed appears to be clearly excessive and cannot be justified and I also find that the sum exceeds the cost that the claimant would have incurred in replacement of the vehicle.

[19] The Court would therefore substitute the sum of \$85,000.00EC which would take into account the year, make, model, and odometer reading of the Audi vehicle in 2017.

[20] The Court's Orders are as follow:

1. The Claimant is awarded general damages of \$85,000.00EC made up of a nominal amount of \$5,000.00EC to the Claimant for loss of use of his motor car;
2. the Claimant is awarded special damages of \$15,500.00EC for the net value of his written-off motor car;
3. the Claimant is awarded interest on the general damages at the rate of 6% per annum from the 25th day of January, 2017 to the 22nd day of January, 2020;
4. the Claimant is awarded interest on the special damages at the rate of 3% per annum from the 26th day of October 2018 to the 22nd day of January, 2020.

Ricardo Sandcroft

Master [Ag]

By the Court

Registrar