

**EASTERN CARIBBEAN SUPREME COURT
COMMONWEALTH OF DOMINICA**

IN THE HIGH COURT OF JUSTICE

CLAIM NO. DOMHCV236/2014

BETWEEN:

**[1] DALE JAMES
[2] CECILE JAMES**

Claimants

and

EAMON GIBBONS

Defendant

Before:

Ms. Agnes Actie

Master

Appearances:

Ms. Gina Dyer- Monroe for the claimants

Ms. Vanica Sobers- Joseph for the defendant

2015: July 21
August 17

Case management powers – assessment of damages- loss of use of vehicle- special damages- nominal damages -- interim payment- Rule 16; Rule 17 of the Civil Procedure Rules 2000 (CPR 2000)

JUDGMENT

[1] **ACTIE, M.:** This is an application for assessment of damages arising out of a motor vehicle accident which occurred on 2nd September 2013. The defendant collided with two vehicles, which were parked outside the claimants' residence. The accident also resulted in damage to a retaining wall at the front of the claimants' residence. The defendant in a defence filed on 1st August 2014 admitted liability. The parties are in dispute about quantum and have asked the

court to make a determination on the assessment of damages. The defendant has since made an interim payment of \$12,730.00.

[2] The claimants seek special damages in the global sum of \$71, 183.68 comprising of the following:

1. Costs of repairs to wall and railings - \$4850
2. Cost for Suzuki Jeep - \$14,000.00
3. Cost for Jeep Scrambler - \$6,500.00
4. Transportation costs - \$11,094.00
5. Loss of income from business - \$33,642.00
6. Costs of reports for vehicles and repair of premises - \$1,097.68

Estimated cost of repairs for wall

[3] The claimants claim a sum of \$4,850.00 for the cost of repairs to the wall. The claimant relies on the report of CIRIS Ltd prepared by Mr. Felix Thomas, civil engineer and director of the company. The defendant on the other hand suggested a sum of \$230.00

[4] Mr. Thomas in examination in chief and cross examination admitted that the entire wall and railing were not destroyed but stated that the metal structure at the top of the wall was permanently distorted as a result of the impact. He stated that the reinstatement of the wall required a total fabrication of the entire length of the railing. He intimated that to reinstate the wall it was necessary to clear out all the damaged components that made up the wall in order to dispose of the materials which were not usable. He stated that there were unbroken concrete blocks which could be salvaged for the reconstruction of the wall. He however opined that he could not attest to the structural integrity of the unbroken blocks as they can

disintegrate in future use. Mr. Thomas stated that there was severe collateral damage and many of the concrete blocks were dislodged from the mortar. Mr. Thomas was of the view that it would be more economical to replace the railing to allow continuity and conformity to the original length of the wall rather than attempting to bend or repair.

[5] The defendant on the other hand is of the view that the amount stated by the claimants is overinflated and does not represent the true value of the sum required to repair the wall. The defendant contends that the damage was only to part of the wall and the iron railings.

[6] I am of the view that Mr. Smith, as a truthful witness experienced in the area of civil engineering and construction, has made sound recommendations with respect to the repair and replacement of the wall structure and the railings. This evidence has not been successfully refuted by the defendant. The court accepts the sum of \$4,850.00 as the estimate replacement value of the wall and railing as proposed by the claimants.

Loss of Vehicles

[7] The claimants' claim for the loss of two vehicles damaged as a result of the accident. Witnesses for both the claimants and defendant confirm their respective version of valuations for the vehicles. What is not in dispute is the fact that both vehicles were declared to be complete constructive total losses and were written off. However there are inconsistencies in the pre accident and salvage values ascribed by the respective reputable assessors who generally prepare valuations in the Commonwealth of Dominica.

The Suzuki Escudo

[8] Mr. Randy Peters, an assessor on behalf of the claimants, in his report prepared on 26th September 2013 gave the Suzuki Escudo vehicle a pre-accident value of \$18,000.00 with a salvage value of \$4,000.00.

- [9] Mr. Adler Hamlet, an assessor on behalf of the defendant, in his report dated 25th September 2013 estimated the pre accident value of \$13,000.00 with a salvage value of \$3,000.00.
- [10] During the cross examination Mr. Hamlet intimated that valuations can vary based on methods used by respective assessors and prevailing market conditions.
- [11] In arriving at an amount, I noted the disparity in the assessments with slight variation and in an effort to reach an equitable median, award a pre-accident value of \$15,500.00 and with a salvage value of \$3,500.00 for the Suzuki Escudo jeep.

The Jeep Wrangler

- [12] Mr. Randy Peters for the claimants, in his report dated 29th October 2013, gave the jeep wrangler a pre-accident value of \$8,000.00 with a salvage value of \$1,500.00.
- [13] Mr. Adler Hamlet for the defendant on the other hand in his report dated 23rd September 2013 gave a sum of \$2,500.00 for both the pre-accident and salvage value. The defendant avers that the assessor found that the damage to the jeep did not materially affect the value due to the extent of the physical deterioration of the existing structure and body frame prior to the accident.
- [14] Counsel for the defendant asks the court to consider the evidence of Mr. Adler Hamlet in his report dated 23rd September 2013. Counsel submits that more weight should be ascribed to the defendant's report, which was conducted contemporaneously after the accident. The defendant's submits that the claimants' assessment conducted more than a month after the accident weakens the credibility of the report which was not as contemporaneous as the defendant's

report. The defendant cites the case of **Attorney General and another v Kalicklal Bhoopial Samial**¹ where Lord Ackner stated:

“Before a trial judge forms a view based on the demeanour of a witness on a matter on which there is a conflict of evidence, he must check his impression on the subject of demeanour by a critical examination of the whole of the evidence (in this case, the contemporaneous documents and the inherent improbability of an import licence having been granted without a sample being produced of the subject matter so far as it was not illustrated in the contemporaneous documents).

- [15] The court notes that the assessor for the claimants' gives a higher pre-accident value of \$8,000.00 but a lower salvage value of \$1,500.00 (although it is noted the sum of \$4000 was stated in words) in comparison to the defendant's assessment of \$2,500.00 for both the pre-accident and salvage value. At the end of the day in making a determination, the case comes down to a comparative assessment of the claimants and defendant witnesses for an explanation where there was some inconsistency in the assessments. Where there is a conflict of evidence such as in this case, reference to the objective facts is required to reach a reasonable assessment. Although it is incontrovertible evidence that the jeep wrangler was in a derelict state prior to the accident it cannot be reasonably stated that the pre-accident value was the same as the salvage value. It is the evidence that the accident cause substantial damage which further compounded the dilapidated state of the jeep. The damage in my opinion would further reduce the salvage value of the jeep. I note that the assessment for the claimants was done 29th October 2013, almost two months after the accident. Taking the two assessments into consideration and in an attempt to reach a median point I award a pre-accident value of \$5,250.00 with a salvage value of \$2,000.00 for the jeep wrangler.

Loss of use

- [16] The claimants' claim for loss of use of their Suzuki Escudo jeep. The claimants aver that they operate a business named Pancho's Services which provides tour

¹ 1987 36 WIR 382.

guides and boat services five times a week. The claimants claimed the sum of \$33,642.00 for loss use. Additionally the claimants' claimed for further transportation expenses as follows:

- (a) \$1,264.00 bus fares for their sons ages 11 and 8 to commute to and from school
- (b) \$60.00 for football practice and other extracurricular activities for their sons
- (c) \$400.00 to attend birthday parties and picnics.
- (d) \$3,120.00 for hire of vehicle to laundry once a week at the cost of \$40 a week
- (e) \$6,240.00 transportation twice weekly in 2014 at \$60.00 round trip to their garden at Wotten Waven.

[17] The amounts claimed by the claimants are not substantiated by any tangible evidence. The amounts claimed were elicited from the claimants and witnesses in their witness statements and examination in chief.

[18] The defendant submits that the claimants have not led any evidence to corroborate the alleged income made from the business as pleaded. The defendant contends that the claimants have not submitted bank statements or any receipts for the months prior to the accident which could serve as evidence to assist the court in determining the business income and resulting loss as a result of the accident. The defendant in support cites the well-established principle in **Ilkiw v Samuels**² where Lord Diplock states:

“special damages in the sense of a monetary loss which the plaintiff has sustained up to the date of trial must be pleaded and particularized....it is plain law..... that one can recover in an action only special damage which has been pleaded and, of course, proved at trial ”.

² 1963 1 WLR 1006.

[19] Quite apart from the absence of written evidence to substantiate the amounts claimed by the claimants the court in such circumstances can rely on the oral evidence of the claimants and witnesses to reach an amount which is not out of scale. The Court of Appeal in **Attorney General of Antigua and Barbuda v The Estate of Cyril Thomas Bufton Lona Eileen Bufton**³ held that the failure of the claimant or counsel to provide evidence of value does not mean, however that the court is inescapably driven to refuse to award any amount for an undoubted loss. The court referred to the Privy Council decision in **Greer v Alston's Engineering Sales and Services Ltd**⁴ quoting from **McGregor on Damages** 13th Ed at para 295 stated:

“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.”

It was decided that nominal damages, in this context did not mean small damages but meant damages that were substantial provided they were not out of scale.

[20] The text **Halsbury's** 4th edition⁵ states the basic rule where a profit-earning chattel, that is used by the plaintiff in the course of his business, is damaged or destroyed: the plaintiff is entitled to loss of profits during a reasonable period of repair, and in the case of destruction he is entitled to loss of profits during the period which is reasonably required to replace the lost article in the market. The cost of a substitute, reasonably hired, may provide the measure of damages⁶. An individual is entitled to damages for the inconvenience due to the loss of use of a chattel.

³ Civil Appeal no 22 of 2004 del on 6th February 2006.

⁴ [2003] UKPC 46 (19 June 2003).

⁵ Paragraph 88.

⁶ Moore V DER Ltd (1971) 3 All ER 517.

- [21] However **Mc Gregor on Damages** ⁷ states that a plaintiff must take all reasonable steps to mitigate the loss to him consequent upon the defendant's wrong and cannot recover damages for any such loss which he could have avoided but has failed, through unreasonable action or inaction. Put shortly, the plaintiff cannot recover for avoidable loss. The plaintiff can recover for loss incurred in reasonable attempts to avoid loss.
- [22] The evidence before the court indicates that the claimants were aware that the Suzuki Escudo jeep was declared a total constructive loss by both assessors, Mr. Randy Peters on 26th September 2013 and Mr. Adler Hamlet on 25th September 2013 respectively. The claimants did not indicate any attempts made in replacing the vehicle. The second claimant in cross examination stated that since the defendant accepted liability she was expecting settlement of payments would have been a lot sooner in an effort to get a replacement of the vehicle. The second claimant stated that their financial status did not allow the purchase of a vehicle during the period of negotiation. The court notes that although the defendant admitted liability, an interim payment was only made sometime in June 2015 upon an application made the claimant.
- [23] The second claimant in examination in chief stated that the business was an ongoing business with the revenue generated used on a day to day basis for the family and business needs. The loss occasioned by the claimants in the absence of documentary evidence turns on the credibility of the claimants and their witnesses. I am persuaded by the evidence that the first claimant was involved in the conduct of tours business using his motor vehicle prior to the accident. What I am not convinced is the unsubstantiated and precise monthly calculations of revenue claimed to have been lost as a result of the accident. The services provided by the claimants are of a commercial nature and should have at least been substantiated by a modicum of documentary evidence. A bank statement, a

⁷ Chapter 7 page 168 Para 275.

receipt or a brochure indicating the costs of the tours offered by the claimants would have assisted the court. I take into consideration that there wasn't any other independent oral evidence to confirm the evidence of the claimants or their witnesses. Evidence of an independent person involved in a similar business would have greatly assisted the plaintiffs in their unenviable position. The claimants are asking the court to place reliance on the oral evidence and witness statements of self-serving parties. I note the monthly amounts claimed with such precision could have been exaggerated absence of documentary evidence. The claimants admitted that the revenue collected depended on the tourist season. It was their evidence that the peak tourist season was between the months of November to April with the low season between May to October.

[24] I am satisfied that the claimants suffered some loss but have failed to substantiate the amount. I also note that although the defendant admitted limited he made an interim payment sometime in June this year. Being guided by the principle by the Privy Council in **Ashton Greer**, I am inclined to make a nominal award for loss of use of the Suzuki Escudo Jeep discounting the sum of \$33,642.00 claimed by the claimants by 50% making a total of \$16,550.00. I also take into consideration that the claimants took steps to mitigate their losses by accepting 30% of the fees for tours assigned to other taxi operators. Accordingly, I further reduce the amount by 30 % thus making a total sum of \$11,585.00 for loss of use for the Suzuki Escudo jeep for the touring business operated by the claimants. I would also make a nominal award of \$3,000.00 for transportation costs for the children for commuting to and from school, social activities and laundry transportation.

[25] I am not convinced that the claimants are entitled to the costs for hiring of taxis to their garden, attending picnics and football training. In absence of receipts I make an award of \$200.00 for each of the reports prepared by the claimants' experts for the assessment of the two vehicles and the wall making a global sum of \$600.00

Order

[26] In summary it is ordered that the defendant shall pay the claimants special damages in the sum of \$35,285.00 as follows:

- (1) \$4,850.00 for the repairs for the wall and railings,
- (2) \$3,250.00 for Loss of Wrangler Jeep - \$5,250.00 (pre-accident value) - \$2,000.00 (Salvage value)
- (3) \$12,000.00 for Loss of Suzuki Escudo Jeep - \$15,500. 00 (pre-accident value) - \$3,500.00 (Salvage value)
- (4) \$11,585.00 loss of use for the Suzuki Escudo Jeep (70% of \$16,550.00)
- (5) \$3,000.00 for transportation costs to school, social activities and laundry services.
- (6) \$600.00 for costs of reports for the two (2) vehicles and the wall.

[27] The award of \$35,285.00 is to be discounted by the interim payment in the sum of \$12,730.00 made by the defendant.

[28] I award interest on the global sum at the rate of 5% on the remaining balance from today's date to the date of payment in full.

[29] I award prescribed costs on the global sum of \$35,285.00 pursuant to CPR 65.5(3)(4)(b)(ii).

[30] I wish to thank counsel for the parties for their very helpful submissions and authorities.

Agnes Actie
Master