

**EASTERN CARIBBEAN SUPREME COURT
HIGH COURT OF JUSTICE
ANTIGUA AND BARBUDA**

CLAIM NO: ANUHCV2009/0598

BETWEEN:

PAGET DAVIS

Claimant

-And-

RUTHLIDGE CRUMP

1st Defendant

ATTALE TRADING INC.

2nd Defendant

Appearances:

Denise Jonas Parillon for the Claimant

Jason A. Martin for the Second Defendant

2011: February, 28

May, 6

JUDGMENT

- [1] **Floyd J:** This is a claim for damages in negligence arising from a motor vehicle collision that occurred on March 17, 2006. A Claim Form was filed on October 13, 2009 alleging that the Claimant was operating his Acura sport utility vehicle ("jeep") when he was struck by a motor bus vehicle ("bus") operated by the First Defendant. The Claimant alleged that the bus was owned by the Second Defendant & that the First Defendant was, at the time, an employee of the Second Defendant. The Claimant further alleged excessive speed, a failure to keep a

proper look out, failure to manoeuvre to avoid a collision, and driving under the influence of alcohol, all on the part of the First Defendant.

- [2] The Claimant sought compensation for the cost of repairs to his vehicle & loss of use (special damages), damages, costs & interest.
- [3] The Second Defendant filed a Statement of Defence on November 17, 2009. The defence admitted that the First Defendant was an employee of the Second Defendant on the date in question but denied that he was acting in the ordinary course of his employment at the time of the collision.
- [4] The First Defendant failed to file a defence, & on November 16, 2009, Judgment in Default was granted to the Claimant.
- [5] On January 26, 2010, an Amended Statement of Claim was filed. The only change noted was to the licence plate number for the bus belonging to the Second Defendant involved in the collision.
- [6] An Amended Defence was filed by the Second Defendant on May 18, 2010 denying that it had any knowledge of the collision until service of the Claim Form.
- [7] In Reply to the Amended Defence, the Claimant alleged that the Second Defendant had knowledge of the collision, as it was reported to the Second Defendant's Insurer, the Second Defendant paid for the towing of its bus from the scene, & paid a mechanic referred to as the "Chinese mechanic," to repair the bus.
- [8] The matter proceeded with List of Documents, Witness Statements & Pre-Trial Memoranda being filed.
- [9] The Default Judgment against the First Defendant was set aside on December 1, 2010, with the issue being set down to be heard by the trial judge, pursuant to

Rule 12.9(2)(b).

- [10] The case was set for trial on February 28, 2011 & was heard on that date. Trial bundles were filed on February 18, 2011 & a bundle of Additional Documents was filed on February 28, 2011, prior to the commencement of the hearing.

THE EVIDENCE:

- [11] The Claimant, Paget DAVIS, provided a witness statement & testified. He stated that on March 17, 2006, between 8:00 - 8:30 P/M, he was driving his jeep east bound on Factory Road. His young daughter was with him. A motor bus approached from the opposite direction & swerved into his vehicle, colliding with his vehicle's right front side. He described the incident as a serious accident. After striking his jeep, the bus left the road & collided with a tree. His jeep was badly damaged & the bus had a broken right front wheel.
- [12] The Claimant stated the bus was being driven at the time of the collision by the First Defendant, Ruthlidge CRUMP. Mr. CRUMP was seen by the Claimant to exit the bus from the driver's side, following the collision. Mr. CRUMP smelled of alcohol, although the Claimant could not say if the odour of alcohol came from Mr. CRUMP'S clothes or his breath. Mr. CRUMP attempted to reverse the bus out of the ditch but could not. The Claimant also saw an adult female in the bus.
- [13] The Claimant called police using 911. He had brief conversation with Mr. CRUMP, whom he had never met before. Mr. CRUMP acknowledged his fault in the collision to the Claimant. In his testimony, the Claimant denied responsibility for the collision. Two police officers arrived on scene approximately ½ hour later, between 8:30 - 9:00 P/M. The police took statements & measurements.
- [14] The Claimant reported the accident to his Insurer, State Insurance, on March 20, 2006, the Monday after the collision. A State Insurance representative advised him

the bus was insured by Bryson's Insurance. The Claimant attended at Bryson's on March 20, 2006 & reported the accident. While at Bryson's, the Claimant saw the First Defendant there.

[15] Shortly after the accident, the Claimant became aware that the bus was owned by the Second Defendant, Attale Trading. However, he left matters in the hands of the Insurance companies & did not seek to locate nor to contact Attale Trading. As a result of the collision, he was unable to use his jeep for a period of time. He was forced to use a vehicle from his employer until his jeep was repaired.

[16] A representative of Bryson's advised the Claimant that the bus was not insured at the time of the collision & a settlement was eventually reached with his own insurer, State Insurance. Modern Auto & Body Shop estimated the repair cost to be \$22,290.00 for the Claimant's jeep. State Insurance determined the amount for repair to be \$21,345.70. That amount, less the policy deductible of \$7,000.00 was eventually paid by State Insurance to the Claimant.

[17] On May 22, 2006, the Claimant received \$14,345.70 from State Insurance. He paid \$22,290.00 to Modern Auto & Body Shop, & got his repaired jeep back some time near the end of June, 2006.

[18] Dalmer McCOY testified & provided a witness statement. He is the Manager of the General Insurance Division of State Insurance. He received the report of this motor vehicle accident from his company's insured, Paget DAVIS, in March 2006. His company advised Mr. DAVIS that the bus was insured by Bryson's. Mr. DAVIS later returned & advised Bryson's was declining to take responsibility for coverage. As a result, Mr. McCOY contacted Bryson's & confirmed their denial of coverage.

[19] Mr. McCOY stated he later contacted Attale Trading & spoke with Mr. ATTALE by telephone. Mr. McCOY also encountered Mr. ATTALE on the street & spoke with him about the accident claim. However, he did not send any written

communication to Attale trading regarding this claim.

[20] The First Defendant, Ruthlidge CRUMP, testified & provided a witness statement. He worked for the Second Defendant, Attale Trading, for eight years, retiring in October or November 2006. He worked as a delivery man but carried out a variety of duties. He kept the company vehicle at his home every day.

[21] Mr. CRUMP confirmed that there was a collision with the Claimant on March 17, 2006 while he was operating the company bus. He spoke to the Claimant after the accident. He told Mr. DAVIS it was a company vehicle insured by Bryson's, & he gave Mr. DAVIS the company name & telephone number. Contrary to the Claimant's evidence, he saw no one in the Claimant's jeep & he stated that no one else was in his bus at the time of the accident. The Claimant's jeep was badly damaged but his bus did not suffer much damage. Mr. Crump called "Jim Daddy's wrecker" to tow the bus to the "Chinese mechanic" for repair.

[22] Mr. CRUMP stated that he was on a delivery at the time of the accident. He was taking bales of flour to a customer named "Jeff" in Seatons. He reported the accident to Bryson's Insurance on March 20, 2006 & saw the Claimant was also at Bryson's at that time. Mr. Crump also reported the accident to his employer, Mr. ATTALE on March 20, 2006. Since the accident occurred on a Friday evening, he reported it to his employer on the following Monday. He also reported it to Denise HENRY, who worked in the office, on March 20, 2006.

[23] Mr. CRUMP testified that Denise HENRY was in charge of the warehouse & ran the office. Ms. HENRY sometimes gave the warehouse keys to Mr. CRUMP in order to open it & pack product. Ms. HENRY'S duties included closing up the warehouse. The office closed between 4:00 - 5:00 P/M, but Ms. HENRY sometimes stayed until 6:00 P/M to close the warehouse.

[24] Since his bus had been towed away, Mr. CRUMP said he walked to work on the

Monday following the accident & eventually got his bus back "a couple of days later" (being Tuesday or Wednesday). Denise HENRY was aware of all of this, according to Mr. CRUMP.

[25] Mr. CRUMP testified that Fridays were pay days & staff could never get home early on a Friday. The accident occurred on a Friday. He received the delivery order (two flour bales, each weighing sixty pounds) for Jeff, minutes before 5:00 P/M. He received the goods at 5:30 P/M but he could not leave until he got paid his salary. He left the office at approximately twenty minutes to 6:00 P/M. The collision occurred ten minutes later, or at approximately 5:50 P/M. He disagreed with the suggestion that the collision occurred between 8:00 - 8:30 P/M.

[26] The motor vehicle collision occurred before the delivery, which was never made. Mr. CRUMP testified that he gave the "paper" (receipt or order form) to Denise HENRY on Monday, March 20, 2006 & also returned the flour bales to the office on that date.

[27] When he was served with "court papers" for this action, 3 ½ years after the accident, Mr. CRUMP spoke to Mr. ATTALE in the presence of Candace JARVIS, another employee. He denied that he told Mr. ATTALE he had forgotten to report the accident to him. He denied telling Mr. ATTALE the accident happened at 4:00 P/M. He denied saying to Mr. ATTALE the delivery was to Potters.

[28] Mr. CRUMP testified that he drinks alcohol but not when he is working.

[29] David ATTALE testified & provided a witness statement as the Managing Director of the Second Defendant, Attale Trading. The company has been in business since 1991. He does not know the Claimant. The First Defendant was an employee until 2007, when he retired from the company. The company's business is the sale & distribution of food stuffs. He confirmed the company owned the bus that allegedly collided with the Claimant's jeep & that the company insures its

vehicles with Bryson's.

[30] According to Mr. ATTALE, Mr. CRUMP was employed by the Second Defendant in March of 2006. Mr. CRUMP'S duties were those of a handyman & driver. His hours of work were 8:00 A/M - 4:00 P/M. All work vehicles were to be back at the office by 4:00 P/M & they were unloaded between 4:00 - 5:00 P/M. Mr. CRUMP did not conduct sales but he did run errands & make small deliveries. The entire office usually closed by 5:00 P/M daily. On Fridays, the office often closed between 5:00 - 6:00 P/M.

[31] Contrary to the evidence of Dalmer McCOY, Mr. ATTALE stated that he has never met nor spoken with Dalmer McCOY. He has never discussed this case with him. Mr. ATTALE stated that he does little or no walking on the street since he has difficulty walking, due to contracting polio as a younger man. (The court was able to note & confirm Mr. ATTALE'S stated condition as he walked to & from the witness box with difficulty.)

[32] Mr. ATTALE testified that Mr. CRUMP lived at Bishop Gate street (which Mr. CRUMP also confirmed in his evidence), so it would not have been sensible for Mr. CRUMP to make a delivery to Seatons on his way home. That is in the opposite direction to Bishop Gate. Mr. CRUMP would not have been asked to make a delivery at 5:40 P/M, as someone would have had to wait for him to return to the office. Mr. ATTALE did, however, concede that although "Jeff" of Seatons was a customer of Tanya ASH (another employee of the Second Defendant), there have been occasions where Mr. CRUMP was asked to make a delivery to a customer of another driver. Mr. ATTALE further conceded that Mr. CRUMP could have been authorized to make a delivery after 5:00 P/M, however, there would have been an invoice in the company record books regarding that.

[33] Contrary to what Mr. CRUMP testified to, Mr. ATTALE'S evidence was that he was not aware of this accident until he was served with a claim form in October 2009.

Days later, Mr. CRUMP came to Mr. ATTALE in the office, in the presence of Candace JARVIS, with a claim document. Mr. CRUMP told Mr. ATTALE he had forgotten to tell him of this accident, but he had told Denise HENRY & reported it to Bryson's Insurance. Mr. ATTALE'S evidence was that he was never contacted by Bryson's regarding this accident nor could he find any record of such a report being made to Bryson's. Mr. ATTALE could find no record of repairs to the bus around the time in question, although he conceded that his company had a relationship with "Jim Daddy Towing", such that any of his drivers could request assistance if needed. He could not, however, locate any invoice from "Jim Daddy's" around the time of this incident.

[34] Mr. ATTALE confirmed that Mr. CRUMP was authorised to use company vehicles, but only for business purposes, emergencies & travelling to & from work. The company vehicle was not to be used for personal use or as a "play thing."

[35] Candace JARVIS testified & provided a witness statement. She has worked for the Second Defendant as a sales clerk since November 2005. She was not aware of Mr. CRUMP having been involved in an accident with a company vehicle until Mr. ATTALE was served with court papers for this claim. Shortly afterwards, Mr. CRUMP attended the office & spoke with Mr. ATTALE. Ms. JARVIS was about two arms lengths away in this small office. The court allowed this witness to testify as to what she heard said between Mr. ATTALE & Mr. CRUMP as a principled exception to the hearsay rule. Both Mr. ATTALE & Mr. CRUMP testified & were cross examined. Witness JARVIS was present during the conversation & therefore could testify as to what she heard said by the parties.

[36] This witness testified that she could not recall all of the conversation. She testified that she heard Mr. CRUMP say the accident occurred at 4:00 P/M, however, that time was not mentioned in her witness statement. In fact, no time of accident was mentioned in her statement. She said she thought she had put it in her statement. She stated that Mr. CRUMP told Mr. ATTALE he had reported the accident to

Bryson's Insurance. Mr. Crump said he did not tell Mr. ATTALE as Mr. ATTALE was "off island" at the time but that he did tell Denise HENRY.

[37] Ms. JARVIS stated that she could not recall Mr. CRUMP ever working after 4:00 P/M. She said that trucks never went out late & would return at 3:30 - 3:45 P/M at the latest. Unloading would be done by that time & everyone left the office by 4:00 - 4:30 P/M. These times did not, however, coincide with the evidence of Mr. ATTALE, who placed the return of vehicles, unloading & staff leaving, later than that. She thought that the bus driven by Mr. CRUMP was present on March 20, 2006 because she "never missed" it. Further, she knew Mr. CRUMP to get drunk on occasion & to smell of alcohol.

[38] Overall, the court was not impressed with the evidence of this witness. It conflicted on salient points with that of David ATTALE, & in particular it was noted that she left out the reported time of accident from her statement. That was an important item that one would have thought would not have occurred to her at the time of testifying but would have been given in her statement, if it were true. Conversely, the court was impressed with the testimony of David ATTALE. Mr. ATTALE testified in a straight forward fashion, maintaining his position in the face of extensive cross examination. He made several candid concessions, including that there had indeed been occasions when his company had asked Mr. CRUMP to deliver to a customer of another driver. In this case, "Jeff" was a regular customer of Tanya ASH. Mr. ATTALE confirmed that deliveries were part of Mr. CRUMP'S duties & that Mr. CRUMP could have been authorized to make a delivery after 5:00 P/M. All of which was fairly & openly stated by Mr. ATTALE in his evidence.

[39] Denise HENRY testified & gave a witness statement. She now works at Call Centre Services but was employed by the Second Defendant from December 2000 - June 2008. She was an office clerk & unofficially ran the office. She confirmed Mr. CRUMP worked between 8:00 A/M - 4:00 P/M & would unload his vehicle thereafter, finishing by 5:00 P/M. Contrary to Mr. CRUMP'S evidence, Ms.

HENRY testified that Mr. CRUMP never reported a motor vehicle accident to her in March 2006, nor at any time thereafter.

[40] Contrary to the evidence of Mr. CRUMP, Ms. HENRY testified that she never gave Mr. CRUMP the keys to the company warehouse. She denied receiving an order from "Jeff" for flour on March 17, 2006 & denied directing Mr. CRUMP to make that delivery. She would not have sent out a delivery at 5:30 P/M. She testified that Mr. CRUMP'S bus was not absent from the company in March 2006 & it was used for deliveries on March 20, 2006. (However, the court notes that she also testified that she could not specifically recall March 20, 2006.)

[41] Ms. HENRY stated that there were two sales trucks & one delivery van (bus). Trucks came back by 3:00 P/M & deliveries were done by 12 noon. However, on Fridays, the delivery van (bus) was in by 3:00 - 4:00 P/M. The court noted, however, that Mr. ATTALE testified that work did indeed sometimes go on later than that.

[42] Ms. HENRY checked the records for March 20, 2006 & Mr. CRUMP'S bus was there (at work) that day. She said she saw the bus & she did not see any damage to it, however, she did not examine the bus. Contrary to Mr. CRUMP'S evidence, she stated that Mr. CRUMP did not tell her of any accident, so she did not examine the bus. She had no reason to. She just saw it at work.

[43] There was attempted confirmation of deliveries made on March 17, 2006 by way of reference to receipts & a sales report found at p. 17 of the bundle of documents. David ATTALE testified that items from 90115 - 90125 found at p. 17 were the only office deliveries that day. Denise HENRY testified that she prepared the sales report found at p. 17. It shows all sales activity for March 17, 2006. It does not show any flour delivery to "Jeff" of Seatons. She stated that items from 89989 - 90125 on p. 17 were for March 17, 2006 but only invoices for 90116 - 90125 were attached, the rest were missing. Item 90115 showed no information in the sales

report - no name, & no monetary amount. She admitted that it could have been an order made up but never delivered (as in a flour delivery to "Jeff"). Item 90125 was the last invoice for the day in question.

SUBMISSIONS:

[44] Learned Counsel for the Claimant submits that the First Defendant, Mr. CRUMP, was responsible for the collision & points to the evidence of the Claimant describing the collision, the admission of responsibility made to the Claimant by Mr. Crump & the location of the damage to the Claimant's jeep (right side, not full front), as all supporting this claim.

[45] Learned Counsel for the Claimant further submits that the First Defendant, Mr. CRUMP, was in the course of his employment with the Second Defendant at the time of the collision. Counsel points to the evidence of Mr. CRUMP that he was making a flour delivery at the time of the collision. Counsel points to evidence from employees of the Second Defendant that Mr. CRUMP did indeed conduct sales & lift items of some weight, which the flour bales were. Counsel further points to the evidence that Mr. CRUMP was allowed to keep the company vehicle at his residence, even in the face of evidence that he consumed alcohol, which was apparently known to his employer, as evidence that Mr. CRUMP was often called upon to work or carry out duties outside of his regular work hours.

[46] Learned Counsel for the Claimant submits that the evidence of the witness, Denise HENRY, that some invoices for March 17, 2006 were missing, confirms the allegation that Mr. CRUMP was making a delivery when the collision occurred. The lack of such an invoice should not be taken as an indication that no such delivery was ordered, merely that no such delivery was made. That conforms to what Mr. CRUMP indicated, since the collision intervened in the delivery. Ms. HENRY admitted that the flour delivery might have been found in one of the missing invoices & a failed delivery might have resulted in a blank entry in the

sales report, such as item 90115. Counsel further submits this is confirmed in the evidence of Mr. CRUMP, when he stated he returned the invoice along with the flour to the office on the Monday after the collision.

[47] Learned Counsel for the Claimant submits that the Second Defendant failed to disclose receipts for towing & repair to its bus in the same manner that it failed to disclose the receipts referred to, supra, which would have confirmed details of the incident.

[48] Learned Counsel for the Claimant submits that the Second Defendant is vicariously liable for the negligence of the First Defendant, its employee, as it was committed in the course of employment. Counsel submits that the court should follow the cases of Stone v. Taffe [1971] 1 WLR 1575 & Hilton v. Thomas Burton (Rhodes) Ltd. And Another [1961] 1 All ER 74 & find that an employer will be held liable where an employee is found to be doing something that he was employed to do, even where the employee was doing work that he was authorized to do at a time outside normal working hours. That is, he was carrying out his authorized duties in an unauthorized way.

[49] Learned Counsel for the Claimant seeks damages by way of repair costs & also loss of use, & relies upon a number of cases, notably The Mediana [1900] AC 113, 69 LJP 35, 82 LT 95 & Halsbury's Laws of England, 4th Edition, V 12(1)) at paragraph 865.

[50] Learned Counsel for the Second Defendant submits that there is insufficient evidence to prove the collision & who was at fault. Counsel points to discrepancies between the evidence of the drivers - the Claimant & the First Defendant - as to facts surrounding the incident, including time of collision, who was present in the vehicles & the use of alcohol by the First Defendant. Counsel submit's the unsubstantiated evidence of the Claimant alone as to the cause of the accident is insufficient.

[51] Learned Counsel for the Second Defendant disputes the amount of damage attributed to the Claimant's vehicle in this accident. He also points to the lack of any receipts for actual payment for repairs & replacement vehicle use to substantiate the damage claim & refers the court to the case of Radcliffe v. Evans (1892) 2 Q.B. 524 (C.A.).

[52] Perhaps most importantly, Learned Counsel for the Second Defendant submits that his client is not vicariously liable for the actions of the First Defendant. He points to the time of collision, as pleaded & testified to by the Claimant, as being well outside normal business hours, & refers to the alleged presence of a female person in the company of the First Defendant at the time as well as the odour of alcohol coming from the First Defendant, as evidence that he was on a "frolic" of his own at the time. He also refers the court to the denial by the Second Defendant, through its witnesses, of the First Defendant being in the course of his employment at the time. The court is referred to the well known case of Storey v. Ashton (1869) LR 4 Q.B. 476.

ISSUES:

[53] Who is responsible for the motor vehicle collision between the Claimant, Paget DAVIS, & the First Defendant, Ruthlidge CRUMP?

[54] Was Ruthlidge CRUMP acting in the course of his employment at the time of the collision, & if so, is the Second Defendant, Attale Trading Inc. therefore vicariously liable for his actions?

DECISION:

[55] That a collision occurred between the jeep driven by the Claimant, Paget DAVIS, & the bus owned by the Second Defendant, Attale Trading Inc. & driven by the

First Defendant, Ruthlidge CRUMP, on March 17, 2006, is beyond doubt. I accept the evidence in that regard. Responsibility for that collision can only be found in the evidence of the Claimant & the First Defendant. The court heard no evidence from anyone else at the scene, nor from police officers who apparently investigated the incident. As a result, the testimony of the drivers, the Claimant & the First Defendant, becomes extremely important. Their credibility becomes extremely important.

[56] The Claimant's testimony is at odds with that of the First Defendant. The Claimant testified that the collision was caused by the bus operated by the First Defendant swerving into the right side of his jeep at 8:00 - 8:30 P/M. There was an adult female in the bus & the driver, the First Defendant, had an odour of alcohol about his person. The First Defendant admitted responsibility for the accident to the Claimant. The Claimant reported the collision at the first opportunity to his insurer. That is confirmed by Dalmer McCOY of State Insurance.

[57] The First Defendant testified that he was on a delivery of flour at the time of the collision, which occurred at 5:50 P/M, to a customer named "Jeff". The First Defendant testified that he advised his employer & reported the collision to the company insurer, Bryson's. The Claimant said he saw Mr. CRUMP at Bryson's, although Mr. ATTALE could find no such record. Mr. CRUMP denied drinking & denied having a passenger in his vehicle. He stated that he reported the collision to Denise HENRY & to David ATTALE three days later. Both Ms. HENRY & Mr. ATTALE denied receiving such a report from him.

[58] Mr. CRUMP stated his bus was towed from the scene & taken to a mechanic for repairs. The court was not provided with any receipts or documents indicating such a tow or repair. I do not agree, however, with Learned Counsel for the Claimant that such a lack of receipts constitutes a failure to disclose on the part of the Second Defendant. David ATTALE testified that he found no such records & I accept that. If such work was carried out (& the court notes Mr. CRUMP testified

that his bus did not suffer much damage), either side could have called as a witness a representative of the tow company & the mechanic, however, the court was not provided with that evidence.

[59] Mr. CRUMP'S testimony that he reported the accident to Denise HENRY & to David ATTALE is contradicted by both those witnesses. His testimony that he was given the warehouse keys by Ms. HENRY on occasion was also contradicted by Ms. HENRY. Ms. HENRY testified that although she did not specifically recall March 20, 2006, she checked company records & noted that Mr. CRUMP'S bus was at work on that date. Further, although she had no reason to examine the bus, she could not recall seeing any damage to it at that time. What is noteworthy is that Mr. CRUMP testified that he walked to work on Monday, March 20, 2006 following the accident, gave the delivery paper to Ms. HENRY & returned the flour bales that same day. No explanation was given by Mr. CRUMP as to how he transported two 60 lb flour bales on foot, without his bus, which he said was in for repairs. It makes no sense & I do not accept it.

[60] As a result of these various contradictions, I do not accept the testimony of the First Defendant, Ruthlidge CRUMP. I prefer & do accept the evidence of the Claimant, Paget DAVIS. His vehicle was involved in a collision & he did what anyone would do in the circumstances, he reported it to his insurer. He was then told to report it to the other party's insurer, which he did . Thereafter, he did what most people in that situation would do, he left it in the hands of the insurance companies. There is no requirement that the Claimant's evidence be substantiated, particularly in the face of my findings on the evidence of Mr. CRUMP. I accept the Claimant's evidence & I find, therefore, that the collision occurred as he described it. I find, therefore, that the accident was caused as a result of the negligent driving of the First Defendant, Mr. CRUMP, between 8:00 - 8:30 P/M. I accept the Claimant's evidence that there was a female passenger in Mr. CRUMP'S bus & that Mr. CRUMP had the odor of alcohol about his person. I find the First defendant was responsible for this collision.

[61] We move then to the second issue: Was the First Defendant operating his vehicle at the time of the collision in the course of his employment? While I accept that some delivery receipts were apparently missing from the Second Defendant's material, I do not find that there was an intentional failure to disclose. Mr. CRUMP may have said he returned the invoice, however, for the reasons noted above, the court is not satisfied with the testimony of Mr. CRUMP. The witness, Ms. HENRY, candidly admitted that item 90115 could well have been an order that was prepared but never delivered, just as the flour delivery to "Jeff" was described. However, the court notes that the testimony of other witnesses makes it clear that any such delivery would have gone out with Mr. CRUMP, no later than 6:00 P/M, & probably before that time, a full 2 - 2 1/2 hours before the collision. There would, therefore, have been ample time for Mr. CRUMP to either make the delivery or not, but more importantly, there would have been ample time for Mr. CRUMP to consume alcohol & pick up a passenger, as observed by the Claimant. In short, Mr. CRUMP could have, in that time, moved from being engaged in company business, to being engaged in personal & private affairs. I do not find, therefore, that the missing invoice proves or could prove that Mr. CRUMP was in the course of a delivery at the time of the collision (8:00 - 8:30 P/M). By the time of the collision, Ruthlidge CRUMP was, to use the phrase from the STOREY v. ASHTON case supra, engaged "on a frolic of his own." I am satisfied that by that time, Mr. CRUMP was simply not engaged in "doing something that he was employed to do" as the court described it in the Hilton v. Thomas Burton (Rhodes) Ltd. & Another case supra. Although Mr. CRUMP was allowed to use the company vehicle after hours, there is no evidence he was engaged in travelling to or from home at the time, & as noted above, the presence of the female passenger & the odour of alcohol upon Mr. CRUMP, evidence of which I accept, clearly indicates he was no longer "working".

[62] As to proof of damages, I am satisfied that the Claimant suffered the damages to his jeep as described in his evidence & as confirmed in the repair estimate from

Modern Auto & Body Shop in the amount of \$22,290.00 found at p. 8 of the bundle of documents. I accept the Claimant's evidence that the damage was assessed by State Insurance to be \$21,345.70 & that he was eventually paid \$14,345.70 by State Insurance, as described in the receipt for confirmation found at pp. 10 & 11 of the bundle of documents. I accept the Claimant's evidence that he had the repairs carried out by Modern Auto in accordance with their estimate.

[63] As for loss of use, I note the Claimant's evidence is that he made use of a company vehicle while his jeep was out of service. The court was not provided with any proof of expense the Claimant was put to in that regard. The court is asked to accept a figure of \$200.00 per day as a reasonable amount for compensation in that regard. The court notes that an owner of a chattel, such as a motor car, wrongfully deprived of its use may recover damages for that deprivation & for inconvenience due to loss of use. (See Halsbury's Laws of England, 4th Edition V. 12(1) para. 865 & The Mediana supra.) However, the court also notes the comment of BOWEN, L.J. in Ratcliffe v. Evans supra, at p. 528, that "special damage...denotes the actual and temporal loss which has, in fact, occurred." With the Claimant having access to a company vehicle while his jeep was in for repairs at no apparent cost to himself, & not being provided with any further proof of quantum to substantiate the claim for loss of use, I am prepared to award nominal damages only in the amount of \$1,500.00.

[64] As to general damages, I note that, fortunately, there was no personal injury in this case. As such, I am prepared to award \$7,500.00 for general damages.

ORDER:

[65] For all of the reasons noted above, I make the following order:

- 1) Judgment is entered for the Claimant against the First Defendant in the sum of \$23,790.00 for special damages.

2) Judgment is entered for the Claimant against the First Defendant in the sum of \$7,500.00 for general damages.

3) The claim against the Second Defendant is dismissed.

4) Interest at the rate of 5% from the date of accident, March 17, 2006, until payment.

5) Prescribed costs payable to the Claimant by the First Defendant and payable to the Second Defendant by the Claimant in accordance with CPR 2000.

A handwritten signature in black ink, appearing to read 'Richard G. Floyd', is written over the printed name.

Richard G. Floyd
High Court Judge