THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
ANTIGUA AND BARBUDA

CLAIM NO: ANUHCV 2009/068

BETWEEN:

ALEX LOSIK

Claimant

And

ELDEANE HENRY

Defendant

Appearances: Ms. Asheen Joseph for the Claimant
Mrs. Denise Jonas Parillon for the Defendant

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2009: December 17

2010: March 15

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JUDGMENT

[1] **Thomas J:** In a claim filed on 11th February, 2009, the Claimant, Alex Losik, makes claim for damages against the Defendant, Eldeane Henry, and consequential loss caused by his negligent driving on 9th September, 2008 on Wireless Road, St. John's, Antigua.

[2] In his statement of claim, the Claimant avers that he is of full age and a medical student at the American University of Antigua, while the Defendant is the owner and driver of a truck C9410 and resides at Barnes Hill.

[3] In terms of the incident, the Claimant contends that on 9th September, 2009, Frances La Barbera was lawfully driving motor car A25227 owned by the Claimant, and with his permission, from South to North on Wireless Road in the vicinity of Mike's Auto Shop when the said car was involved in an accident with motor truck C9410 owned and driven by the Defendant travelling from north to south on the said road.

[4] It is the Claimant's further contention that the accident was caused by the negligence of the Defendant. In this connection the following particulars of negligence are pleaded:

1. Driving too fast.
2. Failing to stop behind three vehicles which were parked on the Eastern side of Wireless Road.
3. Failing to keep any or any proper lookout or to observe or heed the presence of or approach of the said car driven by the Claimant.
4. Failing to apply his brakes in time or at all or to steer or control the said truck as to avoid the said collision.

[5] The particulars of special damages pleaded are: $19,208.75 cost of repairs to vehicle, $2,881.35 ABST, $1,200.00 loss of use of 12 days at $100.00 per day.

[6] The Claimant therefore claims the following:

1. Special damages in the sum of $23,290.10.
2. Damages.
3. Interest.
4. Prescribed Costs.
5. Such further or other relief as the Court may deem fit.

[7] In his amended defence the Defendant admits ownership of a truck with registration number, C9410 but denies the essence of the Claimant's case, except for the location of the collision.

[8] It is the Defendants' case that on 9th September, 2008, he was driving his truck from north to south on Wireless Road, and at the material time he saw three vehicles parked on the eastern side of the said road and that he only decided to proceed on his journey when it was safe to do so. He contends that in the process he turned on his right indicator and proceeded slowly pass the parked cars and actually passed two of them but then observed the Defendant's car approaching from the

opposite direction at great speed. And further, that the Claimant's car attempted to pass his truck even though there was not enough space to accommodate the Claimant's car.

[9] It is the Defendant's averment that in the circumstances he stopped immediately but the Claimant's car proceeded causing the right side of the Claimant's car to collide with and the lug nuts of the right front wheel of the Defendant's truck and that since the Claimants' vehicle continued to proceed the said lug nuts of the right front wheel of the truck scratched and damaged the right side of the Claimant's car, without damage to the truck.

[10] It is the Defendant's contention that the driver of the Claimant's car is the sole cause of the collision. And by way of particulars of negligence it is pleaded that the driver of the Claimant's car was negligent because he:

1. Continued to proceed even though there was not enough space to the Claimants' car to proceed past the Defendant's truck.
2. Drove recklessly and at a fast speed which was excessive in the circumstances.
3. Failed to keep any or any proper lookout or to observe or heed the presence of the Defendant's truck.
4. Failed to stop and wait for the Defendant to complete passing the vehicle so as to prevent the collision.

The Evidence

Alex Losik

[11] The witness, Alex Losik, in his witness statement says that he owns a car A2522, which he permitted his friend Frances La Barbera to use of 9th September, 2008, and which was involved in a collision on the said day. He says also that his car was damaged and the cost of the repairs is $19,208.75. He also calculates the ABST on the amount to be $2,881.35 and loss of use for 12 days at $100.00 per day.

[12] In cross-examination Losik said that he was not at the scene of the accident. He also said that the car, a 1998 Toyota Camry, was not fixed and was sold for $6,000.00. In further cross-examination Losik said he took photographs of the damage to the car and emailed them to the office of the Defendant's attorney and to his attorney. It is also the evidence of the witness, that he obtained an estimate for the repairs which was sent to his insurer's.

[13] In re-examination Losik said he sold the vehicle "two days ago". He also testified that he was leaving Antigua and Barbuda as he had passed all of his exams and was going to start his clinicals in the United States. He said further, that the needed to money to repay a loan.

Frances La Barbera

[14] In his witness Statement Frances La Barbera says that he attends the American University of Antigua, and that he is a friend of Alex Losik who owns the motor car with the registration number A25229.

[15] It is his further evidence that on 9th September, 2008 he borrowed Losik's car and drove to the university driving south to north at 30 km per hour.

[16] In terms of the collision, his evidence is that on approaching Mike's Auto Shop he noticed three vehicles parked on the eastern side of the road and also saw the Defendants vehicle, with licence plate C9410 which was behind the parked vehicles. He says that in the circumstances he "decided to proceed along my lane which was clear of traffic".

[17] As to the position of the Defendant's vehicle the witness say that he noticed it in "my lane" and then served to the left and tried not to drive into the ditch and then stopped. He says further that the Defendant kept driving.

[18] At paragraph 5 to 7 of his witness statement La Barbera's evidence reads thus:

> "5. As a result of the Defendant's action, there was damage to the right side of the vehicle which includes but is not limited to the right rear and front door, the right hand mirror, the right park lamp, the right quarter panel, the right hand door handle and the right fender guard.
> 6. I have read the amended defence filed by the Defendant.
> 7. I was not travelling at a great speed. I was travelling at 30 km/h. The Defendant did not pass both cars, I did. He did not stop his vehicle I did."

[19] Finally, the witness says that Constable George, Badge No. 557 investigated the matter and he received a report dated 19th September, 2009.

[20] In cross-examination La Barbera testified that on the day in question, while driving Wireless Road, the Defendant pulled into his vehicle and he (La Barbera) swerved to the left as far as he could go and stopped, but the Defendant kept coming. It was then put to the witness that if that were the case he (La Barbera) would have collided with the front of the vehicle. La Barbera's response was as follows: "There was no way that could happen. He tried to squeeze between my car and the parked cars. I pulled as far as I could. There were cars parked in the other lane. The truck and the parked cars and my vehicle could not fit on that road."

[21] The same proposition about hitting the front of the truck was again put to the witness who repeated his earlier response and then added: "Physically it does not make sense.

[22] Continuing his cross examination, Frances La Barbera, testified that the damage to his car extended along the right side.

[23] In further testimony La Barbera said this: "It is a big truck. I stopped and pulled to the left. I was close to the ditch. The truck was driving at the same speed as I was. I was not driving fast. It was about 30 km/h the truck could have stopped."

[24] Learned counsel for the Defendant then put it to the witness that he could have stopped. The witness responded in this way: "I was not driving fast. I was in my lane first. I passed in from of two cars on the eastern side. I did not make any different statement in the presence of the Defendant."

Eldeane Henry

[25] In his witness summary it is stated that Eldeane Henry is s truck driver by profession and that he owns motor truck C9410.

[26] At paragraphs 3 to 9 the incident involving the vehicle driven by Frances La Barbera is detailed thus:

> "3. On September 9th, 2008 I was driving my 22 ton motor truck C9410 from North to South on Wireless Road in St. John's, Antigua.

4. Upon approaching Mikes Auto Repair Shop, I observed that there were three parked cars on the Eastern (left) side of the road. I checked to see whether it was safe to pass the three parked cars.
5. I then turned on my right indicator and proceeded slowly to pass the cars as the passage was quite narrow for my 22 ton motor truck.
6. I successfully passed two of the parked cars and observed motor car A25227 approaching from the opposite direction at great speed.
7. While I was passing the third parked car, motor car A25227 attempted to proceed pass my truck even though there was not enough space for the car to pass through.
8. I immediately stopped the truck but the Claimant's car to my surprise proceeded, causing the right side of the motor car to collide with the lug nuts of the right front wheel of my truck.
9. There was no damage to my truck."

[27] In cross-examination, Eldeane Henry testified that Wireless Road is straight without bends and without obstacles. He said further, that from his position there were no obstacles but that from Mike's Auto Shop there is an obstacle at the end of the road so that there is not a clear view from end to end.

[28] It is Henry's testimony that on 9th September, 2008 he was driving his truck at 15 mph and that on approaching Mike's Auto Shop he saw three vehicles on his side of the road. He went on to testify that the lane was clear and he stopped and then proceeded.

[29] Upon given the evidence that he had stopped, learned counsel for the Claimant put it to the witness that that statement about stopping is not in his witness summary. The Defendant's various responses are as follows: "It is not in my witness statement but I stopped. I did stop. I had to stop as my truck is 30 feet long and in order to complete passing I had to stop. I stopped and then proceeded. I checked to see there was no traffic in the other lane and since it was clear I proceeded."

[30] It was put to the witness that his testimony about the lane being clear was untrue; but he maintained it was true. He went on to say that Frances La Barbera was not in the lane and further said that if Barbera was already in the lane there was no way for him [the Defendant] to enter the said lane.

[31] With respect to the damage to the Claimant's vehicle the Defendant testified that it was damaged on the right side and that the damage includes the quarter panel, the front and rear doors, the right side mirror, park lamp, door handle, fender guard, all on the right side of the vehicle.

[32] In re-examination, the Defendant said that he saw the Claimant's car coming. He also said that the damage of which he spoke in cross-examination were all scratches.

ISSUE

[33] The sole issue for determination is whether the driver of the Claimants' car or the Defendant was negligent this causing the collision between the two vehicles.

Analysis

Submissions

[34] Pursuant to the order of the Court the only submission made were those on behalf of the Defendant. They are summarized thus:

1. The photographs of the damaged car was not revealed in the Claimant's List of Documents.
2. The proprietor of Titus Repair and Body Shop was not produced to give evidence on the repairs.
3. The evidence reveals that the damage to Claimant's car was scratched; yet the estimate "AL1" reveals that new parts are required for the entire right-side of said vehicle.
4. The uncontroverted evidence is that the truck was a huge 22 ton truck. If it pulled from behind the parked car into Mr. La Barbera's path at 30 km/h there would have been a head on collision between the two vehicles. What is noteworthy is that Mr. La Barbera's car was not even pushed into the gutter; this means that no force was being applied. It was the car that had impatiently proceeded to its peril despite there being inadequate space for it to do so.
5. The evidence reveals that the Defendant stopped his truck before the collision occurred. The collision therefore was not caused by any fast driving on speed on part of the Defendant.
6. The Defendant was not negligent in failing to stop behind the three parked vehicles which were parked on the eastern side of the road; or in failing to keep a proper lookout or in failing to apply his brakes or to control the truck.

Analysis

[35] In reality the issue boils down to whose evidence the Court accepts as between the driver of the Claimants' car and that of the Defendant.

[36] To begin with, it is the view of the Court that the Defendant is not a truthful witness based on two critical pieces of evidence which the Court does not accept. The first is his evidence that he stopped before proceeding to enter into the right lane. In this regard, learned counsel representing the Claimant put it to him that such a statement was not in his witness summary. This the Defendant accepted but maintained that he did not stop. The second is his evidence that he was travelling at 15 mph. This the Court cannot accept given his objective in trying to clear three parked vehicles on his side of the road and the approaching vehicle which he admitted he saw.

[37] The following issues are either findings of fact or admissions by either or both of the two witnesses:

1. The Defendant admitted that the collision took place on the right side of the road, being the Claimant's lane. And the Defendant further admitted in cross examination that the Claimant's driver had the right of way.

2. The Defendant testified that Wireless Road, except for an obstruction at the end, is a straight road with no obstructions.

3. Both witnesses agree that on the day and time in question the eastern or left side of the road, being the Defendant's lane, there were three parked vehicles.

4. The Defendant in his amended defence pleaded the following: "The Defendant then turned on his right indicator and proceeded to slowly pass the cars as the passage was quite narrow for the Defendant's huge truck."

5. The Court accepts La Barbera's evidence that he was travelling at 30 km/h.

6. As noted above, the Defendant admitted that he saw the Claimant's vehicle approaching.

7. The Court accepts La Barbera's evidence that he swerved to the left in the face of a truck which the Defendant said was 30 feet long and weighs 22 tons.
8. A head-on collision is not the only result that can arise from the circumstances of the two vehicles.

9. Unless the Defendant was not keeping a proper lookout for the traffic, he could not have avoided seeing an approaching vehicle on a straight road and, in his words, travelling "at great speed."

10. In all the circumstances the Court finds as a fact that the Defendant attempted to clear the three parked vehicles that blocked his lane; and this was done in the face of another vehicle travelling at 30 km/h in the opposite direction.

Conclusion

[38] In the final analysis, the Defendants' equation comes down to the following: narrow passage to pass with a 30 foot truck, no right of way due to the three parked vehicles in his lane, an approaching car which he saw and travelling at great speed, and a straight road without obstacles.

[39] On the other hand, the equation of driver of the Claimant's vehicle consists of: having the right of way, travelling at 30 km/h and swerving to the left in an effort to avoid the collision.

[40] In the final analysis, and contrary to the copious submission of learned counsel for the Defendant, it is the determination of the Court that the Defendant made an error of judgment in attempting to clear the three vehicles in a narrow passage with what he described as a huge truck, an approaching car and thus caused the collision. But was negligent?

Negligence

[41] It is said[1] that:

> "The tort of negligence may be ... defined broadly as the breach of a legal duty to take care which results in damage, undesired by the defendant, to the [Claimant]. There are three elements to the tort:
>
> . A duty of care owed by the defendant to the [claimant];
>
> . Breach of that duty by the defendant; and
>
> . Damage to the [claimant] resulting from the breach."

[42] The learned author goes on to identify a number of "common situations" in which it is well established that a duty of care exists. And one of these examples is: "The driver of a vehicle on

[1] Gilbert Kodilinge, Tort: **Text, Cases & Materials** (1995) at page 73.

the road owes a duty of care to the other road users, pedestrians, and occupiers of premises abulting the highway to drive carefully."[2]

[43] Without a doubt, therefore, the Defendant owed a duty of care to the Claimant as a user of the road.

[44] In terms of the breach the test applied in making this determination is the reasonable man test as enunciated in **Blyth v Birmingham Waterworks Co.**[3] by Baron Alderson as follows:

> "Negligence is the omission to do something which a reasonable man, guided by upon those considerations with ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do."

[45] The question then, is this: Would a reasonable man driving a 30 ft truck in a narrow area of the road, without a right of way and seeing an oncoming vehicle in the same narrow area do what the Defendant did? Overwhelmingly the answer must be in the negative which means that the Defendant was in breach of his duty of care owed to the Claimant. And there is no doubt that damage resulted.

Damages

[46] The Claimant claims both special damages and general damages with respect to the collision.

Special damages

[47] The rule is that special damages must be specifically pleaded and proved.[4] To this end the Claimant claims $19,208.75 for cost of repairs; $2,881.35 for ABST and $1,200.00 for loss of use for 12 days at $100.00 per day. This is supplemented by evidence in the witness statement of the Claimant.

[48] The Court has no doubt that the Claimant's vehicle was damaged and not scratched as the Defendant testified in cross-examination. This rests on the sheer length and weight of the

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[2] Ibid at p. 74.
[3] [1865] 11 Ex 781.
[4] Per Lord Donovan in Perestrellos v United Paint Co. [1969], W.L.R. 570

Defendant's truck, the speed at which both vehicles were travelling and the collision taking place in a narrow area. Further, the Claimant was not cross-examined on his evidence in chief that he emailed photographs of the damaged car, which he took, to the Defendant's attorney and to his attorney.

[49] It is common ground that the purpose of damages is to put the Claimant in the position he would have been in, but for the Defendant's negligence.[5]

[50] In terms of cost of repairs the Claimant put in evidence an estimate containing the cost of the parts to be replaced plus labour. This document was disclosed[6] by the Claimant, in accordance with the Case Management Order of 12th July, 2009, on 2nd September, 2009 with the usual notice to inspect the same. There is further evidence on this aspect of the damages but there is a rule which says that in these circumstances the Court must do the best it can.[7] With that said the Court is satisfied that the damage did occur but agrees with the learned counsel for the Defendant that the estimate by itself as to the parts to be replaced and labour, which is the normal measure of damages in these circumstances,[8] cannot be accepted by the Court. This is because of the inadequacy of the evidence as to the damage to the Claimant's car. Fundamentally however, the Court accepts that the car was damaged as the Defendant admitted in re-examination, except he said that it was scratched. In any event, it is almost contradictory to speak of a 30 foot long 22 ton truck scratching a car in a narrow space scratching.

[51] A technical issue arises because the Claimants' car was never repaired and it was sold a few days before the start of the trial for $6,000.00. However, in the view of the Court this does not in any way alter the Defendants' liability to pay damages, period.[9]

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[5] **McGregor On Damages** (15th ed.) at para. 9.
[6] The Claimant's List of Documents was filed on 2nd September, 2009.
[7] See: Briggin and Co. v Permanite Ltd. [1950] 2 ALL ER 859 and Thompson et. al v. Smiths Shiprepair [1984] 1 ALL ER 881, 910 per Lord Mintsill.
[8] See: A.I. Ogus, **The Law of Damages**, (1973) at page 133.
[9] **McGregor On Damages** Op. cit. at para 1250; **Charlesworth On Negligence** (6th ed.), at para 1414.

Nominal damages

[52] To repeat, it is clear to the Court that the Claimant's car was damaged but the evidence is inadequate given the technical indicia of proof of special damages. It is the further view of the Court that this is a case for the award of nominal damages as explained in **McGregor on Damages** at para. 10-004 in this way:

> "Nominal damages may also be awarded where the fact of a loss is shown but the necessary evidence 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 techinally liability but no loss."

[53] It is also important to note that the issue of nominal damages was discussed extensively in **Green v Alstons Engineering Sales and Services Ltd.**[10] The appeal concerned, *inter alia*, substantial instead of nominal damages for loss of use of a backhoe from July 1982 to July 1984. The action was grounded in negligence. An award of $5,000.00 was made plus other awards.

[54] Also relevant to the case of **Dixons (Scholar Green) Ltd. v JL Cooper Ltd.**[11]in which the plaintiffs called no evidence to prove loss incurred by the deprivation of commercial vehicle for 11 weeks, and the English Court of Appeal substituted for the trial judge's award of £2 and award £450 in nominal damages.

[55] On the authority of the foregoing cases as given the facts as found by the Court an award of $8,000.00 in nominal damages is made.

Loss of use

[56] In terms of the loss of use, 12 days are being claimed as special damages. The rule is that such damages are recoverable so long as they are reasonable.[12]

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[10] [2003] UKPC 46.
[11] [1970] RTR 222.
[12] **Charlesworth On Negligence**, loc. cit.

[57] The Court considers that 12 days' loss of use is reasonable in the context of a medical student having to attend classes. Loss of use for twelve days at $100.00 per day is therefore granted which amounts to $1,200.00. As far as the claim for ABST is concerned, this is disallowed.

General damages

[58] The rules with respect to general damages are less strict. Indeed, the rule is that they need not even be pleaded. However, the Court can find no basis upon which to award general damages given the extent of the evidence adduced.

Interest

[59] In accordance with established principles the Defendant must pay interest on the special damages of $1,200.00 from the date of the accident, being 9th September, 2008, to the date of the trial, being 17th December, 2009, at a rate of 2.5% per annum.

Costs

Cost will be prescribed costs.

IT IS HEREBY ORDERED as follows:

1. The Defendant, Eldeane Henry, was negligent in causing the collision involving his truck and the Claimant car.

2. The Defendant is liable to pay nominal damages to the Claimant in the amount of $8,000.00 in relation to the cost of repairs to the Claimant's car plus labour, plus the sum of $1,200.00 as special damages for loss of use.

3. The nominal and the special damages are payable notwithstanding the fact that the repairs were not effected.

4. Interest payable by the Defendant on the totality of the special damages of $1,200.00 is at the rate of 2.5% from 9th September, 2008 to 17th December, 2009.

5. Costs in accordance with Part 65.5 of CPR 2000.

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Errol L. Thomas
Judge (Ag.)