MONTSERRAT

IN THE HIGH COURT OF JUSTICE

CLAIM NO. MNIHCV2004/0059

BETWEEN:

KEVIN WEST

Claimant

and

[1] LAGAN HOLDINGS LTD
[2] JOHNNIE TOLAN

Defendants

Before:
Ianthea Leigertwood-Octave High Court Judge [Ag.]

Appearances:
Mr. David S. Brandt for the Claimant.
Mr. Kharl Markham for the First Defendant.
Second Defendant not present and not represented.

2006: January 30;
February 03.

JUDGMENT

Introduction

[1] LEIGERTWOOD-OCTAVE J [AG.]: On 22nd April 2004, Kevin West was driving his Rav 4 jeep and Johnnie Tolan was driving a pickup owned by Lagan Holding Ltd. in opposite directions along the Davy Hill Public Road. Add to that the fact that Mr. West's vehicle ended up crashing into the embankment on his side of the road resulting in damage to his vehicle and that would be the extent to which the parties agree in this matter. Otherwise,

as quite aptly described by counsel for the First Defendant, the evidence, as presented by the two sides in this trial, is "diametrically opposed".

Case for the Claimant

[2] The evidence given by Mr. West in support of his claim was very short. His evidence is quite simply is that the damage to his Rav 4 jeep was caused when Mr. Tolan attempted to overtake a vehicle when it was unsafe to do so and drove straight into the path of his jeep. In an attempt to avoid a head on collision, he applied brakes, pulled further left upon which his jeep struck the curb and he lost control of his vehicle. As a result, of Mr. Tolan's negligence, extensive damage was done to his jeep and he has claimed damages for his loss.

[3] In cross-examination, he stated that prior to proceeding on the Davy Hill Road he had reversed his jeep from the Carr's Bay/Little Bay junction and he recalled seeing Marvin Bruno, a witness for the defence, in that area. Mr. West denied that he had proceeded from the junction at a very high speed. He agreed that there was an incline on the part of Davy Hill road that he was proceeding along but denied that he was travelling in excess of 50 miles per hour, because he could not be going up the hill at that speed. He stated that his speed was over 25 miles per hour and could have been 40 miles per hour or just less. He also indicated that he was not sure of the speed limit in that area.

[4] In further cross-examination, Mr. West testified that the accident had occurred more than 150 feet from where he had started on to the Davy Hill Public Road from the Carr's Bay junction. He had first seen the pickup driven by Mr. Tolan when he hit the brow of the hill round the corner. At that time the pickup was about 30 to 35 feet away and travelling on the right side of the road, being Mr. West's side of the road. He insisted that Mr. Tolan was not travelling on the left side. Mr. Tolan was in a line a traffic but was out on "his" [i.e. Mr. West's] side.

[5] When asked how he was not able to bring his jeep to a standstill, he answered that he had pulled his vehicle as far left as he could and applied his brakes. If he had stopped, Mr. Tolan would have hit him head on and given the speed that he was driving at it would not have given him much time.

[6] In response to questions as to what had become of Mr. Tolan's pickup he said that it did not overtake the vehicles but it was on his side of the road around the corner on the brow of the hill. He denied that he had been speeding around the curb and did not agree that he struck his wheel and lost control of his vehicle.

[7] James White, an employee of the Government of Montserrat in the Emergency Department supported Mr. West's version of the events. Mr. White, testified that he was driving his jeep down Davy Hill Public Road towards the Carr's Bay junction.

[8] He saw a white pick-up about 2 vehicles ahead of him and it was driving on the right hand side of the road. He said the white pickup appeared like it wanted to overtake the three vehicles ahead of it and at that same time he saw a blue jeep coming up the road in the opposite direction. He slowed down his vehicle anticipating a collision. He then saw the blue jeep pull further to the left trying to avoid a collision with the white pick-up and saw the jeep jump the curve and run into the bank on the left side.

[9] After the collision he observed that the jeep belonged to Kevin West. He did not know the name of the driver of the pick-up but knew that he worked on the airport project.

[10] When he was cross-examined, Mr. White agreed that Davy Hill Road started around Arrow's Man Shop and went down to Carr's Bay junction. He stated that he had been driving down Davy Hill Road in a line of 5 vehicles and the white pick-up was 2 cars ahead of him. The line of vehicles was travelling roughly 25 miles per hour coming down.

[11] He does not recall that there were 2 pickups in the line. The white pick-up was on the left side at Arrow's Man Shop, at Cable TV, the Water Authority and Victor's supermarket and it did not attempt to overtake in those areas.

[12] Cross-examined further, Mr. White stated that he saw the white pickup try to overtake at the junction to the Davy Hill Project near a genip tree and where there was a slight bend in the road. He said he saw the pick-up "varying" on the right hand side of the road going down. He insisted that he has seen the white pick-up on the right hand side of the road and that he was on the spot close to the accident.

[13] When asked if he had seen defence witness, Matthew Butler, at the scene of the accident, he stated that he did not recall seeing him.

[14] That was the evidence from the Claimant and his witness in relation to the cause of the accident.

Case for the Defence

[15] Now to the Defence. It should be noted first of all that Johnnie Tolan has never taken any part in these proceedings. No Acknowledgement of Service of the Claim form or Defence have been filed by him or on his behalf. In fact, there is no evidence on the file that the Claim Form has been served on him.

[16] In its Defence, Lagan Holdings admits that it is the owner of vehicle M2982, which was driven by Mr. Tolan at all the material times. The Defence also states that Mr. Tolan was its employee on the date of the accident and was authorized to drive vehicle M2982. In those circumstances, it was therefore appropriate for the matter to proceed.

[17] Lagan's version as to the cause of the accident is as stated earlier quite different from the Mr. West's.

[18] Matthew Butler, a civil engineer employed with Lagan International was a witness for Lagan. He stated that on the date in question he was driving a Nissan pick-up from east to west on the Davy Hill public road.

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[19] While driving towards Carr's Bay, he was aware that there were two vehicles in front of him and one behind. The vehicle immediately ahead was a pick-up driven by Johnnie Tolan and the vehicle at the front was a white sedan. A 4x4 vehicle was at the rear.

[20] It is Mr. Butler's evidence that as the vehicles continued down the Davy Hill road, a blue Toyota Rav 4 came around the bend in the road in the opposite direction. The vehicle came around the bend at such a speed that the driver lost control, resulting in the Rav 4 crashing into the embankment on the side of the road. He later learned that the Rav 4 had been driven by Kevin West.

[21] Mr. Butler stated that at no time while travelling behind the pick-up driven by Johnnie Tolan did he see the pickup try to overtake the white car travelling in front and that Mr. Tolan's pickup was on the left side of the road at all times.

[22] In cross-examination, Mr. Butler testified that he had given a statement to the police about a week or so after the accident and that statement said exactly the same thing as what is contained in his witness statement.

[23] When asked about the "white sedan" he described in his witness statement, he stated that he did not know who it belonged to neither did he know the number. Mr. Butler stated that the accident happened on the Day Hill road where there was a bend.

[24] Mr. Butler insisted that he had been driving directly behind Mr. Tolan. He denied that he had made up the story because he was an employee of Lagan.

[25] In re-examination, Mr. Butler testified that there was more than 1 bend in the Davy Hill area where the accident took place.

[26] Marvin Bruno, a constable in the Royal Montserrat, was the other witness for Lagan. His evidence is that on the day of the accident he was on Beat and Patrol duty at Carr's Bay. While at the Carr's Bay junction, he saw a jeep reverse from the road leading into Little Bay and proceed eastwards on the Davy Hill Public Road. The jeep had accelerated very fast on the Davy Hill Road.

[27] Officer Bruno went on to say that when the jeep reached in the vicinity of Tom Piper's residence on the Davy Hill Road, he noticed that it "seemed to be going out of control". The jeep had been in his sight at all the material times and there was nothing obstructing his view. He had been paying attention to the vehicle because of the speed it was travelling. He saw the jeep go off the main road and run into the embankment on the left side of the road.

[28] He further stated that on no occasion did he see the vehicle driven by Mr. Tolan on the right side of Davy Hill road while proceeding westward, i.e. down the hill.

[29] The officer testified that he had walked to the scene and observed that the vehicle driven by Mr. West was at a standstill with its front wheels over the curb and resting against the embankment. He also observed that the vehicle had sustained damage.

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[30] He then made inquiries into the accident and recorded explanations from Mr. West and Mr. Tolan as to how it had occurred. In his statement Mr. West had indicated that he had seen Mr. Tolan's vehicle on the right side of the road, pulled off from him, hit his jeep the curb and collided with the bank on the left side of the road.

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[31] Mr. Tolan's had stated that he was coming down Davy Hill Public Road when he saw a blue jeep at the bend, the driver of the jeep swerved towards him because he was travelling at a speed. From his rear view mirror, he saw the jeep hit the curb.

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[32] Officer Bruno also stated that he took a number of measurements at the scene of the accident in the presence of the parties. The measurements were recorded in his pocketbook and are included in his witness statement.

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[33] Under cross-examination, the officer admitted that there was a curve further up from where he was standing but stated that he could see Mr. West's vehicle going up and had seen 2 pick-ups in a line of vehicles coming down. He also insisted that he could see both sides of the road.

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Visit to the scene of the accident

[34] On the application by counsel for the Claimant, the Court visited the scene of the accident. Mr. West pointed out where he had first seen the white pick-up as he was travelling up Davy Hill Road. He also indicated the point where his vehicle struck the embankment.

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[35] Officer Bruno pointed out where he had been standing at the Carr's Bay junction and indicated where Mr. West's jeep had struck the embankment. He also pointed out the changes in the area from the time of the accident. Coming down the hill on the side that Mr. Tolan's vehicle was travelling, he pointed out that there was now house after Tom Piper's home and the bush had now grown up high. In response to a question from the Court he indicated that the road had not changed.

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[36] Matthew Butler pointed out where Mr. West had struck the embankment and distinguished it from the point where the jeep ended up.

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Findings on the Cause of the Accident

[37] In my view one of the most crucial aspects of this case is the Davy Hill Public Road itself and in particular the area where the accident occurred. James White described the Davy Hill Public Road as "not a relatively straight road". Each of the witnesses to the accident expanded that statement in their evidence.

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[38] Mr. West stated that there was a slight incline going up and he spoke of hitting the "brow of the hill round the curve". James White's evidence was that the junction to the Davy Hill project had a slight bend.

[39] Matthew Butler testified that there was one or more bend in the Davy Hill area where the accident took place. He also stated that there where Mr. West had hit the curb was on Victor's side beyond the first bend in the road. Officer Bruno stated that from where he was standing there was a curve on an incline further up the road.

[40] It would be therefore true to say that the area where the accident occurred is made up of curves and inclines going away from Carr's bay junction where Mr. West started off from and where Officer Bruno was standing. The visit to the scene of the accident confirmed this.

[41] Mr. West's evidence is that he saw Mr. Tolan's pickup about 30 to 35 feet away from him when he hit the brow of the hill round the corner and pick was on the right side, being Mr. West's side, of the road and in an attempt to avoid a head on collision he pulled to the right and hit the embankment. James White's evidence is that the pick up was two vehicles ahead of him and it appeared like it wanted to overtake the three vehicles in front of him and was "varying" on the right side of the road.

[42] Matthew Butler said that he was driving directly behind Mr. Tolan and never saw him try to overtake any vehicle and that his pickup remained on the left side of the road at all times. I accept that he was driving his pick-up down Davy Hill around the time of the accident and he was one of the vehicles in the line of traffic, as described by James White. However, I do not accept Mr. Butler's evidence that he was driving directly behind Mr. Tolan.

[43] The statement Officer Bruno recorded from Johnnie Tolan and which was part of his evidence supports that finding. Mr. Tolan's statement was that he had seen the jeep hit the curb from his rear view mirror. It is Mr. Butler's evidence that he saw both crash into the embankment and where the jeep ended up. It is my finding that he could not have

been the car right behind Tolan and seen all of that. He must have been further behind in the line coming down which would also account for him not seeing the pick-up move into the right side at any time because Mr. Butler would have been some distance behind Mr. Tolan and because of the bends in the road.

[44] It is because of the contours in the Davy Hill why I accept the evidence of Mr. West and his witness. With a curve and an incline going away from Officer Bruno, even if he was paying attention, it is quite likely that he did not see the pick up when Mr. West "spotted it" at the brow of the hill round the curve. In my view, it is not the officer is not telling the truth, he just did not see the pick up before the accident because he simply could not see it from where he was standing at the junction.

[45] The evidence is not that Mr. Tolan completed overtaking any vehicle, it was only an attempt. Mr. White speaks of him "wavering" on the right side, this is consistent with him pulling to the right being spotted by Mr. White who pulled to his left to avoid a head-on collision. There is no suggestion that Mr. Tolan was traveling on the right side of the road with bends for any length of time, it is sufficient that when Mr. West saw him for the first time he was on Mr. West's side of the road.

[46] It is therefore my finding that Mr. Tolan was on the right hand side of the road and was the cause of the accident.

Contributory negligence

[47] The speed that Mr. West was traveling at the time of the accident is important. Mr. West testified that he was traveling at over 25 miles per hour and it could have been at 40 miles per hour or just less at the time of the accident. It is Officer Bruno's evidence that Mr. West had accelerated very fast on the Davy Hill road and he was paying attention to the vehicle because of the speed it was traveling.

[48] Under cross- examination, when asked why he had not come to a standstill after he had seen the pick-up 30 to 35 feet away, it is Mr. West's evidence that given the speed that he

was driving at, it would not have given him much time. It is therefore my finding that both parties were negligent, with Mr. Tolan contributing more to causing the accident.

[49] I would fix the respective contributions at 80% fault of Mr. Tolan and 20% fault of Mr. West. Accordingly, Mr. West is only to recover 80% of the damages that he proves.

Damages

[50] Mr. West has claimed $33, 264.00 in damages for the loss suffered as the result of the accident. The damages claimed amount to $18,864.00 for parts, custom charges, brokerage, and materials and labour and loss of use of $14,400.00. When he was cross examined, he stated the repairs on his vehicle were not complete because he could not afford to by all the parts. He testified that he had given his mechanic over $3,000 towards the repairs.

[51] John Semper, a body repair mechanic gave evidence that Mr. West had brought his jeep to his shop for repairs. The vehicle was severely damaged and he had done an estimate. The vehicle remained in his garage for a period of four months because he had to source parts from overseas.

[52] Under cross-examination, he testified that he had spent over $6,000.00 and $3,400.00 on repairs to date.

[53] In British Transport Commission v Gourley[1], Lord Goddard stated that special damages "consists of out of pocket expenses and loss of earnings incurred and is generally capable of substantially exact calculation". A Claimant must not only specifically plead special damages but he must prove them.

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[54] In this case, special damages have been pleaded but no bills and receipts have been produced. Counsel for Lagan submitted that for that reason special damages should not be awarded as they had not been proved.

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[1] [1956] A.C. 185 at 206

[55] Counsel for Mr. West was of the view that Mr. Semper's evidence included the estimate prepared by him and the lists of parts required to repair the vehicle and that was sufficient proof. As counsel for Lagan had not challenged Mr. Semper's evidence with regard to the parts, it must be taken as having been accepted.

[56] The Court of Appeal of Trinidad and Tobago dealt with issue of a Plaintiff's inability to produce receipts to prove damages which had been pleaded in the case of Grant v Motilal Loonan Limited and anor.[2]. In that case the Appellant was claiming for damage to her household furnishings due to the Respondents' negligence. At the assessment of damages before the Master, the appellant did not produce receipts for the damaged articles. The Master disallowed the claim which amounted to $20,000.00 but allowed and ex gratia payment of $6,000.00 on the ground that the appellant had not strictly proved her loss.

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[57] The Court of Appeal in allowing the appeal held that although special damage must be pleaded, particularized and proved strictly, the appellant had prima facie established the cost of the articles and the Respondents had not attempted to challenge the value placed on them. The learned Chief Justice Bernard in delivering the decision of the Court[3] stated the approach that should have been taken by the Master was as follows:

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> "…, the Master, in my view, either had to accept the appellant's claim in full or, if for whatever reason she had reservations, she should have approached the matter along the lines in Ratcliffe's case by applying her mind judicially to each item and the costs therefor in the list."

The Court found that the values claimed were not unreasonable and the claim for special damages was allowed in full.

[58] In my view this is the approach to be adopted in this case. It should be noted that although counsel for Lagan cross-examined Mr. West as why some parts were replaced instead of being repaired he did not challenge the value of the parts as given by Mr. Semper.

[2] [1988] 43 W.I.R. 372
[3] Ibid at page 378

[59] I will now consider the items claimed in turn. In relation, to the amounts claimed in relation to the A/C unit, the windscreen and engine guard, I cannot see how these can be allowed as it is Mr. West's evidence that these have not been purchased. The customs charges and brokerage fees, fall outside of Mr. Semper's area of expertise and although Mr. West testified that he went to customs to find out what the costs of bringing in the parts would be, it is my view that receipts would be required ground to those claims as they are likely calculable on a statutory or percentage basis, which is capable of proof.

[60] On all the other items claimed in relation to the repair of the vehicle, I accept the figures as reasonable. The items which have been allowed and the amount are as follows:

One Front Bumper	$ 1,500.00
One Head Lamp	$ 1,060.00
One Indicator Light	$ 360.00
One Crash Bar	$ 950.00
One Left Front Shock	$ 790.00
One Door Finisher [right side]	$ 620.00
One left Wheel Arch	$ 1,270.00
Materials and Labour	$ 3,800.00
Total	$ 10,350.00

Loss of Use

[61] Mr. West has claimed damages for loss of use for the 4 months that it took for the parts to be ordered from overseas at the rate of $120.00 per day, with a total of $14,400.00 for the period.

[62] The point raised by counsel for Lagan in relation to proof of special damages and the response by the other side would seem to be applicable here. Counsel for Lagan also submitted that Mr. West had not shown the steps that he had taken to mitigate his loss.

[63] In Horsford v Jarvis[4], the learned Chief Justice Sir Vincent Floissac stated as follows:

> "Where property was damaged as a result of a tort and the owner of the property was therefore deprived of the use of the property during the reasonable period allowable for repairs to the property, the owner is entitled to recover general damages from the tortfeasor for such loss of use. The loss of use may be evaluated either by reference to the cost of hiring a reasonable substitute or by reference to a percentage of the capital value of the property or by some other appropriate criterion."

[64] Mr. West has not adduced any evidence that he rented a car during the period for which he claims but simply claims a daily rate of $120.00. . In my view, an application of the principle in Grant v Motilal Loonan Limited[5] would be an appropriate criterion for evaluating the loss of use.

[65] Counsel for Lagan did not challenge the amount claimed or the period for which it is claimed only raising the point that it was Mr. West's duty to show that he had taken steps to mitigate his loss

[66] Mr. Semper's evidence is that Mr. West brought his jeep to his garage on 22nd April 2004, which is the date of the accident. He further stated that the vehicle remained in his garage for four months because he had to source parts from overseas.

[67] Under cross-examination, Mr. West had testified that although his jeep was still missing parts, the mechanic had made it "passable" and when it was roadworthy he drove it. It is my finding that he had taken all reasonable steps to mitigate loss.

[68] I accept the figure claimed as being reasonable and I award damages for loss of use in the amount $14,400.00.

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[4] Civil Appeal No. 14 of 1994 [Antigua and Barbuda]
[5] Supra

Conclusion

[69] Having considered the issues at trial and in accordance with my findings:

i) Judgment is entered for Kevin West against Lagan Holdings Ltd.
ii) Damages in the sum of $24, 750.00 are awarded to Kevin West of which he is to recover $19,800.00, being 80% of the award.
iii) Prescribed costs are awarded to Kevin West in the sum of $5,940.00.

Ianthea Leigertwood-Octave

High Court Judge [Ag.]