

ANTIGUA AND BARBUDA

IN THE HIGH COURT OF JUSTICE

CLAIM NO ANUHCV 228/2004

BETWEEN:

TROPICAL BUILDERS

Claimant

And

GLORIA THOMAS

Defendant

Appearances:

Mr. John Fuller for the Claimant

Mrs. Denise Jonas-Parillon for the Defendant

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2007: March 13th
May 22nd
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JUDGMENT

- [1] **Blenman, J:** This is a claim and a counterclaim for damages arising out of a motor vehicular accident.
- [2] Tropical Builders Ltd (Tropical Builders) is a company registered and operating in Antigua and Barbuda and it is the owner of pickup truck registration number PA 7481 (the pickup truck). Dr. Gloria Thomas (Dr. Thomas) is a medical doctor by profession and the owner of motor car registration number A2382 (the motor car) Tropical Builders alleges that on 23rd June 1998 Ms. Sherry Carter (Ms. Carter), who at the material time was its servant or agent, was driving the pickup truck from north to south on the Weatherhills Road when Dr. Thomas negligently drove her motor car from south to north and there was a collision between the two vehicles.

[3] Tropical Builders further alleges that Dr. Thomas failed to remain on the proper side of the road; failed to keep a proper lookout and also failed to stop or slow down her motor car even though it was unsafe not to do so. Accordingly, Tropical Builders says that the collision was caused solely due to Dr. Thomas' negligence. As a consequence of the collision it has suffered loss and damage since the entire pickup truck was a write off; it seeks to recover the following damages:

(Value of pickup truck)	\$24,134.00
Loss of use for 60 days at \$150.00 per day	\$9,000.00
Total damages claimed	\$33,134.00 together with interest and costs.

[4] Dr. Thomas denies that she drove negligently as alleged or at all or caused the collision. She contends that the accident was caused solely by the negligent driving of Ms. Carter, who at the time was the agent and or servant of Tropical Builders.

[5] Dr. Thomas further contends that she was driving on her proper side of the road and at about 15 – 20 miles per hour when Ms. Carter drove the pickup truck, recklessly at a tremendous speed; on the wrong side of the road and thereby caused the collision between the two vehicles. She further contends that Ms. Carter failed to stop, slow down or manage the pickup truck so as to prevent the collision; in addition, she failed to keep a proper look out.

[6] As a result of the collision, Dr. Thomas says that her motor car was a total wreck and had to be written off. She was forced to seek the assistance of her husband in providing her with transportation for several days. She also, claims for the loss of use of her motor car. Accordingly, she seeks the following damages:

- (a) value of motor car less salvage value \$50,480.00 - \$10,000.00
- (b) loss of use (73 days at \$150.00 per day \$50,480.00)

She also seeks interests and costs.

Issues

- [7] The issues to be determined by the Court are as follows:
- (a) who is liable for the accident?
 - (b) what is the quantum of damages, if any, the Court should award?

Tropical Builders' evidence

- [8] Ms. Carter caused a witness statement to be filed on behalf of Tropical Builders on the day of trial despite the matter being adjourned in order to facilitate the attendance of the Tropical Builders' witnesses on the resumption of the hearing she was not present.
- [9] The other witness Mr. Bengt Berntsson caused a witness summary to be filed. He was a formal witness who merely provided the Court with evidence as to the value of the pickup truck and the loss Tropical Builders incurred as a result of the damage to the pickup truck. In her witness statement Ms. Carter denied that she caused the collision; she said that Dr. Thomas was solely at fault and Mr. Berntsson said that as a result of the collision between the two vehicles, the pickup truck was a total wreck. Before the accident its value was EC\$20,100.00 and he had to replace it with another pickup. He was unable to sell the wreck because it was beyond salvage.
- [10] On the conclusion of Mr. Berntsson's evidence, and there being no appearance by Ms. Carter, Mr. Fuller was left with no alternative than to close his case. Mrs. Jonas-Parillon then invited the Court to dismiss Tropical Builders' case against Dr. Thomas and counsel proceeded, with the leave of the Court on Dr. Thomas' counterclaim.

Dr. Thomas' evidence

- [11] In support of her defence and counterclaim, Dr. Thomas filed 2(two) witness statements on her own behalf. In addition, Mr. Reginald Ferris (Mr. Ferris) an auto repair man filed a witness statement in support of her defence and counterclaim and they were both cross examined.

[12] Dr. Thomas said that on the day in question she was driving from west to east along the Wetherhill Road at approximately 3.40pm. She was not driving fast and had a passenger in the front seat of the car. It was a clear day. She had just negotiated Wetherhill turn and was on the straight stretch of the road when she observed the red pickup truck approaching her vehicle at a tremendous speed. The pickup truck was on Dr. Thomas's side of the road and was thereby traveling on its (the pickup truck's) wrong side of the road. The pickup truck was being driven by Ms. Carter; it was owned by Tropical Builders. Before she could not have driven her motor car out of the way and so avoid the collision, the pickup truck "rammed into" the front of her motor car in a head on collision. As a consequence, her motor car was badly damaged and was written off.

[13] During cross examination by learned Counsel Mr. Fuller, Dr Thomas admitted that she was compensated by the insurance company for the loss of her motor car.

[14] The next witness, Mr. Ferris told the Court that he is an auto repair mechanic and a valuer. He makes estimates for insurance companies. He valued Dr. Thomas' motor car and was of the view that the pre accident value was EC\$60,480 and the salvage value was \$EC10,000. In his view, the vehicle was extensively damaged and the total costs of repair to the motor car would have been \$33,806.00. The motor car was written off.

Mr. Fuller's submissions on liability

[15] Learned Counsel Mr. John Fuller submitted that Dr. Thomas was solely responsible for the collision. He asked the Court to find as a fact that Dr. Thomas negligently drove her motor car on the day in question and caused the collision. Mr. Fuller urged the Court to find as a fact that it was Dr. Thomas who, drove her vehicle on the wrong side of the road and entirely caused the collision between the vehicles. In this regard, Mr. Fuller stated that the Court should accept and rely on the witness statement that Ms. Carter had filed, even though she has failed to attend Court in order to be cross examined.

Quantum of damages

- [16] That in any event, Mr. Fuller submitted that Dr. Thomas is not entitled to be compensated since she has suffered no loss. Special damage must be strictly proven and Dr. Thomas has failed to prove that she has suffered any loss. She has not adduced any evidence of loss and is entitled to be paid the salvage value of the motor car in the sum of \$50,480 since the insurance company with whom the car was insured has replaced it.

Loss of use

- [17] Mr. Fuller stated that even though Dr. Thomas has claimed loss of use at the rate of \$150.00 per day for 73 days in cross examination, she admitted that she did not hire or rent a vehicle; in fact her husband drove her, she is therefore not entitled to recover under that head.
- [18] Learned counsel, Mr. Fuller posited that judgment should be given, to Tropical Builders and that Dr. Thomas' claim should be dismissed with costs and interests.

Mrs. Jonas-Parillon's submissions

- [19] Learned Counsel, Mrs. Jonas-Parillon asked the Court to find as a fact, that the collision between the vehicles was caused solely by Ms. Carter's negligent driving. The Court has only the evidence of Dr. Thomas before it in order to determine the issue of liability. While Ms. Carter has filed a witness statement she did not attend Court to be cross examined; Mrs. Jonas-Parillon therefore urged the Court to strike out her witness statement. Counsel referred the Court to Part 29.8(1) of the Civil Procedure Rules 200 in support of her contention.
- [20] Counsel urged the Court to accept Dr. Thomas' uncontroverted evidence. Mrs. Jonas-Parillon posited that Tropical Builders has adduced no evidence in support of its contention that Dr. Thomas negligently, drove and caused the accident. There is overwhelming evidence from Dr. Thomas that supports her allegation that Ms. Carter, on the day in question, drove recklessly at a tremendous speed and caused the accident. There is also evidence, which the Court should accept, that Ms. Carter drove on the wrong side of the

road, failed to manage the pickup or to keep a proper look out; all of these breaches concluded to Ms. Carter's reckless driving which caused the accident; therefore, the Court should find Tropical Builders is solely liable for the accident.

Quantum of damages

- [21] Learned counsel, Mrs. Jonas-Parillon then dealt with the quantum of damages that should be awarded to Dr Thomas. Mr. Ferris testified that the pre accident value of Dr. Thomas' car was \$60,480.00 and that the salvage value after the collision was \$10,000 Mrs. Jonas-Parillon argued that this evidence was unchallenged; Dr. Thomas is therefore entitled to be compensated in the sum of \$50,480.00. The fact that she received an insurance settlement is of no moment. See: **Bradburn v Great Western Rail Co [1874] – 1880] ALL Er 195; Parry v Cleaver [1969] 1 ALL ER 555**

Loss of use

- [22] Further, Mrs. Jonas-Parillon advocated that Dr. Thomas is entitled to recover loss of use for 73 days based on her evidence that for 73 days she had to make all sorts of arrangements for transport, this length of time also coincided with the time it took for the insurance company to settle her claim. Dr. Thomas alleges that she is entitled to receive \$150.00 per day for the period of 73 days and the Court should award her accordingly. Tropical Builders has not adduced any evidence in defence to Dr. Thomas' counterclaim to support their contention that she is not entitled to receive the sum claimed as loss of use that is EC\$10,950.00

- [23] Finally, Mrs. Jonas-Parillon urged the Court to dismiss Tropical Builders' claim against Dr. Thomas and enter judgment for her in the sum \$61,430 which represents the value of her motor car together with loss of use and together with prescribed costs.

Court's analyses and findings

- [24] I have reviewed the evidence adduced and I have given careful consideration to the submissions of both learned counsel and the following represents my analyses and findings.

[25] In the case at bar, while Tropical Builders had caused the witness statement to be filed by Ms. Carter, however, she did not attend Court to be cross examined. Part 29.8(1) of CPR 2000 clearly states as follows:

"29.8(1) If a party:-

- (a) has served a witness statement or summary; and
- (b) wishes to rely on the evidence of that witness;
that party must call the witness to give evidence unless the court orders otherwise.

The Court did not order otherwise and since Tropical Builders did not call Ms. Carter, I have no other choice but to attach no weight to her witness statement.

[26] On the question of liability, there was no other evidence adduced by Tropical Builders in support of their claim. Therefore, I am left with the uncontroverted evidence of Dr. Thomas as to how the collision occurred. In this regard, I note that even during the strenuous cross examination by learned counsel Mr. Fuller, Dr. Thomas, remained unshakable. I therefore accept her evidence as to how the collision occurred and find as a fact that the collision between the pickup truck and the motor car was caused solely by Ms. Carter negligent driving of the pickup truck as the servant or agent of Tropical Builders. I therefore hold that Tropical Builders is exclusively liable for the damages and loss that Dr. Thomas has suffered.

Quantum of damages

[27] This brings me now to address the second issue namely the question of compensation.

Motor Car

[28] I propose to firstly address the damages recoverable for the motor car. In this regard, for the most part, I accept the submissions of Learned Counsel Mrs. Jonas-Parillon in preference to those of Learned Counsel Mr. Fuller. I have no doubt that Dr. Thomas is entitled to be compensated for the loss suffered despite the fact that she may have recovered payments from the insurance company in relation to the loss suffered. In **Parry v Cleaver** *ibid* it was held that:

“Where the plaintiff suffers through the negligence of the defendant, the damages awarded are not to be reduced because the plaintiff has insured himself. In such a case the plaintiff is entitled to receive the amount payable by the insurer in addition to the damages recoverable from the defendant.”

McGregor on Damages 13th edition 1972 deals with the issue of insurance moneys and their deductibility in relation to claims for medical expenses at page 765 para 1133. It states as follows:

“Insurance moneys

Whether a plaintiff whose medical expenses have been paid for to him under a private medical insurance scheme to which he subscribes, is entitled nevertheless to claim the expenses as part of his damages is a question which does not appear to have been explicitly passed upon by the Courts. It would seem likely that the analogy of the non deductibility of insurance moneys in relation to loss of earnings – a rule unanimously supported by their Lordships in **Parry v Cleaver** – would prevail since the argument in favour of non-deduction, viz that the plaintiff has paid for the insurance with his own moneys and should not be deprived of the fruits of his thrift and foresight to the defendant’s advantage, applies as much in this context as in the other.”

[29] I find the above principles very useful and apply them to the case at bar. The House of Lords in **Smoker v London Fire and Civil Defence Authority [1991] 2 AC 502** held that the non-deduction principle in **Parry v Cleaver** *ibid* remains good law.

[30] In my respectful view, therefore, Dr. Thomas is entitled to be compensated from Tropical Builders in the sum of EC\$50,480.00 which represents the net loss in relation to the value of the motor car.

Loss of use

[31] It is the law that the owner of a motor car that is damaged, or as in the case at bar, is a write off is entitled to recover for being deprived of its use during the period that he was without a motor car. The general principle is that the Court seeks to compensate the Claimant for the use which, but for the wrong, he would have had of the motor car.

[32] Even in the case of non-profit earning chattel the claimant is entitled to recover for loss of use. This principle is well registered in relation to ships and there is no reason why it should not be applied analogously to motor cars. See **The Greta Holme [1897] AC 596**; **The Mediana [1900] AC 113**; **The Hebridean Coast [1961] Ac 545** In the *Mediana* ibid damages were awarded to a harbour board for the loss of use of one of their lightships which had been damaged by the defendant's negligence, even though the lightship was replaced immediately by a spare one which was kept by the board for just such an emergency.

[33] I find the above stated principles very persuasive and applicable to the case at bar and, I can see no reason why Dr. Thomas should not be entitled to compensation for the loss of the use of her motor car for 73 days, since I accept that it took her 73 days to receive compensation from the insurance company with whom she had insured. I have not been presented with any evidence or arguments to persuade me that the sum of EC\$150.00 per day is too high. I am not of the view that in the circumstances of the case, the sum of \$150.00 per day is unreasonable. Accordingly, I am of the respectful view that Dr. Thomas is entitled to receive compensation for the loss of use of her motor car for 73 days at a sum of \$150.00 per day; the total being EC\$10,950.00

[34] In view of the above circumstances and based on the stated reasons, I hold that Tropical Builders has failed to prove its claim against Dr. Thomas where as she has established her counterclaim against Tropical Builders and she is entitled to be compensated the total sum of \$61,430.

Conclusion

[35] Accordingly, I make the following orders:

- (1) Tropical Builder Ltd claim against Gloria Thomas is dismissed together with prescribed costs unless otherwise agreed.

- (2) Judgment is entered on the counterclaim for Dr. Gloria Thomas against Tropical Builders in the sum of EC\$61,430.00 together with prescribed costs unless otherwise agreed.

[36] I commend both learned counsel for their industry.

Louise Esther Blenman
High Court Judge.