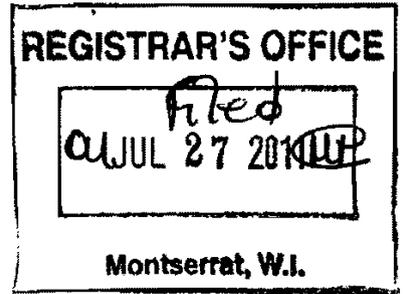


IN THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE
MONTSERRAT
(Civil)



CLAIM NO. MNIHCV2009/0021

BETWEEN:

NIGEL LINDSEY

Claimant

and

JAMES ALLEN

Defendant

Appearances:

Mr. David Brandt for the Claimant
Mr. Jean Kelsick for the Defendant

2011: May 23, 24 and July 26

JUDGMENT

- [1] **REDHEAD J (Ag):** On 1st day of August 2008 the Claimant was driving his motor car M921 along the Brades Public Road in a Northerly direction. The Defendant was driving his motor vehicle in an opposite direction. When the Claimant and the Defendant got to the vicinity of Ashok's Supermarket their motor vehicles were involved in an accident.
- [2] The Claimant alleges that the Defendant was responsible for the accident. The Defendant on the other hand alleges that the Claimant was responsible for the accident.
- [3] The Claimant on 19th August 2009 filed a Claim Form and a Statement of Claim. In his Statement of Claim the Claimant alleges that he was driving his motor vehicle M921 along the Brades Public Road when the Defendant so negligently drove, managed and controlled

his vehicle along the said road in the opposite direction that he caused or permitted the same (vehicle) violently to collide with the Claimant's said motor car and caused damage to the same. The Claimant in his particulars of negligence alleges

- (a) Driving at an excessive speed
- (b) Driving on to the wrong side of the road and there collided with the Claimant
- (c) Failing to keep any or proper look-out or to have any significant regard for other traffic, particularly, on coming traffic on the said road
- (d) Failing to have or keep any proper control of the said motor car
- (e) Failing to stop or slow down, to swerve or in any other way so as to manage or control the said motor car as to avoid the said collision.

By reason of the matters aforesaid the Claimant has suffered loss and damage.

[4] The Claimant itemized his particulars of special damage to the total amount of \$21,415.00.

[5] The Defendant in his defence denies that the collision was caused or contributed by the alleged or any negligence of him. The Defendant alleges that the collision was caused or contributed to by the negligence of the Claimant.

[6] In his particulars of negligence the Defendant alleges that the Claimant was

- (a) Driving too fast in the circumstances
- (b) Failing to keep any or proper look out and /or to observe or heed that presence or approach of the Defendant's said vehicle,
- (c) Failing to keep on his proper side of the road,
- (d) Failing to apply his brakes in time or at all and/or so to steer or control the vehicle he was driving so as to avoid the said collision.

[7] In his Counter Claim the Defendant claims against the Claimant damages for personal injuries which he particularizes as

(a) The Defendant was thrown violently forward in the vehicle immediately after the collision thereby striking his head against the front windshield, which knocked him unconscious. He was taken to Glendon Hospital for examination and suffered headaches

for several months thereafter. The Defendant in particularizing his claim for the damage of his motor vehicle; put the pre-accident value of his vehicle at \$12,000.00.

- [8] In his witness statement he said that he had bought it from his daughter for \$8,000.00 although he had no receipt to back up that claim.
- [9] The Claimant in his witness statement says that he is the owner and was the driver of M921. On 1st August 2008 at about 8 p.m. he was travelling from North to South on the Brades Public Road in the vicinity of Ashok's Supermarket at about 25 miles per hour.
- [10] The Claimant says that there was one vehicle in front of him travelling in the same direction. On reaching the area of Ryan's complex, the vehicle which was traveling in front of him stopped. He, the Claimant, said he stopped behind the vehicle. The vehicle moved off and he too moved off as well. He said he built up a speed of about 20 mph.
- [11] The Claimant said that he then observed a jeep which was travelling in the opposite direction indicating that the driver wanted to cross the road into Ashok's supermarket. The vehicle stopped and allowed him, the Claimant, to pass. In his witness statement, the Claimant said that the jeep that was in front of him travelling North to South continued in the same direction and he, the Claimant, was driving about 16 feet from the vehicle.
- [12] He said as he passed the minor road to his left, he saw two bright lights heading towards him in the opposite direction; he pulled his vehicle more, over to the left side of the road to avoid an accident. He said that his car went up on a dirt embankment on the left hand side of the road close to Ashok's parking lot. He saw a lamp post on his left side. He applied brakes and stopped. He said that as he stopped his vehicle, the front of M293 came to the left side of the road and collided with the right side of his vehicle and caused extensive damage to his vehicle.

- [13] The Claimant said that after the accident he then observed that the Defendant was turning his steering wheel and his vehicle rolled back across the road in a drain on the opposite side of the road and stopped with its two rear wheels in the drain.
- [14] I am of the opinion that the Claimant advanced this evidence to indicate that the Defendant deliberately undertook this maneuver so as to indicate that the accident took place on the other side of the road.
- [15] As Learned Counsel for the Claimant, Mr. Brandt, made the comment on this aspect of the evidence "smart man". I do not accept this evidence. I am more inclined to the view that the Defendant's vehicle ended up where it was having regard to the violent impact of both vehicles. As I do not think that two vehicles having violently collided that the Defendant would have the presence of mind, immediately, thereafter, to manipulate the situation and roll back his vehicle to make it appear that the accident took place at a different spot from where it actually did.
- [16] The Claimant said that after the accident he came out of his vehicle approached the Defendant and told him "Allen you hit me car." The Defendant replied "me in one hurry here to go North". The Defendant of course denied that he said these words to the Claimant.
- [17] The police were summoned to the scene. Among the officers who arrived on the scene was Kirk Brade P.C. who took measurements and gave a witness statement.
- [18] Both vehicles were extensively damaged. The estimated costs of repairs for the Claimant's vehicle M921 is put at \$21,415.00. The Claimant is also claiming \$33,000.00 loss of use of his vehicle at \$100.00 a day for 330 days. I shall return to this issue later in this judgment. He claims a total sum of \$54,415.14 with interests.

- [19] The Claimant said in cross examination that the road on which the accident occurred is a long straight road. He estimated the distance from the corner to where the accident took place to be about 60 feet.
- [20] He also said in cross-examination that when he turned off to approach the Ashok's Supermarket a jeep came and stopped at the entrance of Ashok's Supermarket with its right indicator on. As he approached the entrance, the Defendant's was coming down the road behind the parked jeep with its bright lights on. As he passed the entrance Mr. Allen came from behind the (parked) jeep. He pulled more to the left and applied his brakes because a lamp post was on his left hand side as he did not want to hit the lamp post. Mr. Allen's vehicle slowed down but did not stop.
- [21] The Claimant also said in cross examination that the Defendant's vehicle was turning across the road when the accident occurred.
- [22] He also said that after the accident that Mr. Allen's vehicle ended up on the other side of the road.
- [23] James Allen in his witness statement said that he is 60 years old and have been driving for 39 years.
- [24] On Friday 8th August 2008 at about 8 p.m. he was driving his Toyota Corolla motor car M293 on the Brades main road travelling north. He was travelling about 10 mph.
- [25] The Defendant said that he wanted to turn right at Ashok's Supermarket. He put on his right indicator and brought his vehicle to a complete stop. Before he was able to turn he saw motor car M921 turn the corner that was about 150 feet ahead of him at high speed. He decided to remain at a standstill so as to let the Claimant's vehicle to pass.
- [26] The Defendant also said in his witness statement that when the Claimant reached in front of Ryan's Place the Claimant increased his speed of 70 mph, lost control of his vehicle and

ran into the right front section of his vehicle. The Claimant's vehicle struck his, the Defendant's vehicle with a lot of force. The Defendant said that his vehicle was thrown back by the Claimant's vehicle, causing both of the wheels of his vehicle to end up in the drain on the left hand side of the road.

[27] The Defendant said in his witness statement that at the time of the collision his head struck the front windshield very hard and he lost consciousness. He was taken to Glendon Hospital later that evening. He was examined by a doctor who is no longer in Montserrat and was discharged. He experienced very painful headaches which lasted for 3 months after the accident on a regular basis and then on off for a further of about 3 months. The pain was severe enough to force him to go home and lie down.

[28] In his witness statement he alleges that at the time of the accident the motor car driven by the Claimant is owned by Cheryl Lindsey, the Claimant's mother.

[29] The Defendant is, I suppose, claiming damages for personal injuries. I "suppose" because the claim is not actually made but in his counter claim he lists Particulars of Injuries in which he says

"The Defendant was thrown forward violently in his vehicle immediately after the collision thereby striking his head against the front windshield, which knocked him unconscious. He was taken to Glendon Hospital for examination and suffered headaches for several months."

[30] In his witness statement the Defendant says that his vehicle M293 was extensively damaged by the collision. The cost of repairing it was \$12,463.89.

[31] The salvage (the wreck) was subsequently purchased by Thomas Greenaway for \$4,500. He also says that he bought it in 2004 from his daughter for \$8,000.00. However, he improved the value by repainting it and at the time of the accident it was worth \$12,000.00.

[32] He is also claiming loss of use from 2nd August 2008 to December 2008 i.e. 143 days at \$80 a day \$11,440.00.

[33] The Defendant is claiming \$12,000.00 less \$4,500 which is \$7,500 and loss of use of \$11,440.00 a total of \$18,940.00.

[34] In cross-examination the Defendant admitted that he gave the police officer P.C. Brade an explanation as to how the accident occurred. He also admitted signing the explanation. The Defendant explained to P.C. Brade

“Me a come down de road, I see a car ah come up fast and me hear badam as de car come into me, I was swinging on to Ashok. Turning toward the light and saw de car coming up in one good speed as soon as, I turn, while I have me indicator de car come and hit me”.

[35] First of all, I reject the Defendant's assertion that the Claimant on reaching Ryan's Place increased his speed to 70 mph. It is difficult if not impossible to tell that a vehicle travelling in the opposite direction increasing its speed and to say at what speed that vehicle is travelling.

[36] The Court visited the locus. It was pointed out by both P.C. Brade where the debris was from the accident.

[37] Denise Phillip gave a witness statement on behalf of the Defendant. In that witness statement she said among other things, that she was driving her motor jeep behind the Defendant's vehicle. She said that she saw the Defendant slowed down in front of her vehicle, turned on its right indicator and came to a stop. She came to a stop behind the Defendant's vehicle when the accident occurred.

[38] If her evidence is to be believed the collision could not have taken place where it did. I reject this witness' evidence as untruthful. I am fortified in this view because the Claimant in his explanation to the police did not say he stopped. If he did he would not have failed to

say so to the police. This witness gave her witness statement over two years after the accident. In my view, the passage of time may have dulled her memory.

[39] I find as a fact that the accident occurred as the Claimant was driving his motor car along the Brades main road. The Defendant intending to go into the direction of Ashok's Supermarket turned his vehicle in front of the Claimant's vehicle thereby causing the collision. I do not accept that the Defendant's vehicle was at a standstill when the accident took place.

[40] I find as a fact that the Claimant was speeding. I based that fact on the conclusion that one of the drivers had to be speeding having regard to the extensive damage sustained by both vehicles. The Claimant admitted this fact but said that it was the Defendant who was speeding. The Defendant having emerged from behind a parked vehicle, as I accept to be the case and turning right could not have been travelling fast.

[41] I accept the Claimant's evidence that he owned the motor car having purchased it from Bruce Farara his boss who is an importer of motor vehicles. He paid for the vehicle by monthly installments.

[42] I accept the evidence that the vehicle was registered in his mother's name because as he said at the time of purchase he was unable to get insurance coverage. He said that he bought the car in 2003 or 2004. He is now 26 years old. He would have been 16 or 17 years old at the time of purchase.

[43] At the time of the accident the Claimant would have been 23 years old. He was cross-examined by Mr. Kelsick. He was asked why at the time of the accident the car was not registered in his name. He explained that he was told that he could not get insurance coverage until he was 25 years old. I accept his explanation. He was told that, although it may not have been correct, but he acted upon it.

[44] I do not accept that the Defendant went to the hospital and was seen by a doctor not that this is of fundamental importance having regard to my findings.

However, I reject his evidence on this issue for two reasons:

(1) If P.C. Brade's evidence is to be believed and I accept his testimony as truthful, being independent that the Defendant said that he had a headache. When he was told that he would be taken to the hospital for medical attention, he refused.

(2) He said that he was treated by a doctor. He did not give the name of the doctor. Although he said that the doctor has left Montserrat.

[45] If that evidence is to be believed, notwithstanding that the doctor has left Montserrat, it is easy to find out the name of the doctor because that would be a matter of record, if the doctor attended to the Defendant.

[46] Although I find as a fact that the Claimant was speeding. Speeding by itself is not evidence of negligence. I hold that the Defendant is wholly responsible for the accident for turning into the path of the Claimant's oncoming vehicle.

[47] I turn now to consider the question of damages. Learned Counsel for the Defendant submitted that the Claimant's claim cannot exceed the pre-accident value of the vehicle. Learned Counsel referred to

DeLabasshire v Warren¹,

Herberts Plasticine Ltd v Ware Taste & Co. Ltd²

[48] The Claimant said that he paid \$14,000.00 for his vehicle in 2003-2004. It was a 1994 model. It was a second hand vehicle when he purchased it. He admitted in cross-examination that a vehicle depreciates 20 per cent after the first year. He said that he did not know by how much it depreciated thereafter.

¹ (1963) 3 ALLER 310

² (1970) 1 ALLER 225

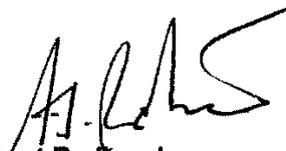
- [49] I agree with the submission of Learned Counsel that the Claimant cannot recover more than the pre-accident value of his motor car. The Claimant said in cross-examination that the value was about \$11,000.00 at the time of the accident.
- [50] Mr. Kelsick put the pre-accident value at \$8,000.00. There was no evidence from the Claimant to support the pre-accident value of the Claimant's vehicle.
- [51] I deal now with the question of loss of use. The Claimant claims 330 days at \$100.00 per day.
- [52] Learned Counsel contends that the Claimant should mitigate his loss. He argued that the Claimant is a young man. He was and is working for Bruce Farara from whom he purchased the damaged motor car. He had been paying for the car after a year and some months. He was in a position to replace that motorcar through the same source. Mr. Brandt, Learned Counsel, argued that the Defendant cannot rely on mitigation as it was not pleaded.
- [53] Mr. Kelsick argued that the **Civil Procedure Rules (CPR)**³, is silent on this aspect. He contends that nothing in the CPR says that one must plead mitigation. I do not agree. Rule 10.5(1) mandates that "the defence must set out all the facts on which the Defendant relies on to dispute the claim". Mitigation is a fact on which the Defendant relies to dispute part of the claim.
- [54] In my judgment the Defendant not having pleaded mitigation cannot rely on it.
- [55] On the issue of mitigation, Mr. Brandt referred to the case of **Langden v O'Connor**⁴. This is of no assistance to me because there is no question of impecuniosity by the Claimant at the case at bar. This present case is also distinguishable from **Alco Minerals of Jamaica Inc. v Broderick**⁵.

³ CPR 2000

⁴ [2003] WKHC at page 1067

⁵ [2002] 1 A.C. 371

- [56] The Claimant is claiming loss of use from 1st August 2008 until filing of the Claim on 14th August 2009. He is claiming a total of sum thus far for \$33,000.00. In my judgment notwithstanding that the Defendant cannot rely on the issue of mitigation, it does not give the Claimant a licence to roam far and wide.
- [57] His claim for loss of use must be reasonable. As there must come a time when the Claimant must realize that it is time for him to find a replacement and not wait on the Defendant or for his Claim to be dealt with by the Court.
- [58] In my opinion to claim for a loss of use for one year is out of the question. I shall award loss of use 60 days at \$100.00 a day - \$6000.00. There will be judgment for the Claimant as follows: \$11,000.00 – value of his vehicle; Loss of use - \$6000.00. Total \$17,000.00
- [59] The Counter Claim of the Defendant is hereby dismissed.
- [60] Cost to the Claimant on a Prescribed Costs Basis.


Albert Redhead
High Court Judge (Ag)