ANTIGUA AND BARBUDA

THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

(CIVIL)

CLAIM NO ANUHCV2013/0562

BETWEEN:

RAYMOND KHOULY

Claimant

AND

[1] JUSTIN STOWE
[2] STAFFORD ADAMS

Defendants

Appearances:

Mr Loy West, Mr Kelvin John and Mrs Lisa John-West
for the Claimant
Mrs Jan Peltier for the Defendants

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2016: February 2
2017: March 7

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JUDGMENT

[1] **LANNS, J. [Ag]:** This claim is grounded in negligence for special damages and loss of use arising out of a collision between two motor vehicles along the Sir Sydney Walling Highway, St John's; for interest on sums awarded, and for costs.

[2] The Claimant's employee, servant and agent Mr Ferdinand Pierre-Louis (Mr Pierre- Louis) was the driver of Motor Forklift Registration No C1660, and the Second Defendant, Stafford Adams, (Mr

Adams) the servant or agent of the First Defendant, Mr Justin Stowe, (Mr Stowe) was the driver of Motor Truck Registration No C11419 owned by Mr Stowe.

[3] Mr Adams, has denied liability. He asserts that the collision was caused solely by the negligence of Mr Pierrelous, in that he slowed almost to a stop and then attempted to make a right turn across the path of the Motor Truck driven by Mr Adams without indicating an intention so to do. The Defendants counterclaimed for special damages in the sum of $172,031.98; damages for loss of use in the sum of $132,000.00; interest on sums awarded, and costs; They allege that Mr Pierrelous, was negligent and that he at least contributed to the accident. Curiously, an alternative claim (paragraph 9 of the counterclaim) is inevitable accident, in that notwithstanding the care and skill on the part of Mr Adams, he was unable to avoid the colllision. As far as I am aware, inevitable accident is known to be a valid defence, and has no place in a counterclaim.

The issues

[4] The issues for determination are

(a) Whether the Defendants are liable in negligence to the Claimant
(b) If so liable what measure of damages to be awarded
(b) Is there contributory negligence on the part of Mr Pierrelous
(c) If so, to what extent
(d) Should the counterclaim be dismissed

The evidence - Liability

[5] The evidence for the Claimant came from the Claimant, Mr Pierre-Louis and three other witnesses. The Second Defendant gave evidence on his own behalf. One other person gave a witness statement, but he could not confirm the correctness of the contents at trial. According to him although he signed the witness statement, he did not read it because he cannot read and it was not read over to him, and he did not tell his lawyer that he cannot read. In the result, counsel for the Claimant suggested that in those circumstances, the evidence is unreliable and declined cross examination. At that point, counsel for the Defendants closed the case for the Defendants.

The Claimant's account of the accident

[6] Mr Pierre-Louis in his witness statement said in essence that

(a) The Claimant (Mr Khouly) sent him to work on a job site near GIGI Industries to lift a building from one place to another. When he finished the job, he travelled back to this employer's place of business.

(b) When he was about to turn the corner by the business place, he slowed down, indicated that he was going to make a right turn. He looked back, and there was no vehicle close behind him, and no traffic was coming from the opposite side.

(c) He proceeded to turn and as he was about to leave the Sir Sidney Walling Highway main Road to g into his employer's property he heard a loud sound coming towards him from behind him. It sounded like a horn and screeching breaks.

(d) He looked at his right side and saw a white truck. The truck hit the folk lift and dragged it past the dirt road on which he was turning, and it pushed the fork lift completely off the main road. Both vehicles came to a rest on the north side of the road.

(e) He could not do anything to avoid the collision. He had no warning that the truck was coming up behind him. It was a split second between the time he saw the truck coming towards him and the moment the truck collided into the folk lift.

(f) The damage to the folk lift was extensive. The axle had broken, oil was leaking from the fork lift; the body of the folk lift was bent and twisted and punctured in certain places; The wheel was twisted out of alignment, and the tyre rims were damaged.

(h) At the scene of the accident, Mr Adams told him he did not see that he was turning, and he (Mr Pierre-Louis) told Mr Adams that he had indicated right. Mr Adams said he was sorry.

(i) He called Mr Khouly. The police came and investigated the accident. He gave a statement to the police. The police took measurements and notes. Two weeks after, the police took a full statement from him.

(j) He was never charged with any offence in connection with the accident. Mr Adams was charged with dangerous driving and was found guilty.

[7] Under cross-examination by counsel Ms Peltier, Mr Pierre-Louis maintained that the truck hit the side of the fork lift. He explained that the reason why the vehicles were virtually parallel (in the picture shown to him) was because the truck, after the impact, pushed the folk lift on the side of the road. Mr Pierre-Louis stated in cross examination that the front of the truck hit the forklift, but

having seen the picture of the front of the truck, he admitted that the front of the truck had no bend along the front, not on its bumper, nor on its license plate. It was suggested to him that he was in the turn and the truck came along and he ran into the truck, and he replied no, I did not'. Then the following exchange took place

BY MRS. PELTIER

Put:	You looked behind last minute?
Answer:	I don't understand what she means by last minute
Court:	Last minute
A:	I am going to turn . I looked back there was no vehicle at my back
Court:	Do you agree with her that you looked behind last minute
A:	Yeah, because I am going to turn so I looked back for me to make my turn; yeah
Q:	And you entered your turn
A:	Yes I did
Put:	You entered into your turn without giving the truck behind you sufficient notice
A:	I could not do that because there was no truck behind me
Put:	In the result the truck attempted to go around you at which time you contact with truck?
A:	That is not possible
Court:	When you say you looked behind you where did you look; and how did you do that
A:	I looked both ways. I looked through my rear view mirror, and I looked behind
Court:	So when you looked did you see anything
A:	I saw a vehicle, but it was far enough to make my turn.

[8] During re-examination, Mr Pierre-Louis stated that it was within a second of looking behind that he started to make his turn.

The Defendants' Account

[9] In his witness statement, Mr Adams stated in essence that

(a) On the 12th June 2012, he was driving a White Nissan UD Truck owned by Justin Stowe. Wayne Pottinger (his friend) was a passenger in the Truck at the time

(b) He was driving from East to West, and a fork lift was travelling in the same direction directly in front of him.

(c) When he reached a good distance away from the fork lift, he blew his horn indicating to the driver of the forklift that he was overtaking. The fork lift came to a halt, and as soon as he proceeded to overtake the forklift, it immediately swirled to the North without notice, hitting the truck on the passenger's side and damaging the entire passenger side of the truck. He was driving at "at about 70 kilometers [or] 30 to 35' mph".

(d) He called the ambulance. It came and assisted Mr Pottinger who sustained severe injuries to hands and feet. Mr Pottinger was taken to the hospital and warded for two days.

(e) He was told that the owner of the forklift was Mr Raymond Khouly.

[10] Under cross- examination, Mr Adams revealed that he did sign the witness statement but he did not read it fully. He also revealed that he signed the counterclaim but he was not the counterclaimant and he did not read the contents thereof. When asked how far behind the forklift he was, Mr Adams replied that he was about 100ft. Mr Adams stated that he never saw Mr Pierre-Louis indicating that he was turning right on to the by-road. He stated that the forklift was at a standstill on the left side of the road when he tried to overtake. He disagreed with counsel's suggestion that he saw the forklift moving forward when he started to overtake, and he denied that when he started overtaking the brake lights of the forklift were on. He agreed that when the vehicles collided they ended up the same place in a corner at the junction. He was shown the photos at page 27 of Bundle 3 which he agreed were the skid marks made by the truck he was driving. He did not agree that he was driving fast, and that while he was driving he was speaking to his friend who was seated next to him on the passenger side of the truck. Nor did he agree that it

was because he was driving fast he could not stop to avoid the collision. He conceded that he was charged with dangerous driving at the Magistrate's Court, and convicted. But he does not accept that he was the one who caused the accident. He denied telling Mr. Pierre-Louis that he did not see him turning right. And it was put to him put to him for the second time, at the end of a lengthy and vigorous cross- examination, that he was the one who caused the accident; he again denied it.

Corporal Nelson's Evidence

[11] Corporal Nelson gave evidence that he visited the scene of the accident at about 12:30 pm on the 12th June 2012. On arrival, he met the fork lift at a standstill position facing West on the North side of the Sir Sidney Walling Highway. Both vehicles were extensively damaged. Mr Pierre-Louis and Mr Adams, in the presence and hearing of each other gave him a different explanation as to how the accident occurred. They showed him the point of impact, and he recorded measurements at the scene. The measurements recorded were not specified or denoted to the court. He said the point of impact was on the Northern side which he simply pointed out in a picture shown to him. He said that both vehicles ended up completely off the road. He indicated on the photos shown to him at page 22 of Bundle3, the position in which he found the vehicles.

[12] Under cross-examination, Corporal Nelson said that the front portion of the Truck was hit. Shown a picture of the front portion of the truck, (page 22, trial bundle 3) and then upon it being suggested to him that the front portion of the truck was relatively untouched, the Corporal replied that the front portion looked damaged to him. When pressed further he said the left side of the truck had the greater damage. As to the point of impact, he said that both drivers pointed out the same point of impact. He confirmed that only the driver of the truck was charged. Upon the intervention of the court, Corporal Nelson produced his note book of the measurements he recorded therein and without objection of either counsel, he was allowed to refresh his memory and gave the court the particulars of the measurements; Whereupon he stated that the point of impact to the northern side of the road was 7 feet, and the entire width of the road in relation to that point was 25 feet. He stated that the distance between the two vehicles was zero as they were touching. With regard to the tyre impression, he stated that the tyre impression from the truck was 91 feet from the point of impact, suggesting that the truck driver began to apply brakes 91 feet away before collision with

the fork lift. He opined that the accident was a high speed accident on the part of the driver of the truck. The front of the truck was extensively damaged and the side was completely smashed in.

Visit to the Locus

[13] The court visited the locus. In attendance were the parties, their witnesses and their legal representatives.

[14] During further examination at the locus, both parties pointed out the point of impact. Notably, Mr Pierre-Louis' point of impact was in accord with the point of impact indicated to Corporal Nelson at the scene of the accident. Mr Adams, on the other hand pointed to a different spot, which was a far distance away from the side road where he had originally pointed out to Corporal Nelson. Asked to show where the truck was when it started to overtake, Mr Adams switched from one position to the next, most likely to give the impression that he was much further back from the spot that he had initially indicated to the court.

The Law

[15] It is settled law that in order for a Claimant to succeed in a claim for negligence, he must prove on a balance of probabilities – (i) that the Defendant owed him a duty of care; (ii) a breach of that duty of care; and (iii) damage resulting from the breach.[1]

[16] The Highway Code (paragraph 167) cautions motorists "DO NOT overtake where you might come into conflict with other road users. For example:

- approaching or at a road junction on either side of the road
- when a road user is indicating right

[17] Section 88 (3) of the Vehicles and Road Traffic Act gives teeth to the Highway Code. It provides that a failure on the part of any person to observe any provisions of the Highway Code may be relied upon by any party to establish or negative the liability which is in question.

[18] In the case of **Cheryl Edwards, Administratrix of the Estate of Janique Lewis[2],** the court stated at paragraph 33 that "Drivers of Motor Vehicles are under a duty to exercise due care on the road.

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[1] Woods v Duncan [1946] A.C. 401

They are expected to maneuver their vehicles in order to prevent and avoid accident. They must exercise due care and attention at all times. ..."

Liability

[19] I am quite satisfied, based on the totality of the evidence as contained in the photographs, and the evidence given by Corporal Nelson, that the Claimant's account of how the accident occurred is to be preferred/believed. The photographs and measurements taken are more consistent with Mr Pierre-Louis' account that he was in the process of turning right into the by-road when the collision took place.

[20] It has been said that in determining liability the Court ought to have regard to the physical evidence. In **Gregory Cooper v Vaughn Anthony Williams**[3] the Learned Judge referred with approval to the case of **Calvin Grant v David Pareedon et al**. (Supreme Court Civil Appeal No. 91/87, delivered on the 4th of October 1988) in which the Court of Appeal commended the approach of Theobalds J regarding the careful consideration of physical evidence as eminently reasonable and logical. The Judge quoted Theobald J as saying, at page 3 of the said judgment. The reasoning of Theobalds J was enunciated as follows –

> "Where there is evidence from both sides to a civil action for negligence involving a collision on the roadway and this evidence, as is nearly always usually the case, seeks to put the blame squarely and solely on the other party, the importance of examining with scrupulous care any independent physical evidence which is available becomes obvious. By physical evidence, I refer to such things as the point of impact, drag marks (if any), location of damage to the respective vehicles or parties, any permanent structures at the accident site, broken glass, which may be left on the driving surface and so on. This physical evidence may well be of critical importance in assisting a tribunal of fact in determining which side is speaking the truth.

[21] In the present case, the physical evidence (in particular the extensive damage to left side of the motor truck, and to a lesser extent, the frontal damage (wind screen, dash board hood) tend to support the Claimant's case and the Particulars of Negligence of the Claimant (set out at paragraph 2 herein) in particular that Mr Adams drove the Motor Truck without due care and attention and

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[2] Cited and applied in Carmillus Emmanuel v Ronald Punnett et al, SVGHCV364 of 2004
[3] Claim No 2013 HCV 01453, Supreme Court of Jamaica

attempted to overtake the Claimant's motor fork lift which was unsafe to do so and thereby caused the accident.

[22] The alleged damage to the vehicles would not be inconsistent with Mr Adams attempting to overtake without looking to see if it was safe to do so. And it would not be inconsistent with Mr Adams driving the truck at a fast rate of speed, in excess of 35 miles per hour[4]. Indeed, Corporal Nelson opined that the accident was a high speed accident. I am entirely in agreement with him especially when one takes into account the extent of the tyre impression of the truck. The undisputed evidence is that the truck left 91 feet of skid marks.

[23] When one is about to make a right turn, one would usually be left of center of the road. Had Mr Adams been paying attention at all times, he would have observed Mr Pierre-Louis signaling his intention to turn right, and was indeed in motion, and would not have been so interested in overtaking as it would have been unsafe for him to do so. The inference is that when Mr Pierre-Louis was about to move from center left to make the right turn into the by-road, is when the collision occurred, pushing the fork-lift nearly 30 feet from the point of impact, and causing damage to the truck's front and extensive damage to its side.

[24] Having seen and heard Mr Adams, I was unimpressed that he was a credible witness, having in the presence of the court sought to point out two different points of impact in an effort to bolster his case, that Mr Pierre-Louis indicated last minute that he was turning right. In the end, I accept the evidence of Mr Pierre-Louis, wherever there is conflict with that of Mr Adams.

[25] In the foregoing premises, I have no hesitation in finding on balance, that the Defendants are liable for the collision.

Contributory Negligence

[26] Ordinarily, in case of contributory negligence, there is negligence on both sides, but, the real test is whether one party could reasonably have avoided the consequences of the other party's negligence. Therefore, in the present case, it depends on the question whether the

[4] It must be remembered that Mr Adams stated at paragraph 4 of his Witness Statement that he was driving at 70 kilometers or 30-35 mph. However, as Mr Weste pointed out, 70 kilometers per hour equates to 43.5 miles per hour, which is about 10 mph, which is faster than the speed at which Mr Adams stated he was driving.

Claimant, Mr Pierre-Louis could reasonably have avoided the consequences of the Defendant's Mr Adams, negligence.

[27] I can find no evidence of contributory negligence on the part of Mr Pierre-Louis. Mr Adams asserts that the Fork Lift was at a standstill, (earlier he said it was almost at a standstill) , and Mr Pierre Louis, without signaling his intention to turn right into the side road, collided with the truck. As I have said, I do not accept that Mr Pierre-Louis failed to signal his intention to turn right into the side road, or indicate at last minute as counsel for the Defendants sought to suggest during cross-examination of Mr Pierre-Louis The evidence which I accept is that Mr Adams was driving at a fast rate of speed, and was inattentive to the indications of Mr Pierre-Louis, that he was turning right and was in fact in motion in an advanced stage, in or about the center of the road, and Mr Adams attempted to overtake when it was unsafe to do so. I believe Mr Pierre-Louis when he said that the collision occurred in a split second and that he had no opportunity to void it. Accordingly, there is no basis for finding contributory negligence.

Damages: Quantum

[28] The main issue for consideration is what quantum of damage is the Claimant entitled to recover?

[29] The Claimant in his statement of claim particularizes his loss as being $81,757.29 made up as follows:

(i)	Cost of repairs	$ 27, 707.29
(ii)	Police Report	$ 50.00
(iii)	Loss of use for 45 days	
	@ $1200.00 per day	$ 54,000.00
	Total	**$ 81,757.29**

[30] In his witness statement, the Claimant sought to give evidence to substantiate the claim for damages. In that regard, he listed the damage to the fork lift. He said that he asked two of his workmen to give him an assessment of the damage and the parts that were needed. He checked his store room and found some parts and he ordered those that he did not have. The

parts arrived 6 months after; whereupon he instructed his workmen to begin work on the fork lift. According to the Claimant, the fork lift was drivable about a week and a half after, but he was still having problems with it. During the period June 2012 (the date of the accident) to January 2013, he had to use another fork lift on jobs for construction. The Claimant outlined the number of uses to which the forklift was put, and he lamented the loss of profit and income occasioned by the damage caused to the fork lift, and he not being able to use it for about 6 months.

[31] Learned counsel for the Claimant submits that the Claimant has provided evidence to show the cost of repairs, and to show that he in fact carried out body work on the fork lift, and that he has claimed a reasonable amount for loss of use in that even though the forklift was not road worthy for six months, he has only claimed for 45 days.

[32] Learned counsel for the Defendants has challenged the sum claimed for repairs. Counsel submitted that the Claimant has failed to provide any or any sufficient evidence to support the claim for special damages. Counsel pointed out that the Claimant and his two witnesses said the forklift was fixed in approximately 8 days, and Mr George was paid $120,00 per day and Mr Browne $200.00 per day making the total wages paid for eight days to be about $2500.00. Counsel laid store on the fact that the Claimant in his statement of claim made a claim for loss of use for 45 days at $1200.00 per day, yet in his witness statement he said that the forklift was fixed 6 months after the accident. Counsel also pointed to the Claimant's altering his position during cross examination when he stated that the forklift was out of operation for approximately three months. Counsel submits that at the rate of usage claimed, the maximum days for loss of use would be 22 days. As far as counsel was concerned, the Claimant has grossly overstated his loss. The maximum loss incurred by the Claimant, submitted counsel is:

Special damages:

Parts:	US$3810.63 x 2.67 =	EC$ 10,174.49
Labour:		EC$ 2,560.00
Sub Total		EC$ 12,734.49
Loss of Use:	22 days x $1200 =	EC$ 26,400.00

Grand Total EC$ 39,134.49

Discussion

[33] Special damages must be strictly pleaded and proved,[5] and thus the obligation rests on the Claimant to prove the special damages which he claims.

[34] The cost of repairs: There is a repair estimate from Hazel's Garage dated 29th August 2012, in which Mr Hazel listed the damage done to the vehicle, and went on to opine that the forklift can be repaired at a cost of EC$27,707.29 in 8 days. The estimated cost of replacement parts alone was said to be $19, 802.04. There are two additional figures in columns two and three of the Estimate for $545.25 and $7360.00 respectively, but it is not quite clear what those figures represent, although they are apparently included in the total amount estimated for costs of repairs.

[35] Notably, there is no list of the parts required submitted from Hazel's Garage, with his estimate. The only evidence of what parts ordered are listed in three Invoices. (which are not receipts) from WEB EQUIPMENT, USA LLC to Khouly Detergent Factory Ltd, (as opposed to Khouly Construction & Engineering Ltd) dated April 2, 2013 for US$679.30; January 9, 2013 for US$2675.24; and August 12, 2013 for US$456.09. This amounts to US$3,810.63 or EC$10,174.49. It cannot be said with definition that these parts were strictly for the repair of the folk lift. Moreover, there is no indication whatsoever as to what parts were provided from the Claimant's storeroom and the value or estimated value of them. The court is not satisfied that the repair costs have been strictly pleaded and strictly proved. As the amount is challenged, the court cannot approve the costs as estimated.

[36] However, the court takes the view that notwithstanding that the repair costs have not been strictly proved, the court is of the view, that it is able, on the material before it, to arrive at a acceptable and reasonable figure to award the Claimant in respect of the cost of repairs to his fork lift.

[37] As dela Bastide, CJ noted in **Sookoo v Ramdath Trinidad and Tobago Civil Appeal No. 43 of 1998, "[**i]t is common experience that items of special damage are sometimes not proved to the hilt, and yet the Court may make an award in respect of them. It is a matter which depends on the circumstances and evidence in each case. The court has to do decide, whether on the material before it, it can arrive at some acceptable conclusion as to the amount which it should award." With that approach in mind, I assess the cost of repairs to the forklift to be $15,000.00

[38] Loss of use: Loss of use is a species of special damages and must also be strictly pleaded and proved:

> "Special damages are such as the law will not infer from the nature of the act because they are generally of substantially exact calculation. There is thus the obligation to particularize

[5] Ilkiw v Samuels (1963) 2 All ER 879)

the claim for damages, since loss of the use of an income earning chattel is a species of special damages. The onus is therefore on a claimant to prove strictly not only his loss but the quantum of it...."[6]

[39] The Claimant pleaded loss of use and he expanded and particularised his loss of use in his witness statement. There is unchallenged evidence as to the rental value of the forklift, and measures taken to substitute another forklift to continue the work. The Defendants have no issue with the claim for loss of use but have put forward a lower figure, (for which there seems to be no justification). The court accepts the evidence of the Claimant as to the use of the forklift in his business operations; that the fork lift was an income earning chattel. The court is further satisfied, based on the evidence that the Claimant took measures to mitigate his losses, as he was wont to do, and that the sum claimed for loss of use is not unreasonable, and thus it awards the Claimant the sum of $54,000.00 for loss of use.

The Counterclaim

[40] As has been previously stated, Mr Adams told the court that he knew nothing about the counterclaim. He said it is Mr Stowe's counterclaim and he could not assist the court in relation to it. Mr Stowe failed to file any defence or witness statement in the matter. Nevertheless, as the Defendants have been found to be wholly negligent, the counterclaim falls away. Moreover, the Defendants have not prosecuted the counterclaim, and thus it stands dismissed.

Conclusion

[41] I grant judgment for the Claimant in the sum of $69,000 together with costs as prescribed under CPR 65.5, Appendices B and C The judgment attracts statutory interest at the rate of 5% per annum from the date of its delivery to the date of final payment.

[42] I am grateful to counsel for their helpful submissions, but it would be remiss of me if I were not to specially mention the industry of Mr Weste for not only providing helpful submissions but for citing and presenting helpful authorities to guide the court.

Pearletta E. Lanns

PEARLETTA E.LANNS
HIGH COURT JUDGE [AG]

[6] Per Mason J. in **Cosmos William** v **The Comptroller of Customs and the Attorney General of St Lucia** – Claim No SLUHCV 2006/0259.