JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 85 OF 2001

BEFORE:	**THE HON. MR. JUSTICE FORTE, P** **THE HON. MR. JUSTICE HARRISON, J.A.** **THE HON. MR. JUSTICE SMITH, J.A.**	
BETWEEN	**BRENTON DAVIS**	**1ST DEFENDANT/ APPELLANT**
A N D	**EATON BURKE**	**2ND DEFENDANT/ APPELLANT**
A N D	**EDDIE FISHER**	**PLAINTIFF/ RESPONDENT**

Bert Samuels for the Appellants
instructed by Knight, Pickersgill, Dowding & Samuels

Dorothy Lightbourne for the respondent

December 12, 13, 2002 and October 8, 2003

FORTE, P.:

Having read in draft the judgment of Smith, J.A. I entirely agree and have nothing further to add. The order of the Court is set out therein.

HARRISON, J.A.

I also agree and have nothing to add.

SMITH, J.A.

This is an appeal against the decision of Wesley James, J in which he gave judgment for the plaintiff/respondent against the defendants/appellants. The suit arose out of an accident on the 11th April,

1996, involving the plaintiff/respondent's Ford 9000 Tipper Truck Reg. No 3193BJ and the 1st Defendant's/appellant's Leyland Motor truck Reg. No. CC677W. The 2nd defendant/appellant was the driver of 1st defendant's/appellant's motor truck at the time of the accident.

At the outset of the hearing of the appeal, counsel for the defendant/appellants intimated to the Court that he would not be challenging the liability of the appellants and that his complaint would be limited to the quantum of damages.

The learned trial judge assessed special damages as follows:

Wrecker fee	$ 20,000.00
Assessor fee	4,708.00
Cost of Labour	122,000.00 (Estimated)
Loss of use 130 days	3,120,000.00
Cost of parts US$ 24,146	1,086,583.00

With interest at the rate of 5% per annum with effect from 11/4/96 – 29/5/01."

Evidence in support of the plaintiff/respondent's claim came from the report of Mr. Michael Forrest, the Director of Trans Jam Loss Adjusters Ltd. The report indicated that the estimated value of the truck before the accident was $1,200,000.00. The value after the accident was $400,000.00. Consequently the real loss as a result of the accident was $800,000.00.

Mr. Samuels in his submissions did not seriously challenge the amounts awarded in respect of wrecker's fee and assessors' fee. His

challenge in the main was aimed at the amounts awarded for, loss of use, costs of parts and costs of labour.

Loss of use

Mr. Samuels for the appellants complained that the learned trial judge erred when he awarded loss of use for 130 days in the circumstances of the case.

Miss Lightbourne on the other hand submitted that the award for loss of use based on 130 days was not unreasonable taking into consideration the time it took to have the report done. The court, she said, will only interfere with "an award of damages if it is so inordinately high or low that no reasonable judge could have made such an award. She relied on ***Stephanie Cooper-Marley et al v Audley Betton*** 24JLR 43.

James J, did not record any reason for the award of 130 days loss of use. The evidence is that the accident occurred on April 11, 1996. The Loss Adjusters inspected the vehicle on April 25, 1996 and made their report on June 1, 1996. The repairs were completed around the end of March, 1997.

In his Statement of claim the plaintiff claims loss of use for 204 days from 11 April, 1996 to 31 October, 1996 at $27,400 per day ($5,589,600).

His evidence is to the effect that he had a contract to "haul bauxite" from St. Ann to May Pen. He testified that he could do three trips for a day carrying on estimate a load of about 30 tons on each trip. He

was paid, he said, $300 per ton. The period of the contract was March/April to about November, 1996. He told the Court that he bought parts for the repair on 1st May, 1996. The parts were taken to Jamaica late September, 1996. The repairs were done at a garage owned by the plaintiff/respondent's uncle. Why the parts were taken to Jamaica in September, 1996 some four months after they were bought is unexplained. Also no reason is given as to why the repairs were only completed in March/April of 1997, almost one year after the accident.

In my view such delay was manifestly unreasonable. The plaintiff/respondent was obviously aware of this and did not claim loss of use for the duration of the repairs. His claim was limited to the period of the contract to "haul bauxite" i.e. 204 days at $27,400.00 per day. In **The Argentino** [1889] 14 A.C. 519 the House of Lords held that a plaintiff may recover damages for the loss of a charter- party. Thus the plaintiff/respondent is entitled to recover damages for the loss of the contract as it was not practical in the circumstances to hire a substitute truck.

The learned trial judge did not reveal his mind as to the computation of the time or the amount allowed. Did he exclude Saturdays, Sundays and public holidays? It seems reasonable to assume that he did.

Mr. Samuels complained that the judge's award was too high in respect of both the time (130) days and the amount of $24,000 per day. Further, he contended that there was not sufficient proof of the contract to "haul bauxite". He submitted that the learned judge allowed the plaintiff to "throw up figures" at the Court in proof of substantial losses.

I think it would be fair to say that there was no real challenge to the plaintiff's claim that he was contracted to transport bauxite from St. Ann to May Pen. It should not, in my judgment, be difficult to challenge such a claim if one were minded to.

In the circumstances I do not agree with counsel for the defendant/appellant that the plaintiff/respondent was allowed to "throw up figures at the Court. In any event, as stated before, the learned judge reduced the per diem claim from $27,400 to $24,000 and the period of time from 204 days to 130 days. Clearly the approach of the judge was not to accept the evidence of the plaintiff/respondent in its entirety. I have not been persuaded that the learned judge erred in this regard.

Another contention of Mr. Samuels was that the plaintiff/respondent acted unreasonably in taking the decision to repair instead of accepting the Loss Adjuster's recommendation to "write off" the vehicle. He argued that the plaintiff/respondent should have been awarded loss of use for no more than 40 days within which time he could secure a replacement of the truck.

As stated before the plaintiff/respondent's claim for loss of use was based on the loss of a contract and not on the period of time during which the repairs were done.

Finally, in this regard, Mr. Samuels submitted that the per diem award was made by the trial judge in the absence of any evidence as to the cost of fuel, insurance, tyres, lubricants, maintenance cost and income tax. There is merit in this submission. Therefore having regard to the operating expenses I would reduce by one-tenth the damages awarded for loss of the contract. That is $3,120,000 less $312,000 which is $2,808.000. Since that sum represents the earning under the contract the sum recoverable must be calculated on the basis of net earnings after deduction of income tax: **(British Transport Commission vs Gourley** [1955] 3 All E.R. 796). The relevant rate of such tax being 25% the sum of $2,808,000.00 is accordingly reduced by one-quarter. Therefore the damages recoverable for loss of earnings should be $2,106,000.00.

Costs of Repairs and Labour

It is convenient to restate the following facts:

- According to the assessor's report the pre-accident value of the truck was $1,200,000.
- The value of the salvage was $400,000. This of course, means that the real loss to the plaintiff/respondent was $800,000.

The learned trial judge awarded $122,000 for costs of labour and $1,086,000 for cost of parts.

In the light of the above facts, Mr. Samuels submitted that the learned trial judge erred in awarding the above amounts in that the total costs of repairs should not have exceeded the pre-accident value of the truck less the value of the wreck. He relied on **Darbishire v Warren** [1963] 3 All E.R. 310.

Ms. Lightbourne for the plaintiff/respondent submitted that the sum for labour was not unreasonably high in the light of the damage to the truck. She invited the court to consider that to replace the truck the plaintiff/repondent would have to purchase it abroad, import it into the island and obtain the necessary import licence. In such circumstances to proceed on a total loss basis would have been more expensive, she contended. She asked the Court to find that in the circumstances the action of the plaintiff/respondent in repairing the truck was not unreasonable.

Darbishire v Warren (supra) is instructive. The facts as they appear in the headnote are as follows:

> "The plaintiff was the owner of a Lea Francis 1951 shooting brake which he kept in good repair. In July 1962, the car was damaged by the negligence of the defendant. The market value of the car at the time was £85 and the plaintiff received £80 compensation from his insurance company. Notwithstanding that the plaintiff was advised that the repair of the car was

> uneconomic, he had it repaired at a cost of £192.
>
> It might have been difficult to find a similar Lea Francis shooting brake on the market , but other similar estate cars could be had for (£85 -£100). The plaintiff did not attempt to find a similar one in the market. He claimed as damages from the defendant the difference between the repair costs and the compensation received from the plaintiff's insurance company."

The Court of Appeal (England) held that the plaintiff had not, as between himself and the defendant, taken all reasonable steps to mitigate the damage according to the practical business or economic point of view, as the car was not an irreplaceable article; accordingly the damages should be assessed on the basis of the market price, not on the higher cost of repairing the damaged car.

Harman, L.J. stated the principle at p. 312 (c-e):

> "The principle is that of **restitutio in integrum**, that is to say to put the plaintiff in the same position as though the damage had not happened. It has come to be settled that in general, the measure of damage is the cost of repairing the damaged article; but there is an exception if it can be proved that the cost of repairs, greatly exceeds the value in the market of the damaged article. This arises out of the plaintiff's duty to minimize his damages."

The authorities clearly show:

(i) Where a chattel was so damaged as to be a constructive total loss the measure of damages is the market value of the chattel at the date of the loss less the scrap value of the

damaged chattel together with any consequential loss arising out of the destruction – ***Moore v D.E.R. Ltd.*** [1971] 1 W.L.R. 1476.

(ii) In the case of a partial loss the measure of damages will usually be the cost of repairing the chattel together with any depreciation in value and such consequential loss as the reasonable cost of hiring another chattel while repairs are being effected.

(iii) Where a plaintiff had his damaged chattel repaired at a cost exceeding its market value instead of trying to purchase a comparable chattel at the market price, he cannot recover the costs of such repair. This is because it is his duty to mitigate his loss – ***Darbishire v Warren*** (supra).

(iv) Where however, the chattel involved was unique in character and quite irreplaceable the owner is entitled to the cost of repairing it at a cost considerably in excess of its market value. See ***O'Grady v Westminister Scaffolding Ltd.*** [1962] 2 Lloyds Rep. 238.

As was said by Pearson, L.J. in **Darbishire v Warren** (supra) at p. 315 a plaintiff is entitled to have his vehicle repaired at whatever cost. But not at the expense of the defendant. The plaintiff must mitigate his loss.

The question then is – did the plaintiff take all reasonable steps to mitigate his loss? He was advised that it would be uneconomic to repair the wreck. There is no evidence that he made any attempt to find a comparable vehicle. He had the estimates of the costs of repair.

In my judgment the evidence does not support the contention that the plaintiff/respondent took all reasonable steps to mitigate his loss. Where the costs of repairs exceed the pre-accident value, prima facie, it is not reasonable to seek to recover the former. The plaintiff/respondent has not shown that the truck was "unique in character and quite irreplaceable" so that the standard market value was irrelevant, as in the ***O'Grady*** case.

In my view the contention that the learned judge erred in basing the assessment on the costs of repairs and not on the market value is sound.

Accordingly I would allow the appeal and assess special damages as follows:

Wrecker's fee	20,000.00
Assessor's fee	4,708.00
Loss of earnings	2,106,000.00
Costs of repairs (pre-accident value less value of wreck)	800,000.00
TOTAL	$2,930,708.00

with costs to the appellant to be taxed if not agreed.