Suit ct — Kitch's — Negligence — Motor vehicle accident — Damages — Assessment — Quantum — Principles to be applied — whether measure of damages should be cost of replacement of items with new ones.

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IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. T056 OF 1992

BETWEEN	CYNTHIA TUCKER	PLAINTIFF
A N D	WALDOLPH MCLEISH	1ST DEFENDANT
A N D	GERMAINE LONGMORE	2ND DEFENDANT

SUIT NO. C.L. R069 OF 1992

BETWEEN	DAVID ROBB	PLAINTIFF
A N D	WALDOLPH MCLEISH	1ST DEFENDANT
A N D	GERMAINE LONGMORE	2ND DEFENDANT

Case referred to (Cont)

REMEDIES

Mrs. McCauly instructed by Morisa Dalrymple for the Plaintiffs.

Mr. Jack Hines instructed by Keith Smith for the Defendants.

Heard: 14th, 15th, 16th, 20th, 21st, 22nd & 23rd July 1993
10th December, 1993

Judgment

PITTER J.

By consent both actions were tried together.

In the early morning of the 14th February, 1992, the household of Mrs. Cynthia Tucker had a rude awakening when a truck laden with sugar left the roadway and ended up in her living room. This unwelcome entry left a trial of destruction, hence these suits. The truck is owned by the first defendant and driven by the second defendant. Liability is not challenged by the defendants but the quantum of damages is, and the matter is before me now for assessment.

The plaintiff Mrs. Cynthia Tucker's claim is for personal injuries, damage to the house and the contents thereof. The plaintiff Mr. David Robb's claim is for damage to his motor car which was parked on the premises, and the resultant lossess.

The major part of Mrs. Tucker's claim concerns her house at Duncans in the parish of Trelawny which was badly damaged. Support for this area of her claim comes mainly from Humphrey Taylor a civil engineering contractor, whose estimate of repairs amounted to $397,011.32 to which an adjustment of 12½ percent is to

be added for updating and a further 2½ percent for additional GCT. This amount was hotly contested as being grossly exaggerated.

Wilbert Reid a contractor and builder who gave evidence for the defence, estimated the total cost of repairs to amount to $144,129.69. This is inclusive of GCT. This fugure vigorously challenged by Mrs. McCauly who appears for the plaintiffs as being unrealistic.

The area of damage to this three bedroom house includes the verandah, living and dining rooms. Photographs were submitted and it is clear when one looks at photograph #6 with the truck juxtaposed as it was against the building, it suggests that this is not a very big house. The only detailed measurement of the entire house is 43' x 23' 6", the damaged area being 12' 8" x 6' 5". The disparity in the estimates are so wide that it raises the question as to which should be relied on by the Court. The evidence suggests that the estimate submitted by the plaintiffs is grossly exaggerated. This I find on a balance of probabilities. It is clear for example, that there is no need to replace the entire roof when only the area over the verandah, living room and dining room was damaged. Again I would not allow for provision of store room and construction site office as the building itself could be utilised for this purpose. Another example is the item - "to provide material and rewire house $25000," is also grossly exaggerated. I find that this estimate cannot be fully relied on.

On the other hand, bearing in mind that the estimate from Mr. Reid was provided for the defence, I find it to be the more reliable in the sense that detailed measurements were given. However there seems to be a deficiency as to the extent of the repairs to be done, for example, where there is provision for only a minimum amount of tiles. The fact that this laden sugar truck could have done so much damage, it is reasonable to accept that some damage was done to the tiles over which it travelled and finally come to rest. On the evidence before me, the only way to resolve the differences in estimates is to find the approximate average which I am of the opinion would be fair and reasonable and which would cover the cost of repairing the damaged building.

Accordingly an amount of $250,000 is awarded under this head.

Turning to the claim for contents of the house, the main challenge is in the area of replacement and the costs. This evidence was supplied by Miss Goshing

the daughter of the plaintiff who lived at the same house with her. The list of items claimed for is a very long one. The claim for the contents of the house amounts to $306,542.50, whilst the evidence given, is that these said articles would at the time of the trial cost $391,883.55.

Mr. Hines who appears for the defence, challenged the figures given by Miss Goshine as being excessive and exaggerated. His main contention is that (a) a house of this size could not contain all these items in the space available, and furthermore all of the items claimed are for new ones to replace the damaged ones and not the value at the time of the accident. There was no evidence of salvage and no evidence of the extent of damages to the articles.

He complains that the evidence is short of what is required in that it is just the word of Miss Goshine as regards the quantity of article destroyed. Photographs were tendered of the damage to the building itself but not of the contents. The nature and extent of the damage to items such as buffet, dinning table set, hassocks, refrigerator televisions, and living room suite to name a few, were not given except that they were damaged. Mr. Hines contends that in so far as the contents of the house is concerned, the maximum "restituto in integrum" should be applied, as to award damage for the cost of new items to replace those used, would be to put the plaintiff in a position of excessive profits.

In support of his contention he cited the cases of **Tarrabain v. Ferring (1917) 2 WWR.** Miss Goshine admitted in cross-examination that the claim is based on the cost of new items to replace those damaged. These prices she had seen and obtained in the stores. She also admitted that she had not made any enquires regarding replacement of the damged items by used ones, nor was any effort made to obtain the costs of used items in condition similar to hers. Mrs. McCauly on the other hand contends that the plaintiff aught to recover new items to replace those loss. She prayed in aid the case of **Moor v. DER Ltd (1917) 3 AER 517** and **Caxton Publishing Co. Ltd v. Sutterland Publishing Ltd (1938) 4 AER 353.** There is no evidence coming from the plaintiff as to the extent of the damage to the contents of the house. There is no evidence as to whether any or all of these items were repairable and if so at what cost. Miss Goshine has no idea of the value of the damaged goods before they were in fact damaged. Her only concerns

is to replace them with new ones. It is difficult to appreciate that the damage would be so extensive that items like 36 teddy bears which were in a chair could have all been totally destroyed. A claim for $2000 for them appears exaggerated. She admits that the items in the house were not new but were being used for some-time.

It was suggested to Miss Goshine that the prices are all inflated and she denied this - It was further suggested that she padded the list and she denied this. It was also suggested to her that given the size of the living, dining and verandah all these items could not have been held in such a small space. She replied that they held, but were very tight.

Tendered in evidence was a copy of the Daily Gleaner dated 16th July, 1993 under the heading "Classified Ads," where a number of comparable items were advertised for sale at prices substantially less than those claimed by the plaintiff.

Mrs. McCauly's approach to the quantum of damage is that the plaintiff aught to be believed, and the measure of damages should be the replacement of these items with new ones.

The case of **Moor v. DER Ltd. (1917) 2 AER** was cited but this case is not applicable to the instant case. In that case the plaintiff was entitled to purchase a new car to replace his damaged one but the excess cost for the purchase borne by him. There it was held to be reasonable for him to claim hirage of a similar car to his for the period he had await the arrival of **the new car.**

The general rule is that the measure of damages is the difference between the value of the chattel, before the damage, and its value as damaged. In the case of a partial loss, this will usually be the cost or repairing the chattel, together with any depreciation in value, that is, the difference between the value of the chattel, when repaired, and the value before the damage ..... See **Charlesworth and Percy on Negligence, Seventh Edition para. 4 - 5 at page 266.**

At page 253 paragraph 4 - 31, the learned author states:-

> "Where as a result of the defendants' negligence, the plaintiff actually gains some benefit, which would not otherwise have accrued to him, the defendants are entitled to set off against the claim for damages, the value of such benefit. See Nadraph v. Witmett & Co. (1978) 1WLR 1537."

In cases where goods are destroyed, the law is as stated by the learned

author in fourteenth edition of McGregor on Damages at paragraph 1030. It is -

> "The unusual measure of damages is the market value of the goods destroyed at the time and place of destruction. In ship collision cases, it has also been said that the owners of the lost are entitled to restituto in integrum; this was said to be "the leading maxim" by Dr. Lushington in the Clyde and its applicability was not questioned by the defendant in Liebasch Dredger v. S.S. Edison (1933) AC 449....."

In Eire, it has been decided that the appropriate measure of damages, should be that, which is best calculated, in the circumstances, to put the plaintiff fairly and reasonably in the position in which he was before the damage was occasioned. Accordingly in **Minelly v. Calcon (1978) 1 R 387.** It was held that only damaged representing the diminished value of the premises, ought to be awarded in a case where it was held that re-instatement damages would have enriched excessively and unnecessarily the plaintiff and have muleted the defendants unreasonably.

I adopt the above reasonings which I find applicable to the instant case.

I reject the argument that the plaintiffs should be awarded re-instatement damages, that is replacement with new items in place of those destroyed. I find that the complaint of Mr. Hines is justified in that the plaintiff would have been enriched excessively and unnecessarily and that the plaintiff would have muleted the defendant unnecessarily.

I find on a balance of probabilities that the plainitff's claim is exaggerated. To claim $2000 for a black and whit television which does not work is grossly over estimated - Similarly items such as a 6 piece bone-china set for $4000 without any proof of its value is to gain an attempt to mulete the defendant. As regards the refrigerator there is no evidence of the extent of the damage yet a new replacement is claimed. I find the total claim to be excessive and unreasonable, and in the circumstances therefore, under the heading contents of house I will award the global sum of $145,000.00.

It now remains to look at the claim for personal injury to the plaintiff. She claims nervous shock as a result of the rude awaking she had that morning. It is reasonable to expect that this a consequence that would result. I find therefore that she did in fact suffer nervous shock. The medical evidence discloses that she has been a hypertensive for many years and there is no evidence of

permanancy. An award of $15000 is appropriate. I will allow the sum of $250 for medical certificate and a further $600 for visits to the doctor.

I find that services of a watchman was necessary for the period 14th February 1992 to 30th April 1992 and accordingly award the sum of $6080 for such service.

It is not unreasonable for the plaintiff to seek alternative accomodation owing to the extent of the damage caused to her house. I find that the rental of similar house in the area at $5000 per month be reasonable. I would not expect the plaintiff in these circumstances to be shopping around to find cheaper accomodation as the situation warranted immediate action.

Mr. Hines challenged this head of claim as being excessive and submitted that no award should be made to the plaintiff as this sum was paid for by her daughters. The unchallenged evidence of the plaintiff is that it was she who rented the house. Miss Goshine's evidence which I accept, is that herself and her sister contributed towards the payment of rental. I find that this item of expense was properly incurred by the plaintiff as a result of the defendant's negligence and is reasonable as a part of the plaintiff's claim for special damage. This claim for $15000 for rental of premises from the 14th February to April 30th, 1992 is awarded to the plaintiff.

Damages are assessed in the sum of $15,000.00 for general damages with interest thereon at the rate of 3% per annum from the 3rd July 1992 to the 10th December 1993; and in the sum of $516,930.00 with interest at the rate of 3% per annum from the 14th February 1992 to the 10th December, 1993. Costs to the plaintiff to be agreed or taxed.

The second action concerns the claim of Mr. David Robb whose 1975 Toyota Corolla panel van was parked in the car park of the building and was damaged beyond repairs. His particulars of special damages are as follows:-

Cost of replacement vehicle Lite Ace Panel Van from Uni-Motors Plus duty at 62.5% Plus Dealers mark-up 12½% Plus J$8000	US$10,901.00
Assessors Fee	$ 800.00
Loss of use - paid rental of car from 14th February to 10th April 1992 and continuing per week	$ 500.00
Loss of earnings as fish supplier from 14th February 1992 and continuing at (the plaintiff will rely on purchase orders in proof thereof).	$ 1,200.00

Mr. Robb is a bank supervisor who boarded with Mrs. Tucker at her house in Duncans Trelawny. His van was badly damaged as a result of the defendants truck crashing into the building. He now seeks replacement of that van by a new one and claims loss of earning. As a result he uses his van as a means to travel to work from Duncans to Montego Bay, and sometimes does travelling for the bank. He also uses this van to supply seafood to various hotels and restaurants. From this enterprise he earns a net income of $1200 - $1300 from which he pays no income tax. He has lost this activity because of the destruction of his van and now seeks to be compensated. He has also lost the use of the said van.

In the interim he hired a Toyota Starlet motor car costing US$500 for the period 14th February - 10th April 1992 (and continuing) from which he seeks re-imbursement from the plaintiff. After a period of 10 weeks, he started travelling with one Courtney Wilson and paid him $1500 per week. He could not use the Toyota Starlet car to carry his goods. Prior to the accident Mr. Robb says his van was in excellent condition, he having just over hauled the engine and done body work to it. It had in extras such as tape deck, sports , sports steering wheel and equalizer. He gave no evidence of its value at the time of the accident, but says, he had insured it for a value of $38,000.00.

Mr. Morris Campbell, a loss-adjuster, a witness for the plaintiff said that he inspected and made an assessment to the plaintiff's van. He concluded it to be a total write-off and place a pre-accident value on it for $35,000 including extras. He says that similar sizes units of the same year and make would sell

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for between $35,000 to $50,000. They were not however, readily available, there were other makes of similar size and age on the market, but they too were not very easy to come by.

Mr. Robb disagrees with the valuation given by his assessor Mr. Campbell and also disagrees that panel vans similar to his has an average market of $35,000. He says that during his search for a replacement he found two vans similar vintage to his, but both needed repairs, and these were being sold for $58,00 and $60,000 respectively. He later found a 1976 model van similar to his and in good condition selling for $150,000. He did not purchase it because he was not in a financial position to do so at the time and in addition he was awaiting instructions from his attorney-at-law. He says it was because of the unavailability of a suitable replacement why he is now claiming a new 1992 Toyota Lite-Ace Panel the cost of which is some J$430,000. He however agrees that there were other types used vans he could get for the purpose of taking him to work and to transport goods and also that he could have used a covered pick-up and continued his business. He denies that the first-named defendant Waldolph McLeish spoke to him regarding the availability of similar make vans obtainable in Mandeville and Kingston. He also denies telling the first-named defendant that he wanted $200,000 for his damaged van. I accept the evidence of the first-named defendant that he did tell Mr. Robb of the availability of similar panel van.

On the totality of the evidence I find that Mr. Robb made no effort to obtain a suitable equivalent to replace his damaged van because he wanted a new Toyota panel van. The statement of claim strengthens this finding. There is no reasonable explanation why he did not purchase the 1976 model he found in October 1992 save that he was impecunious at the time. I find this rather difficult to appreciate when Mr. Robb's evidence is that from his seafood business alone, he earns a net profit of $12,000 to $13,000 weekly.

Mrs. McCauly relied on the case of **Moore v. DER Ltd (Supra)** to justify a claim of replacement. In that case the plaintiffs was not claiming nor seeking to get a new car from the defendants to replace his damaged one. His claim was for damages for the cost of hiring a substitute car over the period it took him to get a new car to replace his. The Court held that in so doing he acted reasonably.

In the instant case, the plaintiff Mr. Robb is claiming a new replacement for his damaged van. In fact he has claimed a sum for the purchase of a van which would take it out of the range of the one he had, both in terms of size, model and cost. If he were to succeed, he would have benefitted to the extent of some $400,000 profit!

The general principle on which damages for negligence are assessed, is that they are to be regarded as compensation for the injuries sustained. Subject to the qualification restriction that damages must not be too remote, the rule is one of "restituto in integrum" whether the wrongful act arises out of a breach of contract or tort. See **The Argentino (1889) 14 App. Con. 519.** The measure of damages is defined as

> "That sum of money which will put the party who has been injuried, or who has suffered, in the position as he would have been if he had not sustained the wrong for which he is now getting his compensation, or reparation."

per Lord Blackburn in **Livingston v. Rawyards Coal Co. Ltd (1880) 5 App. Cas. 25.** It is the market value of the goods destroyed at the time and place of the destruction that represents the unusual measure of claim. In ship collision cases, it has always been said that the owners of the lost ship are entitled to "restituto in integrum," this was said to be the leading maxim by Dr. Lushington in **The Clyde (1856) Swab 23:24** and its applicability was not questioned by the defendant in **Liesbosch Dredger v. S.S. Edison (1933) AC 449.** The basis of putting the plaintiff into the position he would have been, had the collision not occurred, which is what is required to effect "restituto in integrum," is the award of the market value of the lost ship, this was accepted in the above case where Lord Wright stated the rule to be that the measure of damages was "the value of the ship to her owner as a going concern at the time and place of the loss. With this sum the plaintiff can obtain a replacement. However the plaintiff will not be entitled to the cost of a replacement where it is unreasonable to demand an exact replacement.

I adopt the forgoing to be the statement of the law as regards the measure of damages. Applying this to the instant case, Mr. Robb is entitled to the market value of his car at the time of the accident or its replacement by a similar unit.

Although the assessor place a pre-accident value on the van at $35,000, evidence from the plaintiff himself and the second defendant, gives the market value of similar vans ranging from $50,000 to $68,000 to a high of $150,000 for a later model. From these figure given, I would award the sum of $68,000 which sum would put back the plaintiff in the same position prior to the accident. The sum of $800 is also awarded for assessors fees.

Under the heading **"Loss of Use"** the plaintiff claims US$500 per week for the rental of a car from the 14th February to the 10th April 1992 and continuing. The car he rented was a Toyota Starlet. He used it for 10 weeks after which he travelled with one Courtney Wilson at a cost of $1500 per week to help him do his job in the days.

I will allow for rental of car for a period of 6 weeks at US$500 per week which would translate into the sum of J$75900. This part of the claim is supplied by a voucher from Depass & Son Car Rentals. He is accordingly awarded $75,900 under this head. The claim for further sum of $9,000 for car hirage for a further period of 6 weeks at $1500 per week willnot be conuntenanced. I regard a maximum of six weeks as a suffficiently reasonable period within which the plaintiff could have acquired a replacement.

A claim is made under the heading "loss of earnings" as fish supplier from 14th February 1992 and continuing at $12,000 per week. Mr. Robb's evidence is that because he lost the use of his van, he was unable to supply his customers with seafood and this resulted in a loss to him. The evidence which I accepts is that there were vans that could be used for the dual purpose of transporting the plaintiff to work and to do his fish business. He rented the Toyota Starlet the very day of the accident and claims re-imbursement for its rental and thereafter used a hired car. If the Toyota Starlet is rented in place of his van how then can he claim loss of profit. I would have thought that when Mr. Robb rented this car, he did so to replace his and that it would have been used for the same purposes as the panel van. Why then did he rent a unit which could not transport his seafood, whilst there were other vehicles he could have acquired, which would serve the dual purpose to which he had put his panel van.

It appears from the evidence that the plaintiff had no intention of mitigating his loss. Indeed, if he choses to rent a vehicle which could not transport his

goods, yet expect the defendants to pay for it, then he does so at his own peril. Had he rented a suitable replacement, no loss of profits would incur. It is the plaintiff duty to mitigate his loss. Here, he seeks to extend it.

Pearson LJ in the case of **Darbishire v. Warran (163) IWLR 1067** gave a proper analysis when said:-

> "It is important to appreciate the true value of the so-called "duty to mitigate the loss," or duty to minimise the damage. The plaintiff not under any contractual obligation to adopt the cheaper method, if he wishes to adopt the more expensive method, he is at liberty to do so and by doing so he commits no wrong against the defendant or anyone else. The true meaning is that the plaintiff is not entitled to charge the defendant by way of damages with any greater sum than that which he reasonably needs to expand for the purpose of making good the loss. In short he is fully entitled to be as extravagant as he pleases, but not at the expense of the defendant."

The plaintiff's claim under this heading fails.

Damages is assessed in the sum of $144,700.00 with interest at the rate of 3% per annum from the 14th February 1992 to the 10th December 1993.

Costs to the plaintiff to be agreed or taxed.

Cases referred to

1. Tarrabain v. Ferring (1947) 2WWR
2. Moor v DER Ltd (1917) 3AER 517
3. Caxton Publishing Co. Ltd v Sutherland Publishing Ltd (1938) 4AER 353
4. Mineley v Calcon (1978) 1R 387, (SC)
5. The Argentino (1889) 14 App Cas 519
6. Livingston v Rawyards Coal Co. Ltd (1880) 5 App Cas 25
7. The Clyde (1856) Swab 23:374
8. Liesbosch Dredger v SS. Edison (1933) AC 449.
9. Darbishire v Warran (1963) 1WLR 1067.