BARBADOS.

IN THE SUPREME COURT OF JUDICATURE

HIGH COURT

Civil Jurisdiction

No. 1890 of 2004

BETWEEN:

MARK LAYNE Plaintiff

AND

ARTHUR McCOLLIN Defendant

***Before the Honourable Madam Justice Margaret Reifer, Judge of the High Court.***

2005: November 16, 18 22;

2006: February 15, 16, 17, 18, 20, 21, 24;

2007: July 27.

Mr. Alrick Scott and Mr. Aidan J. Rogers, Attorneys-at-law for the Plaintiff.

Mr. David Thompson in association with Ms. Onika Stewart, Attorneys- at-law for the Defendant.

-

-

-

-

-

-

***DECISION***

**The Background to this Claim**

[1] The matter to be determined by this Court arose out of an accident that occurred on the 2nd March 2004. On that day, the Plaintiff Mark Layne was driving his motor-coach registration number BT-17 along the Spring Garden Highway, when it was involved in a collision with motor vehicle registration number M-4949 driven and owned by the Defendant Arthur McCcollin.

[2] It was not disputed that the accident was caused by the negligent driving of the Defendant. Consequently, on the filing of the Writ and Statement of Claim, the Defendant through his attorneys filed a Defence on the 17th June 2005 in which he admitted his negligence, but disputed the damages claimed by the Plaintiff.

[3] The Plaintiff filed a Summons on the 21st July 2005 and on the 19th September 2005 obtained an order pursuant to Order 27 rule 3 of the Rules of the Supreme Court entering judgment against the Defendant on the admissions contained in the above-mentioned Defence and a further order for damages to be assessed before a judge in chambers.

[4] Certain catalogued and largely undisputed damages were sustained to the vehicle when, following the accident, it was taken to Simpson Motors and an estimate of damage prepared. The Defendant's insurer determined that the vehicle was not a write-off after the repairs were estimated at $24,811.50 and consequently authorized Simpson Motors to undertake the repairs. This decision was taken by mid-April 2004 with an expected repair time of nine weeks. As is often the case, and as warned by the repairer Simpson Motors, the damage was found to be more severe on closer inspection and it was not until September 2004 that the vehicle was declared 'repaired' by Simpson Motors.

[5] Simpson Motors signaled its readiness to deliver in September 2004, and the Plaintiff, who had some notable expertise in this area declared his dissatisfaction with the state of repair when he carried out his own inspection and test-drive. He immediately opined that the 'ride-height' of the motor–coach did not meet standard requirements and that the vehicle was not roadworthy. The Plaintiff had maintained this position since July when he carried out his first post-repair inspection and expressed his dissatisfaction with the result. He again carried out another inspection in September with the same result.

[6] Both parties contracted their experts to examine the vehicle and render an opinion, the Plaintiff choosing Mr. Michael Power and the Defendant, Mr. Russell Norville both of whom prepared written reports.

**The Claim**

[7] The Plaintiff operated his vehicle as a Luxury Coach trading under the business name Sun Island Tours which said business was engaged in the transport of tourists and locals around the island. It is therefore his argument that not only was his vehicle damaged by the accident but he suffered consequential losses as a direct result of this accident.

[8] Thus, in an Amended Statement of Claim filed pursuant to an Order to amend granted by this court on the 17th November 2005, the Plaintiff claimed damages and consequential loss of $390,075.00 and continuing as follows :

> "1. Damages for loss of profits;
>
> 2. Damages for loss of a chance;
>
> 3. The replacement costs of BT17 or alternatively a declaration that the plaintiff is entitled to an order that the defendant do pay the reasonable cost of repairing BT- 17 to a roadworthy condition;
>
> 4. Cost of storage;
>
> 5. Interest pursuant to section 35A of the Supreme Court of Judicature Act, Cap. 117A of the Laws of Barbados;
>
> 6. Costs; and
>
> 7. Any other relief that this honourable Court deems fit."

[9] **What are the Issues in this case?**

1. The primary issue is one of Causation, namely, (a) to establish the current defect with the coach and then (b) to determine whether it was caused by the collision;

2. Whether the Plaintiff has failed to mitigate his losses;

3. Under the head of Measure of Damages, (a) whether the Plaintiff should be awarded for loss of earnings and if so, at what daily rate and (b) whether the Plaintiff is entitled to damages for Loss of a Chance and if so, how much.

**What caused the damage to the Plaintiff's vehicle?**

[10] The answer to this question is at the heart of this action. There is consensus that the vehicle is not roadworthy, that there is some fault in the air suspension system, possibly a faulty valve or valves, resulting in the vehicle not achieving proper "ride height". This answers the question as to what is the current defect in the vehicle. But was this caused by the accident at Spring Garden ?

**The case for the Plaintiff**

[11] The plaintiff's position is simple in so far as he maintains that the damage was the sole result of the collision with the defendant. His expert was Mr. Michael Power who has in excess of 25 years practical experience in the mechanical and automotive engineering field. He is a qualified and certified professional diesel engineer specializing in mechanical systems and operations. He has worked with British Airways and for Chevron Texaco and Shell Guianas Limited as a fleet maintenance consultant and operations instructor, all of which has given him expertise in the area of air suspension systems. As the Managing Director of his own business Autocraft Engineering Services, he has extensive experience and expertise in diesel mechanics and air suspension systems. He was tendered and accepted as an expert with no objection from the defendant.

[12] He inspected the vehicle and produced his first report dated October 22nd 2004. This first report concluded that the vehicle was not road-worthy as there was a system leak which could not be identified without further testing. He again inspected the vehicle in January 2005 together with the

Defendants expert Russell Norville and other persons. At this meeting the experts agreed that their differing opinions as to the cause of and solution to the problem could only be settled conclusively by further testing. The only point of agreement at this time was that the vehicle was not roadworthy and that the source of the problem was a faulty valve. This was effectively the gist of this expert's second report, dated January 31st 2005 and admitted into evidence as ML47. This expert was of the opinion that only the Hydrostatic Test for which he provided an estimate could isolate the faulty valve and result in its being fixed or replaced. The anticipated cost of this test was $40,000 and it was never carried out. This contrasted with the test proposed by the Defendant's expert Mr. Norville. He proposed a "water soap test" which Mr. Power described as a visual test without any technical persuasion. He felt that this would be an irrelevant test and he did not recommend it.

**The case for the Defence**

[13] The defence had as its expert Mr. Russell Norville. He is an Insurance Adjuster of 10 years experience providing motor vehicle engineering services for insurance companies and for most of the major garages in Barbados. His opinion as to the cause of the present difficulties differed from that of Mr. Power. He inspected BT 17 in November 2004 and produced his report dated January 2005, around February/March 2005. He explained his delay as being due to the fact that he was not familiar with BT17's air suspension system and he needed to secure the relevant workshop manuals.

[14] His mandate was to determine if the damage sustained in the accident was in any way related to the faulty air suspension system and to determine whether there was significant damage or any damage caused by the fall from the wrecker. He specifically tested the air suspension system which he noted **was directly in the accident zone** and was satisfied that it was faulty. The test proposed by him, 'the water soap test', appeared to be a simplistic visual test designed to identify where a leak existed by the application of soap and water without providing any assistance in identifying its cause. It appears to be a starting point before going on to more complex tests. He confessed to a lack of knowledge concerning the hydrostatic test proposed by Mr. Power.

[15] On the issue of the cause he opines that there are three possibilities:

(1) the accident;

(2) the fall sustained from the wrecker; or

(3) moisture that accumulated in the air suspension system because the bus was laid up for a long period of time.

[16] He later in his evidence introduced a fourth cause when he adverted to an accident prior to this one in which an airbag was ruptured and in my opinion speculated against the weight of evidence that it had been improperly repaired.

[17] Ultimately Mr. Norville did not fulfill his mandate as he advanced no forensic evidence supportive of the defendant's position that the present damage could not have been caused by the accident, expressed an inadequacy of knowledge about what, if any, damage was caused by the bus falling from the wrecker and advanced a third possibility with respect to moisture in the system which at this stage appeared to be mere conjecture or possibility. In fact, he conceded in cross-examination that he still does not know the nature of the problem afflicting BT17, nor does he know if there is anyone at Simpson Motors competent to carry out the repairs.

[18] Separate from Mr. Norville's evidence and opinion the defence introduced a number of pre-accident and post-accident possibilities as being the possible causes of the present problem.

**What is the Test of Causation**

[19] This is clearly the central and most significant issue of this case, that is to determine whether the Defendant's negligence did in fact cause the damage to the Plaintiff's motor-coach which presently makes it unroadworthy.

**[**20] The law on causation is succinctly outlined by **Clerk & Lindsell on Tort** as follows:

> " … analysis of causation in tort has been divided into two stages- establishing factual causation ( the actual link) and consideration of remoteness of damage. The first stage looks to see what concrete evidence exists to link the defendant's wrongdoing to the harm of which the complainant complains ... The second stage, remoteness of damage, is not strictly speaking concerned with causation but with the limits of legal responsibility for damage which has undoubtedly been caused by the defendant."

[21] The Plaintiff's case can only succeed if the court finds on a balance of probability that the present deficiency in the vehicle is as a result of the March 2nd 2004 accident. To do so the court must apply the legal test of causation, that is, to determine whether in the eyes of the law the defendant caused the particular damage to the Plaintiff, that is factual causation. The court must ultimately consider the issue of remoteness of damage in the context of whether the damage is not in law too remote a consequence of the defendant's wrongdoing.

[22] In so doing, the Court is guided by the 'broad common sense approach' as adumbrated in **Yorkshire Dale SS Co. v Minister of War Transport [1943]2 AER 6 where Lord Wright remarked at p. 15** thereof:

> "Causation is to be understood as the man in the street and not as either the scientist or the metaphysician would understand it. Cause here means what a … man would take to be the cause without too microscopic an analysis but on a broad view."

[23] The authorities advance the "but for" test, as the relevant test to be applied in these circumstances. *Clerk & Lindsell On Torts, 18th edition at 2-06* defines and explains this test as follows:

> "The first step in establishing causation is to eliminate irrelevant causes, and this is the purpose of the "but for" test. The courts are concerned, not to identify all of the possible causes of a particular incident, but with the effective cause of the resulting damage in order to assign responsibility for that damage. The "but for" test asks: would the damage of which the Plaintiff complains have occurred "but for" the negligence (or other wrongdoing) of the Defendant? Or to put it more accurately, can the claimant adduce evidence to show that it is more likely than not, more than 50 per cent probable, that "but for" the defendant's wrongdoing the relevant damage would not have occurred. In other words, if the damage would have occurred in any event the defendant's conduct is not a "but for" cause."

**The Burden of Proof in Causation**

[24] The burden of proof in causation rests on the Plaintiff on the balance of probabilities. Counsel for the Plaintiff however instructs that thereafter the evidentiary burden shifts to the Defendant requiring him to advance some evidence to rebut the inference that would otherwise be drawn. He cites in authority *Cross on Evidence (6th Australian Edition) at p. 224 section 3 on Shifting Burdens:*

**Findings of Fact**

[25] I am satisfied on the balance of probabilities that the damage sustained to the motor coach, specifically the problem now facing the air suspension system, was as a result of the collision. There is no evidence to suggest a causal connection between previous accidents and this present state of affairs. The previous repair involving the air bellows appears to all intent and purposes to have been effected satisfactorily, specifically in accordance with factory standards and specifications, and there was no manifested problem with the air suspension system prior to the collision. This clearly does not appear to be the cause as the air bellows were replaced in the repair by Simpson Motors and yet the vehicle continued to manifest inadequate 'ride height'.

[26] I also accept Mr. Power's evidence on this point to the effect that he investigated and researched the repair method used and can give credit to the repair method as successful and in keeping with the manufacturers of components repair method. His evidence is that the rupture he saw in his examination was not connected to the patch. In addition, it was his view that prior to the collision the system would have executed over 60,000 miles on the repaired air bag and in his opinion this certified that the repair method was sustainable and safe.

[27] There is no evidence that the fall from the wrecker damaged the air suspension system. The problem of the vehicle not maintaining ride height manifested itself immediately after the collision and throughout has been the constant complaint of the Plaintiff. I accept Mr. Power's opinion, reluctantly agreed to by Mr. Norville, that instability as a result of damage to the air suspension system, is the likely reason that the bus fell from the wrecker. It was not an intervening factor or novus causa interveniens as seen in **Knightley v Johns (1982) 1WLR 349**, and in my opinion did not break the causal link between the collision and the damage claimed. I accept the submissions of counsel for the Plaintiff that as a result of the collision the coach was at risk of further damage from the towing without negligence on the part of the wrecker or the Plaintiff. There is no such evidence of negligence.

[28] Taking these facts into account, and after reviewing the various opinions expressed by the experts, I have given greater credence to the opinions expressed by Mr. Power and I am satisfied on the balance of probabilities that 'but for" the collision the Plaintiff's vehicle would not have sustained the damage claimed.

**The Issue of Mitigation**

[29] The Defendant pleads in his Defence of June 17th 2005 that the Plaintiff failed to mitigate his losses.

[30] The Plaintiff in his Reply filed November 16 2005 states as follows:

> "2. In response to paragraph 4 of the Defence, the Plaintiff states that he acted reasonably at all times. The Plaintiff was bound to accept the Defendant's decision or that of his insurer to have the vehicle repaired as opposed to treating the same as a write-off. Unless and until the Defendant or his insurer changed his, her or its position, the Plaintiff was bound to await completion of the repairs;

3. The Plaintiff will establish at the trial, that the motor coach was never repaired to a roadworthy condition and that there was culpable delay on the part of the Defendant or his insurer in notifying the Plaintiff that he or it had changed his or its position on repairing the motor coach.

4. Further, the Defendant or his insurer unreasonably took the position that the motor coach was roadworthy when it was not, and unreasonably delayed satisfying himself or itself that the motor coach was indeed unroadworthy. The Plaintiff was entitled to await resolution of that issue or communication by the Defendant or his insurer that it no longer wished to repair the motor coach.

5. The Plaintiff states that he is not debarred by the principles of mitigation from recovering the loss of use claimed in the Statement of Claim.

[31] This plays a significant part in this claim as it is alleged that the Plaintiff did not do all he could to mitigate his loss. It is trite law that a claimant must take all reasonable steps to mitigate the loss to him consequent on the defendant's wrongdoing and cannot recover for avoidable loss.

[32] The defining principle on the issue of mitigation is thought to have been comprehensively and succinctly expressed by Viscount Haldane L.C. in the case of **British Westinghouse Co. v Underground Ry. (1912) AC 673** when he stated as follows at P. 689:

> "The fundamental basis is thus compensation for pecuniary loss naturally flowing from the breach; but this first principle is qualified by a second, which imposes on a plaintiff the duty to take all reasonable steps to mitigate the loss consequent on the breach, and debars him from claiming any part of the damage which is due to his neglect to take steps."

[33] The onus of proof on the issue of mitigation is on the defendant. (See **Roper v Johnson(1873)LR8CP167**, and **Garnac Grain Co. v Faure & Fairclough (1968)AC1130).**

[34] The question whether a claimant has acted reasonably is a question of fact and not one of law: see **Payzu v Saunders (1919)2KB 581**. Counsel for the Plaintiff argues that the threshold for reasonable behaviour is low.

[35] In examining the Plaintiff's conduct, I am satisfied that the Plaintiff acted reasonably up to March 2005 when by letter dated March 11th 2005, the defendant's insurer took the position that the bus was unroadworthy and also made it clear that it was their position that there was no nexus between the accident and the existing damage.

[36] I am not satisfied however that the Plaintiff thereafter explored the several options that may have been available to him, including the acquisition of a replacement vehicle, the leasing of a vehicle, and least of all obtaining employment. The Plaintiff in his evidence admits to applying for one job and after being told that he was over-qualified becoming frustrated and thereafter not attempting to secure employment. He repeatedly denied being employed even in the face of a newspaper article identifying him as a taxi-driver. He maintained that he was merely a spokesperson for the group.

**The Measure of Damages**

[37] Having found that the Defendant is liable for the damages sustained by the Plaintiff, the next step must be to determine the quantum of the said damages. In his Amended Statement of Claim the Plaintiff claims under six (6) heads as follows:

(1) **Damages for loss of profits**.

In his Particulars of Loss the Plaintiff claims loss of use at the rate of $527 per day from 2nd March 2004 to 30th April 2005 and continuing until the date of assessment. The Plaintiff's evidence on this claim provided somewhat of a challenge. He submitted some accounts to the Defendant which were unsubstantiated and did not conform to accounting standards. His witness Wayne Parravicino who is a registered Tour Operator gave evidence of his (the witness's) earnings and costs which conceivably gives some guidance as to what he could possibly earn rather than what he in fact earned. There was reference to the General Insurance Association of Barbados (GIAB) guidelines used by the insurance industry to determine 'going rates' for loss of profits for public service vehicles in circumstances where a claimant is unable to effectively prove his loss, which were merely persuasive and not binding. The evidence on this score is that the going rate for loss of use is $450 per day. In a previous claim by the Plaintiff, the company was paid by the plaintiff on the basis that his loss was at the rate of $500 per day.

I have awarded the Plaintiff the sum of $450 per day for loss of use for the period 2nd March 2004 to 11th March 2005 in the sum of $168,750.

(2) **The Loss of a Chance**

Under this head the Plaintiff gave evidence and produced some confirmatory documentation of discussions being held by him with Carnival Cruise Lines Inc sometime after the accident. He maintained that this would have been a lucrative contract for him and loss of his vehicle did not afford him the opportunity to benefit from this. However no contract was concluded and it appears to this Court that the Plaintiff was engaged in pre-qualification exchanges without commitment on either side.

Stated otherwise, it never crossed the threshold from speculative to real or substantial. He also produced letters from Foster and Ince and the Carlisle Bay Centre showing a general intention to use his services. However these documents lacked detail and certainty, in particular as to the frequency of intended use, the number of passengers to be carried and financial information of a nature that would enable a court to assess a measurable loss.

The assessment of this claim is based on an evaluation of the circumstances by the court to determine if there was a real or substantial chance that the plaintiff would have been awarded this contract and thereafter to have some basis on which to assess its value and consequently be able to assess in money terms, the

loss to the Plaintiff: see *McGregor on Damages 16th Ed para 376*, **Allied Maples Group v Simmons & Simmons (a firm)(1995) 1WLR9 1602.** In my opinion the information provided lacked substance, was not convincing that it would achieve fruition and even if so found, lacked the detail needed to assist a court in valuing such a loss.

In these circumstances, this Court does not find for the Plaintiff under this head.

(3) **The Replacement of BT17**

By all accounts the vehicle is unroadworthy and taking into account the uncertainty as to the nature of the defect, the cost of effecting repair and the ability to effect repair in Barbados, it is my view that the Plaintiff should be paid the value of the coach at the time of the accident, namely the sum of $147,000 as determined by Simpson Motors Ltd. in its valuation dated 30th March 2004 and admitted as ML4.

(4) **Cost of Storage**

The plaintiff claims storage costs for 624 days, namely from March 3 2004 to November 17 2005 at $25 per day. The Plaintiff has included as proof a letter from Simpson Motors dated November 17th 2005 asking for payment of storage costs from January 3rd 2005 and not from the date of the accident. There is evidence that the vehicle was at the time of hearing being stored at the home of the Plaintiff, but no clear evidence as to the date that it would have been removed from Simpson Motors.

I have awarded the Plaintiff storage charges in the amount claimed by Simpson Motors, namely 318 days for the period January 3 to November 17 2005 in the sum of $8050.00.

(5) **Cost of mechanical survey and reports prepared by Autocraft Services Inc.**

This amount is not disputed and the Plaintiff is awarded the sum of $3500 under this head.

(6) **Interest**

Interest shall be paid on the above sums at the rate of 4% from the date of filing of the writ of summons to the date of judgment and thereafter at the rate of 8% per annum until payment.

(7) **Costs**

The Plaintiff is awarded costs fit for two counsel.

Payments already made to the Plaintiff shall be deducted from these amounts.

**Summary and Order**

[38] In summary the Plaintiff herein is awarded damages as follows:-

1. Loss of profits in the sum of $168.750;

2. The sum of $147.000 as the replacement cost of BT17;

3. The cost of storage of BT 17 in the sum of $8050.00;

4. The sum of $3500 being the cost of the mechanical survey and reports prepared by Autocraft Services Inc.;

5. Interest shall be payable at the rate of 4% from the date of filing of the Writ of Summons to the date of judgment and thereafter at the rate of 8% per annum until payment;

6. The Plaintiff shall have his costs fit for two counsel.

Margaret Reifer

Judge of the High Court.