COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT
Common Law Side

1995
No. FP/265

B E T W E E N

ALLAN ROBERTS

Plaintiff

AND

CONCEM LIMITED

First Defendant

AND

EUGENE ALFONZO CORTELESE

Second Defendant

Appearances: Joseph Hollingsworth for the plaintiff
Helen Jones for the defendants

ASSESSMENT OF DAMAGES

This is an assessment pursuant to an Order of Longley, J. dated 3rd October, 1996, that judgment be entered against the first and second defendants with damages to be assessed and that the costs of the action be reserved pending the assessment of damages.

By his Writ of Summons dated and filed October 19, 1995, the plaintiff claimed damages for loss caused by the negligent driving of the second defendant as servant or agent of the first defendant. By his Statement of Claim filed November 8, 1995, and subsequently amended on April 25, 1996, the plaintiff, in addition to his claim for general damages, claimed a total of $45,200.00 as special damages.

As liability is not in issue, I am merely to determine the issue of damages.

The plaintiff, a 74 year old man, until the time of the accident worked as a taxi driver.

The plaintiff's evidence is that on April 17, 1995, he was traveling from the Freeport Harbour going east on Sunrise Highway when a bus driven by the second defendant in a northerly direction did not stop at the "red" light and hit the plaintiff's taxi #138. The plaintiff said

that the hood of his car was "knocked up," the bumper was "mashed up," four (4) lights (across the front) were broken and his car's battery was knocked about 40 feet away from the car. The police arrived on the scene of the accident very quickly and the plaintiff said he was assured that the accident was not his fault. The plaintiff said that after the police had taken statements from the parties, he tried to start his vehicle but it would not start and subsequently had to be towed away by a wrecker. He said that while the vehicle was being towed away, he noticed that transmission oil was leaking therefrom.

The plaintiff said that after the accident he reported the matter to his then attorney ("the plaintiff's first attorney") and instructed her to "deal with it."

According to the evidence of Mr. Queswell Ferguson, an insurance adjuster underwriter employed by J. S. Johnson & Co. Ltd., insurers for the plaintiff as well as the defendants, the plaintiff's first attorney obtained and forwarded to the insurers two (2) estimates for the repair of the plaintiff's vehicle - one from Quality Auto Sales Freeport Ltd. estimating the cost of repair at $3,215.00, and the other from Mel's towing stating that the vehicle was "beyond economical repair." The evidence further shows that the defendant's insurers also obtained two (2) additional estimates for the repair to the body of the plaintiff's vehicle - one from Greg's Painting Bodywork **("Greg's")** in the sum of $2,065.00 and the other from Halls Auto Repair Ltd. in the sum of $1,799.00. None of the estimates included any charges for mechanical repairs. According to Mr. Ferguson, on May 24, 1995, J. S. Johnson & Co., after consulting with the plaintiff's first attorney, authorized Greg's to carry out the necessary repairs to the plaintiff's vehicle so as to return the vehicle to its pre-accident condition.

This, I believe, is an appropriate point at which to set out the evidence regarding the plaintiff's vehicle in its pre-accident state.

The plaintiff's vehicle is described in his Writ of Summons as a white 1985 Chevrolet Suburban taxi #GB138. The plaintiff said he paid $7,800.00 for the vehicle and that he had owned it for approximately ten (10) months prior to the accident; that the vehicle was purchased by an agent on his behalf. Under cross-examination, the plaintiff admitted that at the time of the purchase, he did not think that he had got value for his money; that he thought he could have got a better buy than his agent got for the $7,800.00. The plaintiff said that despite the fact that his vehicle was a "used" vehicle, it was "running good" prior to the accident, and that he had no problems with it except for minor body work done on a "running board" on the side of the car. He said that during the time he owned the vehicle, it had not been to the mechanic's shop nor had it "cut off" while he was driving. In fact, under cross examination the plaintiff said that prior to the accident he would check his car's transmission oil every weekend and that though he has had to put transmission oil in his car, it was usually a quart at a time, never three (3) to five (5) quarts at one time as he had to do since the accident.

The accident occurred on April 17, 1995. Greg's was authorized to repair the vehicle on May 24, 1995, and the vehicle was returned to the plaintiff on or about June 6, 1995. J. S. Johnson & Co. paid the bill tendered by Greg's in the sum of $2,168.22, which reflected an additional charge of $102.67 for a battery.

The plaintiff said that when he first received the vehicle from Greg's he noticed that three (3) lights had been "put on," the bumper was fixed and the hood also, though, he said, the hood did not close as well as it did prior to the accident. The plaintiff further stated that **"the ceiling where people was grabbing to hold on was pulled down and not fixed and the car was leaking transmission oil."** During cross-examination the plaintiff said that when he picked up the car from the "body man" he went to get the car inspected, but changed his mind because he did not think it would pass inspection. He gave no reason as to why he thought the vehicle would not pass inspection.

The plaintiff said that shortly after he received the vehicle from Greg's he had problems with the steering wheel so he took the vehicle to the parking lot of the Regent Centre East Building which housed the offices of both his first attorney and the insurers. He said he left the vehicle in the said parking lot and notified his first attorney thereof.

Mr. Ferguson testified that the insurers were informed by the plaintiff's first attorney that the plaintiff was experiencing mechanical difficulty with the vehicle, and though, according to Mr. Ferguson, the insurers did not accept liability for the mechanical problems as having been caused by the accident, in an effort to settle the matter, he, on behalf of J. S. Johnson & Co., sought the opinion of Mr. Leroy McKenzie of Roi's Auto and with the agreement of the plaintiff's first attorney and the plaintiff, authorized Roi's Auto to effect the mechanical repairs. J. S. Johnson & Co. subsequently paid Roi's Auto's bill in the sum of $347.75. The estimate (dated July 19, 1995) for the repair work done by Roi's Auto included inter alia "replacing transmission pan gasket" and "7 quarts of transmission fluid."

The plaintiff said that about a week after he left the vehicle in the said parking lot, his first attorney called and instructed him to go to Roi's Auto to collect his vehicle. He said he refused to do so and suggested instead that the person who fixed the car should take it to his first attorney's office and he, the plaintiff, would meet the mechanic there and take the mechanic back to his shop. The plaintiff said that while taking the mechanic back to his shop, he again experienced problems with steering the vehicle; that at the mechanic's shop, the mechanic checked the car, put some transmission oil in it, and told the plaintiff that the vehicle was okay and that he could take it - which the plaintiff did. The plaintiff said he went to Freeport Harbour to await a job. He said that when he arrived at Freeport Harbour he checked under his car and saw that it was leaking oil. He said that he did not take the car back to the mechanic at that time because the boat had arrived and he wanted to get a job; that he hoped the car would "hold up." He eventually got a fare to the Port Lucaya area. However, on his way, he again had

difficulty with the car so that he had to park the car and seek the assistance of another taxi driver to take his passengers to their destination, while asking someone else to purchase transmission oil from a nearby service station for his vehicle. He said that by the time he put the transmission oil in the car and drove from Winn Dixie on Royal Palm Way to the Coral Road Gas Station (about 3 minutes' drive), he had to buy more transmission oil. He said he tried to drive the car but after a few minutes the car "cut off" again so he had to leave it on the side of the road on Coral Road. He then got a ride to his first lawyer's office. He said his first lawyer then arranged to have the car towed from Coral Road to Automotive Industrial Distributors ("A.I.D") on Queens Highway.

The plaintiff said that he was subsequently advised that there was no one at A.I.D who could effect transmission repairs and that the vehicle was sent back to Roi's Auto. The plaintiff said that Roi's Auto had the car for about two (2) weeks before it was returned to him and that when he received the car, he continued to experience the same problem as before, so he did not "bother with the car anymore." The plaintiff said he took the car to his first attorney's office again and left it there - though he was subsequently called and advised by his attorney that the car was at McGibbon Enterprises. He said he went to McGibbon Enterprises but noticed that no one had worked on the vehicle and to the best of his knowledge the vehicle was, at the date of the hearing, still at McGibbon Enterprises in need of repair.

The plaintiff is of the view that the vehicle has transmission problems which were caused by the accident. The defendant is, of course, of the opposite view. In fact, counsel for the defendant submitted, and rightly so, that the most contentious allegation on the subject of repairs is clearly whether or not the alleged transmission problems with the motor vehicle were caused by the accident. She went on to state **"I say alleged because I respectfully submit that the plaintiff has failed to discharge its evidentiary burden of showing that the car does indeed have transmission problems or at all!"**

It is unfortunate that neither party saw fit to call a mechanic or other expert witness to give evidence as regards the alleged mechanical problems, though invited by the court to do so, so the court is left with the evidence in its present state.

The plaintiff maintained throughout his testimony that there were no mechanics on staff either in Mel's Towing or Greg's which eventually did the repair work on his vehicle, so he was of the opinion that no checks were made immediately following the accident, prior to the estimates for repairs being obtained, to determine whether or not the vehicle had mechanical problems.

The plaintiff's opinion as to the alleged transmission damage is, he said, based on his 25 years' experience as a taxi driver. He attributed the transmission problems to the accident because, as he said, prior to the accident, he had no mechanical problems with the car and since the accident he has had mechanical problems with the car.

Despite the submission by counsel for the defendant, it is evident from the evidence before this court that the vehicle does in fact have transmission problems. The plaintiff maintains that the vehicle has transmission problems, though counsel reminded the court that the plaintiff is not an expert and is probably not the best person to give evidence as to any transmission damage to his vehicle. While I agree that the plaintiff is not an expert in the field of mechanics, I am of the view that he is the best person to say whether, and how, his vehicle was working before and after the accident. The plaintiff said before the accident he had no mechanical problems with the vehicle, and since the accident he has had mechanical problems which he attributes to transmission damage. Additionally, the defendant in its bundle of documents which were relied on by both parties, provided the court with an estimate from McGibbon Enterprises in the sum of $1,450.00 for inter alia "overhauling transmission (including parts) and transmission repairs" with respect to the plaintiff's vehicle and a letter from Mr. Leroy McKenzie of Roi's Auto containing the following statement:

> **"Leroy McKenzie have checked the vehicle and based on my knowledge, the vehicle had transmission problems that could not have been caused from the collision."**

To my mind, the real item of contention is not whether the plaintiff's vehicle has a problem with its transmission, but rather, whether such problem was caused by the accident. It is interesting to note that though the insurers, according to Mr. Ferguson, did not accept responsibility for the mechanical damage, the estimate (dated July 19, 1995) for repair work done by Roi's Auto included "replacing a transmission pan gasket" and "7 quarts of transmission oil." As stated previously, Roi's Auto bill for the repairs was paid by the insurers.

Again, it is unfortunate that neither Mr. McKenzie nor any other mechanic had been called to give evidence.

According to Mr. Ferguson when the insurer was asked to pay for the repairs to be done by McGibbon Enterprises, he, Mr. Ferguson, sought the opinion of Mr. McGibbon regarding the state of the vehicle but that McGibbon refused to give one on the basis, according to Mr. Ferguson, that he did not know the history of the vehicle.

Having observed the plaintiff during his evidence, I find him to be a credible witness and I believe his evidence that before the accident he had no mechanical problems with his vehicle but after the accident he has had mechanical problems which he believes is due to transmission damage.

In view of the foregoing, I find that the plaintiff's vehicle does have transmission damage and on a balance of probability that such damage was more likely than not caused by the negligence of the defendant.

Now to the issue of damages.

Damages are catalogued into three (3) broad heads: general damages for non-pecuniary loss, general damages for pecuniary loss and special damages.

In the case of damage to chattels, 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. This will usually be, in the case of a partial loss, the cost of repairing the chattel and any depreciation in value, being the difference between the value of the chattel when repaired and the value before the damage, less any increase in value due to the substitution of new for old material. Where the chattel is completely destroyed, or so damaged as not to be worth repairing, the measure of damages is the value of the chattel together with any consequential loss following on the destruction of the chattel. **See The Common Law Library Charlesworth on Negligence 4th Edition, paragraphs 1254 and 1255.**

The plaintiff's evidence is that he purchased the vehicle approximately 10 months before the accident for the sum of $7,800.00. The vehicle at the time was a 1985 model. The cost of repairing the vehicle includes the amount paid to date by the insurers ($2,515.97) plus the estimate submitted by McGibbon Enterprises of $1,450.00 for repairing the transmission et al, for a total sum of $3,965.97. The plaintiff's evidence is that he was advised by his first attorney that the insurers were willing to settle for $7,000.00, but that when he went to collect the cheque, he was advised that the insurers had decided to have the vehicle repaired instead. Mr. Ferguson's recollection is that the plaintiff's first attorney was trying to negotiate a total-loss settlement, meaning the insurers would pay the market value of the vehicle. Mr. Ferguson was of the opinion that the market value was around $6,000.00, while, he said, the plaintiff was asking for between $9,000.00 and $10,000.00 as a replacement cost.

However, no evidence was led as to the present value of the vehicle (i.e. post-accident and repairs to date) or what the value is likely to be after the transmission repairs have been effected.

The plaintiff in his amended statement of claim, claimed the sum of $2,000.00 for repairs to taxi #GB138, though in his counsel's submission the court was asked to find that the vehicle was beyond economical repair, calling in aid, the "beyond economical repair" estimate from Mel's Towing Company. Counsel for the defendant submitted that the Towing Company's estimate of "beyond economical repair" was overweighed by the estimates obtained from the other companies and I accept that view.

The estimate from McGibbon Enterprises shows the sum of $1,450.00 as the estimated cost of effecting the transmission repairs; no other estimates for any other repairs were submitted.

Having held that the damage to the plaintiff's transmission was caused by the negligence of the defendant, I find that the defendant is liable to pay in damages the additional sum of $1,450.00 being the plaintiff's estimated cost to repair the transmission damage to the vehicle. The balance of $550.00 for repairs to taxi #238 is not allowed.

The plaintiff also claimed the following additional special damages: $28,800.00 for loss of income and $14,400.00 for loss of transportation.

There is no doubt that the plaintiff is entitled to loss of income and loss of transportation incurred during the period his vehicle was being repaired.

According to his amended Statement of Claim, the plaintiff arrived at the aforesaid sum of $28,800.00 by calculating the plaintiff's income at the daily rate of $80.00 per day for 360 days from the date of the accident to April 17, 1996..

The plaintiff's evidence is that prior to the accident he had been a taxi driver for about 25 years; that he made an average of $80.00 per day; sometimes, if he could get a union job, he would make as much as $200.00 per day. There is no evidence as to how many days per week prior to the accident the plaintiff worked as a taxi driver, nor how often the plaintiff got union jobs; not from the plaintiff or any other source, so the court is left to speculate. There is also evidence that the plaintiff's first attorney and the insurers had reached an "agreement" as to the amount due to the plaintiff for loss of earnings and this amount, namely $3,105.00, was subsequently tendered to the plaintiff's first attorney by the insurers with their letter dated June 23, 1995. There was no evidence as to how that sum was calculated, but, according to Mr. Ferguson, it was a lump sum payment intended to compensate the plaintiff for his loss of earnings during the time the vehicle was off the road. However, the "settlement" was apparently unacceptable to the plaintiff as he refused to accept the cheque and sign the release tendered by the insurers. According to the plaintiff he did not think it was enough.

Counsel for the defendant submitted that though the plaintiff is entitled to proven consequential loss, such as loss of income and loss of use, he was obliged to take all reasonable steps to mitigate the loss to him consequent upon the defendant's wrong and ought not to be allowed to recover damages for any such loss which he could have avoided but failed, through unreasonable action or inaction (as the case may be) to avoid.

Counsel for the defendant further submitted that the plaintiff's claim for loss of income and loss of use would have been considerably lessened by well-advised action on his part by effecting the necessary repairs to the vehicle himself. She pointed out that there was no evidence that the plaintiff was impecunious at any time since the accident and that the plaintiff himself stated that he had a nephew who could have repaired the vehicle.

Though counsel for the plaintiff did not respond to the defendant's submission regarding mitigation, the authorities are clear, the onus of proof on the issue of mitigation is on the defendant. If he fails to show that the plaintiff ought reasonably to have taken certain mitigating steps, then the normal measure will apply. The question of mitigation is, of course, a question of fact not law.

The plaintiff agreed that if he had had the vehicle repaired he could have saved damages. However, he said in order to repair the vehicle he would have had to use his savings, which, if he did, would mean he would have no money to buy food. The plaintiff is a 74-year old

man, with no real hope of further employment enabling him to earn funds to replenish his savings if he used them to repair the vehicle. In the circumstances, I am of the view that the defendant has failed to show that the plaintiff acted unreasonably in not effecting the aforesaid transmission repairs and thereby mitigate his damages.

I accept the plaintiff's evidence that he made an average of $80.00 per day. However, taking into consideration the plaintiff's age, the fact that there is no evidence as to how many days per week he worked prior to the accident, and the fact that it is unlikely that he would have worked every day during the stated period, I will allow damages for loss of income for the stated period at $15,000.00

As to the issue of loss of transportation, the plaintiff in his amended statement of claim claimed the sum of $14,400.00, calculated by $40.00 per day for 360 days (i.e. from the date of the accident to April 17, 1996). The plaintiff said that his taxi was also his means of transportation and that since the accident in order to "get around" he had to take a bus or taxi. He said that the cost of a bus from High Rock to Freeport (round trip) is $16.00. There is no evidence as to how frequently the plaintiff traveled to Freeport from High Rock since the accident, and whether by bus or taxi. There is, however, some evidence that he made and continues to make trips to Freeport and I will allow the sum of $400.00 as reimbursement of transportation costs during the aforesaid period.

Counsel for the plaintiff also urged the court to award future loss of income to the plaintiff, on the basis that the plaintiff, had it not been for the accident, would have had three (3) more productive years as a taxi driver. The plaintiff is a 74 year old man, who at the time of the accident was 72, seven (7) years past the legal age of retirement in The Bahamas. The plaintiff's testimony is that had it not been for the accident he would have continued driving as long as he was able, though later he stated that as a result of a dream in which the Lord showed him that he could have died in the accident, he decided not to drive again, even for pleasure. He also cited a bad heart as a reason he did not wish to risk going behind a wheel again. Considering the aforesaid no award is made for future loss of earnings.

Special damages are therefore allowed in the sum of $16,850.00 made up as follows:

Cost of repairs to vehicle	$ 1,450.00
Loss of income	$15,000.00
Reimbursement of transportation costs	$ 400.00

There will be judgment for the plaintiff against the defendant in the sum of $16,850.00 with interest at the rate of 10% per annum from the date hereof until payment with costs to the plaintiff to be taxed if not agreed.

DATED this 16th day of May A.D. 1997

Estelle G. Gray Evans
Deputy Registrar