

**TRINIDAD AND TOBAGO**

**IN THE HIGH COURT OF JUSTICE**

**H.C.A. S 234 OF 1998**

**LYNETTE HUGHES**

**PLAINTIFF**

**AND**

**DOUGNATH DEONARINE**

**&**

**RYAN DEONARINE**

**DEFENDANTS**

**BEFORE THE HONOURABLE MADAM JUSTICE JUDITH JONES**

**Appearances:**

**Mr. K.Garcia for the Plaintiff**

**Mr. L. Sanguinette for the Defendants**

**JUDGMENT**

This is a claim in negligence arising out of a motor vehicular accident which occurred on the 3<sup>rd</sup> September 1996 at the intersection of Leotaud Street and Henry Street in San Fernando. The Writ of Summons was filed on the 10<sup>th</sup> March 1998.

**LIABILITY**

The collision occurred at the intersection of Leotaud Street, the major road, and Henry Street, the minor road. It is not in dispute that the first Defendant's motor vehicle, driven by his son, emerged into the intersection from the minor road

while the Plaintiff's motor vehicle driven by a driver in her employ emerged from the major road into the intersection.

The Plaintiff's case is that the collision occurred while her motor vehicle was on its correct side when almost midway into the intersection it was hit on its left front fender by the Defendant's motor vehicle. The impact caused the Plaintiff's motor vehicle to end up partly on the southern side of the intersection and partly into Henry Street. According to the driver of the Plaintiff's vehicle he did not see the Defendant's motor vehicle prior to the collision. The Plaintiff's other witness, a passenger in the car at the time, says that she saw the Defendant's vehicle a split second before the collision and called out to the driver who she says "pulled his brakes". In all other material respects the evidence of the witness corroborated that of the driver.

The second Defendant, the son of and the driver of the first Defendant's car did not give evidence as he had, by the time of the trial, migrated. Evidence was given by his brother who was a passenger in the back seat of the car. He stated that the second Defendant stopped at the major road and that he, the witness, did not see anything in the front right of Leotaud Street. According to him on reaching south of Henry Street he felt an impact to the back and the car crashed into the lamppost. Neither party called the police officers whom, it is claimed, measured the width of the road and its relation to the point of impact.

I do not accept the evidence of the Defendant's witness. I find on a balance of probability the accident occurred as described by the Plaintiff's driver and her witness. Despite what may on the face of the evidence seem to be a conflict

between the evidence of the Plaintiff's driver and the witness on a close examination of the evidence there is no real conflict, save for the claim by the witness that the driver "pulled his brakes". In arriving at my decision I had regard to the manner and the demeanor of the witnesses. Of some assistance as well were the photographs of the damage to the vehicles, exhibits LH1 to LH 7, in particular LH6 which is the only evidence of the actual damage to the Defendants' car, the front right fender and headlight. I also find that given the damage to the Plaintiff's car, its final position and the fact that it was turned onto its side that the Defendants' motor vehicle must have been going very fast. There was raised in the pleadings and by way of the addresses some issue of contributory negligence by the Plaintiff's driver. While I accept that the Plaintiff's evidence was that he never saw the Defendant's vehicle and that he did not mash his brakes or attempt to avoid the collision I am of the view that given the circumstances of the accident including the speed at which the second Defendant must have been driving and the topography of the area it is reasonable to expect that the Plaintiff may not have seen the Defendant's vehicle prior to the accident and would not have expected that a vehicle would have emerged from the minor road to the major road in such a manner. In the circumstances I find the second Defendant wholly liable for the collision.

#### DAMAGES

With respect to the Plaintiff's case it has been conceded by the Plaintiff that on the evidence the Plaintiff's motor vehicle was uneconomical to repair and as a

result the Plaintiff is entitled to the cost of a replacement, the measure of damages being the market value of the motor vehicle minus the value of the wreck.

Although the Plaintiff purports to give evidence as to the pre- accident value of the motor vehicle the only real evidence as to its pre accident market value is that of the Defendant's adjuster. His evidence is that the car, some 13 years old at the time of the accident, was valued at \$15,000.00 before the accident and the wreck at \$6,000.00 to \$8,000.00.

The real issue in dispute is the Plaintiff's claim for loss of use. The Plaintiff claims loss of use from the 3<sup>rd</sup> of September 1998 and continuing. It has not been disputed that the Plaintiff received the sum of \$270.00 a day, 7 days a week from the motor vehicle. It is trite law that the usual period allowed for loss of use in the case where the chattel is repairable is the length of time it would have taken to repair the chattel. Where it is uneconomical to repair the claim for loss of use is limited to the time it would have reasonably taken to obtain a replacement.

The Plaintiff's case is that, she being impecunious, her loss of use claim should run from the date of the collision to the date of judgment since she would not have been in a position to repair the vehicle without the Defendant paying the cost of the repairs. Since it has now been conceded that what the Plaintiff would have been entitled to would have been the cost of a replacement substitute that for the cost of repairs.

In support of this claim Counsel for the Plaintiff cites two cases, which he submits changed the position as established in the case of **Liesbosch Dredger v Edison [1933] AC 449**, the Privy Council decision of **Alcoa Minerals of Jamaica v**

**Herbert Broderick [2002] 1 AC 371** and the House of Lords decision in the case of **Lagden v O'Connor [2004] 1AC 1067**.

The evidence led by the Plaintiff in this regard was that at the time of the accident she was, and still is, a civil servant. She received estimates for the repairs to the motor vehicle in the sum of \$53,547.00. These estimates, she says she submitted to the Defendant's insurance company because they had agreed to repair the vehicle. They subsequently did not accept liability. According to her she was not in a financial position to repair the vehicle. Her evidence was that she could not afford to fix the car because she had invested all her money in it. "After the loss of the use of the car I was left without any money to live on. I could not service debts.. I still have the balance on a bank loan outstanding at 17% interest. I have not been in a financial position to repair the vehicle since the accident."

According to the **Liesbosch** case the measure of damages in the case of a profit earning chattel is the value of the chattel at the time and place of the loss and included a capital sum made up of the market price, at the time, of a comparable chattel; the cost of adapting transporting and insuring the new chattel and compensation for disturbance and loss suffered by the owners in carrying out their contract between the date of the accident and the date when a substitute chattel could have reasonably been available for use, that is its loss of use, "but neglecting any special loss or extra expense due to the financial position of one or other of the parties"

The **Alcoa and the Lagden** decisions modified this position. In the Alcoa case the Plaintiff had been led to believe that the Defendant was going to settle his

claim and as a result he awaited payment from them before repairing the damage. In fact the Defendant did not settle the claim, denied liability and the Plaintiff was forced to sue. In the interim there was a massive devaluation of the Jamaican dollar and the Plaintiff could not afford to repair the damage.

According to Lord Slynn of Hadley the case dealt with two separate but related questions

- “(a) is the Plaintiff entitled to have damages assessed at a date other than the date by which the physical damage was complete; and
- (b) does the fact that he could not afford to pay for the repairs until he had obtained judgment have to be ignored when fixing a date by which judgment must be assessed?”

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It was held that the answer to the first question was, in the circumstances of the case, yes, that there was no absolute rule in tort that damages which resulted from the impecuniosity of the innocent party was to be ignored when deciding the appropriate date for the assessment of damages and that on the facts the Plaintiff had behaved reasonably in waiting until money was available from the Defendant before embarking on the repairs.

In the Lagden case the impecunious Plaintiff, unable to afford to pay for the hire of a replacement car, entered into an agreement with a credit hire company to hire an alternate vehicle at a higher than usual cost. The House of Lords held that in approaching the question of damages payable to an injured party whose expenditure in mitigation had been augmented by his impecuniosity, the Court

was not precluded from considering the injured party's lack of means as being a factor too remote to be taken into account, but would apply the principle that a wrongdoer had to take his victim as he found him and had to bear the consequences if it was reasonably foreseeable that the injured party would have had to borrow or incur some other kind of expenditure to mitigate his damages. In the instant case the Plaintiff has not sought to have the market value of the motor vehicle assessed at the date of the hearing on the ground that given her financial situation she could not have afforded a replacement until the money for same was provided by the Defendant which was the argument in the Alcoa case. Rather she seeks to justify her failure to mitigate her loss by claiming lack of funds. The question raised by the Plaintiff's failure is not as in the Lagden case, that is, whether the steps taken by the Plaintiff to mitigate his loss were reasonable in the circumstances which circumstances included the Plaintiff impecuniosity, but rather, is it reasonable for the Plaintiff not to take any steps to mitigate her loss?. The effect of this being to seek, at this stage, an award for loss of use of the vehicle for some 8 years.

Whereas on the authorities it is clear that the Court is not to reject out of hand the Plaintiff's claim of impecuniosity. The determining factor must be the question of what is reasonable in all the circumstances.

It cannot be reasonable for a Plaintiff to claim impecuniosity for some 8 years and to sit and await judgment. This is particularly so in a situation where the evidence is that she was at all material times employed as a civil servant and it is to be presumed in receipt of a salary. To do so would make a mockery of the principle

that a party must take all reasonable steps to mitigate the loss. In any event there is no evidence before me that using the moneys received from the sale of the wreck the Plaintiff would not have been able to obtain a loan for the purchase of a replacement vehicle, that is a vehicle valued at \$15,000.00. That I suggest would have been a reasonable expenditure in an attempt to mitigate her loss and an expense which would have been recoverable given the decision in Lagden. Even if I accept that the effect of the Plaintiff's evidence is that she would have been unable to purchase a replacement vehicle without receiving an award in damages from the Defendant, it is not denied that the car would now be approximately 21 years. Is it reasonable to expect that the car would still have been earning an income of \$270.00 a day for the Plaintiff?

What then is the Court to do in the circumstances? Counsel for the Defendant suggests that a period of two months loss of use is reasonable. In all the circumstances of the case including the fact of the Plaintiff's impecuniosity I find that the Plaintiff ought to have taken reasonable steps to mitigate her loss and that a period of six months is sufficient time for the Plaintiff to sell the wreck, find a replacement vehicle and obtain a loan for its purchase.

In the circumstances the Plaintiff is entitled to the sum of \$ 9,000.00 representing the market value of the motor vehicle minus the value of the wreck, which value I have placed at \$6,000.00; the sum of \$48,000.00 representing her loss of use for a six month period and the sum of \$420.00 representing her wrecking costs the cost of the photographs and the certified copy, which I understand is not challenged by

the Defendant. There will therefore be judgment for the Plaintiff in the sum of \$57,420.00.

I will hear the parties on the question of interest and costs.

Dated this 9<sup>th</sup> day of November 2004

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Judith A. D. Jones  
Judge