[2015] JMSC Civ. 258

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2011 HCV 06977

BETWEEN	**AMY BOGLE**	**CLAIMANT**
A N D	**THE TRANSPORT AUTHORITY**	**DEFENDANT**

CONSOLIDATED WITH

CLAIM NO. 2012 HCV 02555

BETWEEN	**AMY BOGLE**	**CLAIMANT**
A N D	**LLOYD BOWEN**	**1ST DEFENDANT**
A N D	**PAULINE SAUNDERS**	**2ND DEFENDANT**
A N D	**THE TRANSPORT AUTHORITY**	**3RD DEFENDANT**

Garth Lyttle, instructed by Garth Lyttle and Co., for the Claimant

Cheryl-Lee Bolton and Janna-Marie Patel and Shaniel Hunter, instructed by the Director of State Proceedings for the 3rd Defendant

Ann-Marie Jordan appears as a representative of the 3rd Defendant

Heard: **January 7, 8 and October 5, 6, 7, & 9, 2015**

CLAIM FOR DAMAGES FOR DETINUE OR CONVERSION – CLAIM FOR DAMAGES FOR NEGLIGENCE – CONSOLIDATED CLAIMS – NEED FOR CLAIMANT TO PROVE UNQUALIFIED DEMAND FOR RETURN OF ITEM ALLEGEDLY UNLAWFULLY DETAINED – BURDEN OF PROOF OF 'POSITIVE DEFENCE' – BURDEN OF PROOF AS REGARDS ISSUE OF MITIGATION OF DAMAGES

ANDERSON, K. J

INTRODUCTION

[1] These claims, are consolidated – The 2011 claim was first in time and the claimant seeks to recover, by that claim, damages for negligence arising from a traffic collision/accident which occurred on February 5, 2011. The 2012 claim was later instituted – claimant seeks to recover, by that claim, damages for detinue or conversion. Although they were not set out as alternative claims – in either the Claim Form or Particulars of Claim, pertaining to the 2012 claim, learned counsel for the claimant has made it clear, during his closing submissions, that this court should treat with those two (2) claims, in the alternative.

[2] Claim No. 2012 HCV 02555 was never served on either the 1st or 2nd defendant and accordingly, that claim as against those defendants has expired and thus, can no longer be pursued. Accordingly, when this matter came before this court for trial, the only disputing parties were: Amy Bogle and The Transport Authority.

[3] The measure of damages for detinue, is not the same as that for conversion and in fact, detinue affords a successful claimant, a remedy which may be of greater value to a claimant than that which can properly be granted by a court, in a successful claim for conversion.

[4] This is so because, in a claim for relief based on detinue, the court can order, in favour of a successful claimant, that the item/property/thing which was unlawfully detained, be returned to that claimant. In addition, the court can award damages for consequential loss.

[5] On the other hand, in a claim for relief based on conversion, a successful claimant can be awarded nothing other than consequential loss – which would, of course, be assessed by the trial court and be awarded in the form of monetary compensation, known in law, as 'damages.'

[6] One of the leading cases in this jurisdiction, which has specifically addressed the issues of what constitutes conversion and what constitutes detinue and the measure of damages for each, is: **The Attorney General and The Transport Authority and Aston Burey** – Supreme Court Civil Appeal No. 109/2010. See also: **Trevor Wright and D/Sgt. Yates and Inspector Canute Hamilton & The Attorney General of Jamaica** [2012] JMSC Civ. 52, as well as – **Carl Brown and Attorney General of Jamaica and Constable Clive Nicholson** [2013] JMSC Civ. 151 and **Kirk Lofters and Attorney General and Deputy Superintendent Cleon March** [2012] JMSC Civ. 189.

[7] Even if the claimant succeeds in proving her claim for relief based on either the tort of detinue or conversion, she would not be entitled to recover more as damages, through this court, then she had actually lost, monetarily. If she were therefore, to recover the value of her vehicle, either as at the date of judgment, or as at the date of the allegedly unlawful seizure of same by the Transport Authority and also to recover any sums spent by her to rent a comparable vehicle during the period leading up to the judgment order, such orders would merely result in the claimant being put in no worse of a position than she would have been in, had her vehicle not been 'unlawfully seized' - if indeed this has been duly proven.

[8] What it would mean though, is that the defendant would be put in a much worse position, than they would have been in, if they had not unlawfully seized the claimant's vehicle. This must be so, because, if they had unlawfully seized the claimant's vehicle and sold it, on the mistaken assumption that they were lawfully entitled to have so done, or even if they had not sold it and thus, are able to return it to the claimant, they would nonetheless, have to compensate the claimant also, for losses incurred by the claimant, as a consequence of the claimant not having had the use of her vehicle, up until the

date of judgment. In the circumstances, it would undoubtedly be, not only in accordance with common sense and fairness, for police and transport authority personnel alike, to act cautiously and overall, with prudence, in determining if and when a vehicle ought to be seized by them, but in addition, it would also be financially prudent for them to so act.

[9] As regards the claim for damages for detinue, that claim must and does fail. The claimant has wholly failed to prove that she either personally, or through anyone acting on her behalf, such as an attorney, made at any time, an unqualified demand for the return of her vehicle to her. Enquiries made by her, as to the whereabouts of her vehicle, is by no means, the equivalent, or even close to the equivalent, of her having made any unqualified demand, at any time, for the return of her vehicle, to her. While the claimant provided evidence to this court of the former, she gave no evidence whatsoever, of the latter.

[10] This court entirely rejects the claimant's counsel's submission to the contrary. Accordingly, having failed to prove that there was any unqualified demand, or for that matter, any demand at all, for the return of her vehicle to her, the claimant's claim for damages for detinue, must and does fail. On that point, see the **Carl Brown** case (*op. cit.),* which, in that particular respect, applied what has been laid down in various cases from both England and Jamaica, through the years. See for example, **George and Branday Ltd. v Lee** – [1964] 7 W.I.R. 275, in which Waddington J.A. said – *'The gist of the cause of action in detinue is the wrongful detention, and in order to establish that, it is necessary to prove a demand for the return of the property detained and refusal, after a reasonable time to comply with such demand.'*

[11] For the claim based on the tort of conversion though, it is not necessary to prove that any demand was made for the return of any goods. Indeed, that could not be an element of that tort, since if the claimant's item has been converted, at least as a matter of law, there ought not to be expected, any return of the converted item. All that the

claimant can recover, in respect of a claim founded on the tort of conversion, is damages for consequential loss. See: **The Aston Burey** case (*op.cit.).*

[12] The parties' counsel have, during the trial of these consolidated claims and in particular, Mr. Lyttle and Ms. Patel (for the claimant and the 3rd defendant respectively), sought to make much of the Magistrate's Court having ordered the return of the claimant's vehicle to her, 'on bond.'

[13] In response to the claimant's counsel having made much of same, the defendant's response, as gleaned from their lead counsel's oral closing submissions, was that the Magistrate's Court ordered the claimant's vehicle to be released on bond and the claimant has not brought any evidence before this court, during this trial, such as could serve to satisfy this court, that the claimant had met the preconditions as were ordered by the court, in order for her to have her vehicle, be released to her, by the Transport Authority.

[14] What was given in evidence by the defence witness and named defendant – Pauline Saunders, on the particular issue as to the precise nature of the traffic court (otherwise referred to as 'the Magistrate's Court's) order for the return to the claimant, of her vehicle, is as follows: Firstly, it was the claimant's counsel who asked Ms. Saunders whether she was at the traffic court on the first day when the matter went before that court. To that question, Ms. Saunders answered – 'Yes.' The next question asked of Ms. Saunders during cross-examination, was – 'Did you hear, based on an application made by the claimant's counsel, the court ordered the return of the claimant's vehicle, on bond?' The answer to that question, was – 'Yes sir.' The next question that followed, was – 'Did the Transport Authority comply with the court's order to give back the vehicle to the claimant?' Answer – 'I have no knowledge of that.' An exchange then followed between the Judge and that witness, as follows – Judge: 'You have no knowledge as to them – the Transport Authority having given back the vehicle to the claimant, or is it that you have no knowledge as to whether or not the Transport Authority complied with the court's order to give back the vehicle to the claimant?'

Answer – 'I have no knowledge as to whether or not the Transport Authority complied with the court's order to give back the vehicle to the claimant.'

[15] Taking that evidence carefully into account, what is clear, is this: The claimant's counsel suggested to the defence witness, that the Magistrate's Court had ordered that the claimant's vehicle be released to her, on bond. That having been what was suggested to the defence witness, by the claimant's counsel, the claimant cannot resile from that. In any event, the defence witness – Ms. Saunders agreed with that suggestion. As such, both parties agreed, during the trial of this claim, that the relevant vehicle was ordered to be released on bond, to the claimant. There is also, no dispute between the parties, that to date, the relevant vehicle has not been released to the claimant.

[16] It is also the evidence that said vehicle has never in fact been released to the claimant. The claimant herself gave that evidence.

[17] That means therefore, that the next question which ought to have been asked at the trial and which in fact, was asked by defence counsel, of the 2nd defendant, Pauline Saunders, was: 'What is the process involved when the traffic court orders a vehicle to be released to an accused person on bond?' That question was posed to the 2nd defendant, during re-examination. To paraphrase that witness' answer to that question, she said – 'The judge will make the ruling that the vehicle is to be released to the owner in bond of 100 some or 200 some. She will also state that all fees are to be paid. After going to room 2 at the traffic court, that is the office, with the documents for the vehicle, the owner will get a letter to proceed to Transport Authority. There at the Transport Authority – 119 Maxfield Avenue, the pound fee will be paid. Managers will then sign the relevant documents for the release of the vehicle, nothing else.'

[18] The next question and answer that followed, upon re-examination, were as follows:

Q. 'After the relevant documents are signed for the release, what happens?'

A. ‘The owner of the vehicle would go to the pound and retrieve the vehicle.’

[19] No evidence was provided to the trial court by anyone, either as to whether the relevant processes for the release of the relevant vehicle to the claimant were or were not complied with by the claimant following upon the traffic court having ordered that the claimant’s vehicle was to have been returned to her, ‘on bond.’

[20] The lead defence counsel specifically submitted, during her oral closing submissions, that the burden of proof rested on the claimant, to prove to this court that she had complied with all necessary processes, so as to enable her vehicle to have been released to her by the Transport Authority, following upon, as the parties clearly have agreed, the traffic court having ordered that the same be released to her, ‘on bond.’

[21] That particular submission was, in turn followed by the lead defence counsel’s submission that in so far as the claimant never placed any such evidence before this court during trial, the claimant’s claim for damages for detinue or conversion, must fail. These two (2) particular submissions of the lead defence counsel must, of necessity, be examined particularly closely and carefully, for the purpose of rendering judgment on this claim.

[22] Firstly, in examining same, it is important to note that in the claimant’s claim for damages for detinue and conversion, that being Claim No. 2012 HCV 02555, the claimant had filed and served a Particulars of Claim. In that Particulars of Claim, the claimant made no allegation whatsoever, of any court, at any time, having ordered that the said vehicle be released to her, whether ‘on bond,’ or otherwise.

[23] Equally, in the 3rd defendant’s defence (Transport Authority’s Defence), no averment whatsoever was made as to the traffic court having ordered that said vehicle be released to the claimant, ‘on bond’, and/or that following upon such order having been made, the ‘bond’ conditions attached to such release, were not complied with by

the claimant and as such, the claimant's vehicle was not released to her, since, if the Transport Authority had in fact released said vehicle to her, in non-compliance with the court's order that same be released, 'on bond,' then, that would have meant that the 3rd defendant would not have been compliant with the traffic court's order as regards same.

[24] It is this court's considered opinion that the issues of the alleged court order that the said vehicle be released to the claimant, 'on bond' and as to whether same complied with by the defendant, or not, as well as whether any obligation rested on the claimant, to ensure that she complied with the processes attendant upon that court order and whether, if such obligation rested on her, she did meet that obligation, are all issues, which ought, at the very least, to have been foreshadowed by averments made in the respective parties' statement of case.

[25] The days of trial by ambush, ought by now, to be nothing other than historic, rather than present reality. Our present Civil Procedure Rules of the court ('the CPR') require that parties must, if they intend to rely on any factual argument, or make any allegation, set out that matter of fact, or allegation, in their Particulars of Claim, or defence (as the case may be), provided that such could have been done. See: **rules 8.9 A and 10.7 of the CPR** in that respect.

[26] The trial court can permit a matter of fact or allegation to be pursued at trial, even though same has not even been so much as foreshadowed in a party's Particulars of Claim or Defence (as the case may be), but this should be the exception, rather than the rule.

[27] Furthermore, if a party wishes to rely on an allegation or factual argument which has not been set out in his Particulars of Claim or defence (as the case may be), then it is the duty of that party, to specifically seek the permission of the trial court, to do so, prior to either making any such allegation, or by any means, obtaining such evidence – if that party wishes to rely on same.

[28] In the case at hand, no such permission was sought by either counsel, as regards any of these particular issues that have arisen in respect of the Magistrate's Court's order pertaining to the relevant vehicle, but essentially, although not formally so, it is clear that the trial court granted such permission and that is why the evidence was adduced.

[29] Having been so adduced by both parties, the most pertinent issue now to be determined by this court is how this court should treat with such evidence. In deciding on same, this court though, must first decide as to who had the burden of proof on those issues. In other words, was it that the claimant needed to have proven on a balance of probabilities, that an order was made for the release of the relevant vehicle to her, 'on bond' and that she complied with any processes that may have been required of her, so at to enable same to actually have been so released to her? Is it instead, that the burden of proof rested on the defendant, to prove on a balance of probabilities, that not only was it that the relevant vehicle was ordered by the traffic court to be released to the claimant, 'on bond,' but furthermore, that the claimant never complied with the required processes, in order to have her vehicle finally be released to her, 'on bond.'

[30] The lead defence counsel has categorically and very clearly stated that the burden of proof in those respects, rested on the claimant. The claimant's counsel, on the other hand, never made any submission to the trial court, as to whether or not the burden of proof as regards same, rested on the claimant. He did not address that particular legal issue, even though he could have done so, since he presented his oral closing submissions to the trial court, subsequent to the presentation of the 3rd defendant's oral closing submissions, by the 3rd defendant's lead counsel. Perhaps though, he did not do so, because as senior counsel, he thought it wiser to leave that matter for this court to determine, without his specific assistance as regard same. Lead counsel for the 3rd defendant was not so fortunate however, since this court had specifically posed to her, during the course of her oral closing submissions, the question as to who had the burden of proof on those issues. She answered that question categorically, by stating that it would be the claimant.

[31] Following on having so submitted, she then went on to submit that in so far as the claimant failed to prove that she had complied with all of the prerequisite processes in that respect, the claimant's claim for damages for detinue, as well as her claim for damages for conversion, must both fail.

[32] For the purpose of determining who had the burden of proof with respect of those particular issues, it is necessary to first consider what in law, constitutes the tort of conversion and therefore, what it is that the claimant needed to have proven, on a balance of probabilities, in order for her claim for damages for conversion, to be successful. This court will, at this stage, only consider the burden of proof issue, in respect of the tort of conversion, since it is not necessary to do so, on the detinue claim, as this court has already concluded that the claimant's claim for damages for detinue, must and does fail.

[33] As has been referred to by our nation's Court of Appeal, in the case – **The Commissioner of Police and The Attorney General and Vassell Lowe** [2012] JMCA **Civ. 55**, in the 21st edition of the text – Salmon and Heuston's Law of Torts, at page 97, conversion is described as, *'an act or complex series of acts of wilful interference, without lawful justification, with any chattel in a manner inconsistent with the right of another whereby that other is deprived of the use and possession of it.'* (See: paragraphs 9 and 35 of the **Lowe** case).

[34] In paragraph 36 of their Lordships' judgment in the **Lowe** case, their Lordships stated as follows: '*In addressing the elements required to constitute conversion the learned authors provide a brief and useful history of the tort, stating, inter alia, that there are three (3) distinct ways by which one man may deprive another of his property and so be guilty of a conversion, namely*

(*1)* *'by wrongly taking it,*

(2) *by wrongly detaining it and*

(3) *by wrongly disposing of it.'*

Historically, the authors state, the term conversion was originally limited to the third mode as merely to take another's goods, however wrongful, was not to convert them and merely to detain them in defiance of the owner's title was not to convert them. However, in its modern sense, the tort includes instances of all three (3) modes and not of one mode only. The authors point out that two (2) elements combine to constitute wilful interference:

(1) A dealing with the chattel in a manner inconsistent with the right of the person entitled to it; and

(2) An intention in so doing, to deny that person's right or to assert a right which is in fact inconsistent with such right see: **Caxton Publishing Co. v Sutherland Publishing Co.** [1939] AC 178, 187 and **Penfold Wines Pty Ltd. v Elliott** [1946] 74 LR 204, 229.

[35] The learned justices of appeal, went on, in paragraph 37 of their judgment in the **Lowe** case, to state – '*The courts have determined that in the absence of wilful and wrongful interference there is no conversation even if by the negligence of the defendant, the chattel is lost or destroyed (see:* ***Ashby v Tolhurst*** *[1937] 2 KB 242). Further, the authorities show that every person is guilty of a conversion who without lawful justification takes a chattel out of the possession of anyone else with the intention of exercising a permanent or temporary dominion over it because the owner is entitled to the use of it at times (see:* ***Fouldes v Willoughby****). This, at first glance, would seem to provide some authority for the learned trial judge's finding that in taking the truck and its contents into their custody without the consent of the respondent, the police had deprived him of the use and possession of his 'missing' items and had therefore converted them. But, a mere taking unaccompanied by an intention to exercise dominion is no conversion. Further, the detention of a chattel amounts to conversion only when it is adverse to the owner or other person entitled to possession – that is, the defendant must have shown an intention to keep the thing in defiance of the owner or person entitled to possession. The usual way of proving that a detention is adverse within the meaning of this rule is to show that the party entitled demanded the delivery of the chattel and that the defendant refused or neglected to comply with the demand. In the instant case, the learned trial judge did not make a finding that there was a*

demand, so that her finding that there was conversion was clearly not based upon this method of establishing the tort.' (See: **Barclays Mercantile Business Finance Ltd. v Sibec Developments Ltd.** [1992] 1 WLR 1253)

[36] In paragraph 39 of their judgment in the same case, their lordships opined in reference to the tort of conversion, that – *'…it is evident that the key to the establishment of the tort is wrongful interference or unjustifiable interference with the chattel so as to question or deny the owner's title to it.'* See: **Kuwait Airways v Iraqi Airways** [2002] 2 AC 883).

[37] All of this dicta requires careful analysis and consideration *vis-a-vis* the claimant's claim for damages for conversion. In the **Lowe** case, the Court of Appeal overturned the judgment of the trial judge, which was to the effect that the respondent's claim in the Supreme Court, for damages for conversion, was successful. As such, the appeal was allowed and no re-trial was ordered.

[38] Interestingly enough also, their Lordships had, in the **Lowe** case, made it clear, that the seizure of the claimant's chattel, under and pursuant to a valid warrant, was not an 'unauthorized dealing' for the purpose of the tort of conversion, since, where a chattel is seized by police personnel, pursuant to a warrant, the possessor's right or title to that chattel is not abridged and that possession is merely suspended. In the circumstances, since the learned trial judge in the **Lowe** case, had not exposed what was her thinking on the existence of the warrant, it was also held by their Lordships, that on that ground, she had also fallen into error. See: **Webb v Chief Constable of Merseyside Police** – [2000] QB 427; and **Costello v Chief Constable of Derbyshire Constabulary (CA)** – [2001] 1 WLR 1437 and paragraphs 22 and 40 of their Lordships' judgment in the **Lowe** case.

[39] This court has carefully considered, analyzed and applied all of the aforementioned legal dicta, to the matter at hand. In that light, clearly, the making by the traffic court, of the order which it did, releasing the claimant's vehicle to her, 'on

bond,' must be of significance. It is of significance because the claimant is seeking to be awarded damages for conversion, based on her vehicle not having, up until now, been released to her.

[40] If though, the said vehicle was at all material times, lawfully being held, pursuant to a court order and pursuant to relevant legislation and if, while being so held, the Transport Authority lost the vehicle, that would not constitute conversion. Furthermore, if, while the same was being lawfully so held by the Transport Authority, pursuant to a court order and the relevant legislation, it had been held for such a lengthy period of time, that by law, the Transport Authority was entitled to have disposed of same by means of public auction and they did so, then that too would not constitute conversion.

[41] Of course though, what is surprising to this court, is that not only has the 3rd defendant not made any averment whatsoever in its defence, as to where the claimant's vehicle is presently located, but also, it has provided no evidence of same, either. Surely, that information should be within the defendant's knowledge and the opposing party should have been made aware of same, as also, should have been, this court.

[42] What is known though, is that on the first day when the case against the claimant went before the traffic court, with the claimant then facing the criminal charges of operating a public passenger vehicle without a licence for that purpose and operating without valid insurance, those charges were dismissed. The claimant gave unchallenged evidence of this.

[43] The traffic court, as was suggested by the claimant's counsel to a defence witness, during cross-examination and then agreed to, by that witness, ordered that the vehicle be released to the claimant 'on bond.' As such, with that court order having been interposed, as it were, between the 3rd defendant and the claimant, as regards that vehicle, at that stage, the claimant's rights to possession of that vehicle, were certainly not abridged, but merely, suspended. It could only have been if the claimant had met the necessary prerequisites for the release to her of her vehicle, 'on bond' and

notwithstanding, said vehicle had not been thereafter, within a reasonable time, released to her, that the claimant's claim to be awarded damages for conversion and accordingly, to be awarded compensation for that which she has alleged, was her rental of a comparable vehicle, for the period commencing from when, as she has contended, her vehicle was unlawfully seized, until the date of this judgment, could properly succeed.

[44] This does not mean though, that the claimant's claim for damages for conversion, related to the period of time between when the vehicle was seized and when the claimant's criminal case surrounding what had allegedly led to that seizure, was first brought before the traffic court, cannot succeed. In that particular respect though, what this court must no doubt carefully consider, firstly, is whether the claimant's vehicle was lawfully seized and whether, in having seized it, the 3rd defendant is to be taken as having intended to exercise dominion over it, in disregard of that which the claimant has alleged, is her right to possession of same.

[45] As was laid down in the **Lowe** case, one of the means by which an intention to exercise dominion over a chattel, in disregard of another's legal right to possession of same, can be established, is by the leading of evidence capable of satisfying the trial court, that a demand was made for the return of the vehicle, yet, the same was not returned within a reasonable time thereafter. This is though, not the only means, albeit that it is the typical means.

[46] The claimant, this court has already found, has wholly failed to establish that any such demand was made either by the claimant personally or by anyone acting on her behalf. What the claimant is also seeking to rely on, to prove that the 3rd defendant in having unlawfully seized the claimant's vehicle, did so with intent to exercise dominion over it, is that the Magistrate's Court ordered that the said vehicle be released to the claimant 'on bond', but the same was never so released to her.

[47] It is the considered opinion of this court that the claimant is entitled to rely on such circumstance, if she can prove it, as constituting proof that in having unlawfully seized the said vehicle and thus having unlawfully detained the same, the 3rd defendant did so with intention to exercise dominion over same.

[48] On the other hand, it is also this court's considered opinion, that the 3rd defendant is entitled to rely on the actions of their client, in having brought the matter before the traffic court, as showing that the 3rd defendant had never, at any time, intended to exercise dominion over the said vehicle. Of course though, if the conditions for the release of the said vehicle to the claimant, 'on bond' were duly met by the claimant and yet, said vehicle was not released to the claimant, it would strongly signify that the 3rd defendant would not only have unlawfully seized the vehicle (accordingly to the claimant's case as alleged in that respect), but would also have unlawfully detained the same and would have done those things, in wilful disregard of the claimant's right to possession of her vehicle and accordingly, with the intention of exercising dominion over same.

[49] This court is of the view that, as was accepted by the 3rd defendant's lead counsel, in her oral closing submission, the burden rested on the 3rd defendant to establish that the claimant's vehicle was lawfully seized. That burden rested on them, because in, contending that the vehicle was lawfully seized, they raised what is understood in law, as a 'positive defence' and as such, since they are alleging same, it is for them to prove. See: Murphy on Evidence, 2009, 11th edition at page 79.

[50] This court is of the view that the 3rd defendant failed to meet that burden and thus, this court has concluded that the claimant's vehicle was unlawfully both seized and detained.

[51] This court also, does not agree with the 3rd defendant's lead counsel's submission, that the burden of proof rested on the claimant to satisfy this court that she met all the prerequisites for the actual release of her vehicle to her 'on bond.' Since the

3rd defendant no doubt wished to rely on the claimant's alleged failure to comply with those prerequisites, as part and parcel of their defence to the claim for damages for conversion, this would also fall within the category of a positive defence and he who alleges, must prove. See: **Joseph Constantine Stewardship Line Ltd. v Imperial Smelting Corporation Ltd.** – [1942] AC 154, at 174, per Viscount Maugham.

[52] With there having been no evidence led in proof of same, by the defendant, it is patent that the claimant's claim for damages conversion, must succeed and this court so concludes. The 3rd defendant unlawfully seized and detained the claimant's vehicle.

[53] The claimant has proven that they did so without reasonable and/or probable cause. This court does not accept that at any time, on the relevant occasion, did the 3rd defendant's servants or agents, see the claimant operating her vehicle in a manner which is typical of that in which a public passenger vehicle would have been operated. This court does not accept either, that at any material time, the 3rd defendant's servants or agents saw two (2)male passengers entering, remaining in and thus, utilizing the said vehicle, for hire.

[54] The claimant has also proven that in having so unlawfully seized and detained the claimant's vehicle, without reasonable and probable cause, the 3rd defendant did so with intention to exercise dominion over that vehicle and to keep possession of the claimant's car, in defiance of the claimant's right to possession of same.

[55] In terms of damages, the claimant is seeking to recover over $12,000,000.00 for rental of a comparable vehicle – as she has alleged, was the vehicle that she rented and in addition, is seeking to recover the sum of $500,000.00 as the value of her vehicle which is a Toyota Mark II, 1989.

[56] The 3rd defendant's lead counsel has submitted, during her oral closing submission that this court should conclude that the claimant never paid the sums of money which she has alleged that she paid for that which the claimant has alleged, is

the rental of a comparable vehicle. Ms Patel also pursued that contention of hers, by means of her questioning of the claimant, during cross-examination. The claimant on the other hand, expressly denied that submission, when she was questioned during cross-examination about it and in fact, moreover, produced to the trial court, evidence in the form of receipts, in an effort to prove that such payments were made.

[57] The burden was on the claimant to prove her loss. She has proven same, to the requisite standard, that being, on a balance of probabilities. On the other hand, the burden of proof was on the defendant to prove, if they had wished to do so, that the claimant had failed to adequately mitigate her loss. See: **Geest Plc v Lansiquot** – [2002] 61 W.I.R 212.

[58] The 3rd defendant though, did not seek to rely on any contention that the claimant failed to adequately mitigate her loss. Instead, they chose to rest their case, as regards the issue of damages, on the ground that the claimant failed to properly/adequately prove that she suffered the loss as alleged.

[59] As regards proof of the value of the claimant's vehicle therefore, the 3rd defendant's lead counsel contended that since this was a claim for special damages and the claimant had failed to specially prove that said value, at the time of conversion, was $500,000.00, the claimant had failed to prove that loss and thus, should recover nothing for same.

[60] There is undoubtedly a general rule, that special damages should be specially pleaded and specially proven, but clearly, in the case at hand, the claimant could not have been expected to obtain a loss adjuster's report as to the value of her vehicle at the time when it was seized, since the claimant clearly did not know where her vehicle was being stored by the 3rd defendant. A warning notice was served on the claimant and on that notice the words – 'The Lyndhurst Road Pound' are written at the top. That warning notice was entered into evidence at trial, as an exhibit. As things turned out though, evidence was given at trial by both of the defence witnesses that the vehicle

was not at any time stored at the Lyndhurst Road pound since that pound was full, when, after it had been seized, the claimant's vehicle, was first taken there. Thereafter, the claimant's vehicle was taken to another pound. Ms. Saunders gave that evidence.

[61] In the circumstances, in the overall interest of justice and in fairness to the claimant, it would be unjust to expect her to specifically prove the value of her vehicle at the time of conversion. This court is entitled to draw its best conclusion, on the available evidence, as to the value of the claimant's vehicle, when the same was converted, on or about February 15, 2011- at which time, it was then twelve (12) years old. See: **Jamalco & Lunette Dennie** – [2014] JMCA Civ. 29. This court is of the view that the said vehicle would then have been valued at $400,000.00.

[62] As regards the claimant's claim for damages for negligence, this court accepts as truthful, the claimant's version of events, as to whose vehicle impacted with whose. This court is of the view that it was the 3rd defendant's vehicle that collided into the claimant's vehicle, while her vehicle was parked on her correct side of the road. This court also accepts the claimant's evidence that she endured pain, as a consequence.

[63] In the circumstances, the claimant has succeeded, on a balance of probabilities, in proving her claim for damages for negligence. She has proven her loss, as part and parcel of her proof of that claim. For that claim, she is to be awarded general damages for pain and suffering, at an interest rate of 3%, with effect from February 15, 2011 and special damages for her medical expenses in the sum of $92,500.00, with interest at the rate of 3% with effect from the date when the claimant's claim for damages for negligence, was served on the 3rd defendant.

[64] This court will not specifically award to the claimant, as special damages, the cost of her legal representation by Mr. Garth Lyttle in the Magistrate's Court. That legal representation related to the claimant having been criminally charged arising out of her interactions with transport authority personnel on February 5, 2011. If the claimant is to properly recover for that legal representation she would have to do so by means of a

separate claim for a separate tort or separate torts, than those which were pursued in these consolidated claims.

[65] This court has utilized the present Consumer Price Index (CPI) for the purpose of making its award of general damages, as regards the negligence claim. The current CPI is 229.

[66] This court has relied on the following cases for the purpose of assessing the sum to be awarded as general damages to the claimant, based on the claim for damages for negligence. They are: **Poyser v Superior Party Hireage Ltd. & anor.** – Reported at Harrison's Assessment of Damages at page 86 – Assessment for pain and suffering and loss of amenities was $40,000.00 – awarded on May 14, 1992, in respect of a claimant with whiplash injury with pain in the neck, shoulder and back. The CPI in May, 1992 was 16.104. When updated, this sum would have to be discounted, since, in the case at hand, there is no evidence of loss of amenities and there is no evidence of whiplash injury. Also: **Campbell v Cameron**, reported at Harrison's at page 85. That was an award made by Wolfe J. on February 6, 1991for pain and suffering and loss of amenities as a consequence of a fracture of the no. 6 cervical vertebra and the wearing of a collar for two (2) months. The CPI in February, 1991 was 7.099.

[67] By this court's calculations and making the appropriate discounts, so as to meet the particular circumstances of this particular case, this court will award general damages for negligence, in the sum of $350,000.00 and special damages in the sum of $92,500.00 both with interest at the rate of 3%.

[68] This court awards to the claimant as special damages for conversion, $10,400,000.00. This court has concluded that the claimant would not have needed to have rented the vehicle which she used as an alternate for more than six (6) days per week and thus, has approximated, to the nearest million dollars, 6/7of $12,000,000.00.

Judgment Orders

1. The claimant is awarded damages for conversion in the sum of $10,400,000 with interest at the rate of 3% from May 14, 2012 (date of service of claim forms) to date of judgment.

2. The claimant is awarded general damages for negligence, in the sum of $350,000.00 with interest at the rate of 3% from February 16, 2011 to date of judgment.

3. The claimant is awarded special damages for negligence, in the sum of $92,500.00, with interest at the rate of 3% from November 22, 2011 (date of service of claim form) to date of judgment.

4. The costs of this claim are awarded to the claimant with such costs to be taxed, if not sooner agreed.

5. The claimant shall file and serve this order.

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Hon. K. Anderson, J.