



[2014] JMSC Civ. 200

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN CIVIL DIVISION

CLAIM 2008/HCV00931

BETWEEN	WEBSTER GRANT	CLAIMANT
A N D	SYDNEY LEE SING LTD. (T/A as LEE SINS SHELL SERVICE STATION)	DEFENDANT

Sean Kinghorn instructed by Kinghorn and Kinghorn for the Claimant.

Miss Carlene McFarlane instructed by McNeil and McFarlane for the Defendant.

Heard: November 14, 2010 and September 1, 2014

**Damage to motor vehicle – issue of liability –
causation – damage – remoteness - mitigation**

Daye J,

Reasons for Judgment

- [1] On the 22nd February 2008 Mr. Webster Grant a business man and farmer of Runaway Bay, St. Ann sued Lee Sing Shell Service Station, Runaway Bay, St. Ann for Damages for Negligence relating to his 2003 Nissan Terracan Sports Utility Vehicle (SUV) registered 2929 EE.
- [2] He alleges that on the 26th January, 2005 he drove his diesel engine motor vehicle to the service station and ordered diesel fuel. However, the gas attendant at the service station put gasoline in the gas tank. As a consequence at that moment the engine of the vehicle would not start when he switched on the ignition. This he claimed later cause damage to the pressure pump and fuel system of car.

Admission

[3] The service station accepts that the pump attendant employed to them mistakenly placed gasoline instead of diesel fuel in Mr. Webster Grant's motor vehicle. They accept this was a breach of their duty of care to this customer. So there is no issue joined on what was done to Mr. Webster Grant's car. Therefore negligence is proved.

Defence

[4] But they do not accept that the negligent action caused the subsequent damage of the claimant's car and the resultant loss he claims. They explain in their defence they took all necessary corrective action immediately. The defence reads:-

"6. Defendant admits Particulars of Negligence, but says however that it took steps to correct the mistake by removing and emptying and changing the tank of all gasoline before same could be transmitted to the fuel line, refitted the tank with the correct fuel and placed diesel additives in the tank to treat and clear the fuel and or fuel lines and any loss on damage was not as a result of the Defendant's negligence".

[5] The claimant Mr. Webster Grant did not challenge the service station's action or account in his evidence. He affirms under cross-examination the procedure that service station undertook. He also agreed his motor vehicle was pushed from the fuel pump stand to the service station car park with the assistance of the gas attendant and the gas tank was removed and emptied.

Issue

[6] So then an issue of causation arises. The question is whether it was the wrongful supply of gasoline in the fuel tank for the brief moment in Mr. Webster Grant's car caused all the damage and loss to his pressure pump and fuel system up to 2008.

Damage

The learned author McGregor on Damages (15th ed. (1988) ch. 285 et. seq.)states:

[7] "The fundamental basis is then compensation for pecuniary loss naturally flowing from the breach, but this first principle is qualified by a second,

which imposes on the plaintiff a duty of taking 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 such steps – British Westinghouse Co. v. Underground By. [1912] A.C. 672

“287the principle apply equally to non- pecuniary loss and to tort as in the case of the plaintiff who, having been physically injured failed to take reasonable steps to obtain medical aid and thereby fails to cut down the pain and suffering resulting from the injury.

288the onus of proof or the issue of mitigation is on the defendant. The question of mitigation is a question of fact.

289whether the plaintiff has acted reasonably is in every case a question of fact, not of law. The true meaning (duty to mitigate) of fact is that the plaintiff is not entitled to charge the defendant by way of damage with any greater sum than that which he reasonable need to expend for the purpose of making good the loss. In short, he is fully entitled to be extravagant as he pleases but not at the expense of the defendant.”

Claimant’s Contention

[8] Mr. Webster Grant’s account of mechanical problem to his car is characterized as:

- (a) On the 20th January, 2005, he tried to start his vehicle for about five (5) minutes but it would not start after the pump attendant placed gas in it.
- (b) On the 20th January, 2005 he drove off his vehicle from the service station after the fuel tank was drained of gasoline and refilled with diesel, but he discovered that vehicle could not go above 40 miles per hour, within four minutes after leaving the station.
- (c) The vehicle would then start shutting off. Later the vehicle would not start. He had to park the vehicle.

In cross-examination he testified that it was one week after the incident the vehicle stop working that he had to park it. He also testify the vehicle would not work from the next day after the incident.

The proximity of the mechanical problem Mr. Webster Grant experienced with his car to the date that gasoline was placed in his car and replaced by diesel in his fuel tank is a relevant factor to the issue of causation of the damage to his motor vehicle.

Defendant's Contention

[9] The defendant contends that damage was not proximate to the incident and thereby challenge Mr. Webster Grant's complaint. They also refute any inference causation of damage can be drawn from Mr. Grant's complaint. The reason the defendant raise in cross-examination are that:-

- (i) the fuel tank was cleared and treated. No issue joined by the parties
- (ii) he made no complaint to the owner and operator of the service station between January 2005 and January 2006.
- (iii) Mr. Grant had the opportunity to complaint because he visited the service station regular between that period and purchased gas by means of bounce cheque which the owner spoke to him about.
- (iv) The service station received written complaint for the first time a letter from Attorney-at-law Mr. Ernest Smith about incident on 9th January 2006 about one year later. The length of time in absence of any communication reduce a casual link with incident.
- (v) The engine of the motor vehicle was not started at the pump station when it had discovered gasoline was put in tank. This is an issue as pump attendant said claimant went to tuck shop after engine was shut off. When he returned car was pushed from back of station but not started. The claimant said he started car for five minutes but it would not start. If the car was started then gasoline would flow in the engine and may contribute to the problem Mr. Grant experienced.

Opinion-Expert Evidence

[10] He explained the problem Mr. Webster Grant experienced when his car and the damage to pressure pump and fuel system and mechanical. This relate to a technical subject

even through motor vehicle ownership and use has increased in the country and drivers and owners are mere knowledgeable, technical despite about the operation of motor vehicle require testimony beyond the ordinary driver or owner.

[11] The technical subject of mechanical malfunction requires technical and or expert evidence to prove and to assist as to what is the cause of the problem.

Mr. Webster Grant presented his opinion evidence of what caused the damage and repairs to his motor vehicle. He is asking the court to infer from this witness testimony that it was the incident that caused the damage to his car. The relevant portion of the witness evidence is as follows:

“You reported the tank was emptied and refill, you did not say that the fuel line or the entire system (injection pump, injection pipe, injection and fuel filter) was cleared of gasoline. Therefore this lead to an ultimate damage to your fuel injection system to the failure of your motor vehicle.”

[12] The parts manager was reporting on the replacement and the cost of new pressure pump and injector as well as the labour to fix the vehicle on June 7, 2006. This evidence is limited as opinion evidence as the report is not that of someone who is claiming to be qualified as an expert witness by training, qualification or experience. Further the witness did not physical examination of the motor vehicle. He was basing his opinion of the self report of the complaint Mr. Webster Grant. This evidence is of limited value in that it merely described certain type of new parts which were missing and which were needed to correct problem.

[13] On the 6th April 2010 the service manager of Key Motor opined the effect of gasoline on the diesel engine. He stated that the 2003 Hyundai Terracon vehicle is:

“2not a conventional fuel injection system meaning there is an electrically operated lift pump which transfer fuel to the main high pressure pump once the engine is switched on and will continuously run until the

engine is switched off. The high pressure which operates under very high tolerance is easily damaged by foreign material entering the system. Lubrication of the pump is performed by the diesel fuel. Introducing gasoline will continuously reduce the lubricity of the fuel thus damaging the pump beyond repair i.e the pump cannot be repaired.”

[14] Having seen and heard the claimant and defendant Mrs. Phyllis Lee Sin and her witnesses Tanzian Stephenson and William Rodway cross-examined by the respective counsel, I find that pertinent issues of fact are in dispute. They are as follows:

- (a) Did the claimant on the 26th January, 2005 immediately try to start the diesel motor vehicle immediately after he found out that the pump attendant wrongly placed gasoline in his fuel tank,
- (b) Did the claimant come out of diesel motor vehicle and left for the snack shop right after gasoline was put in the fuel tank without doing anything further.
- (c) Did the diesel motor vehicle stop working on the 26th January, 2005 after the claimant drove off from the gas station?
- (d) Did the claimant report the problem with his vehicle in 2005 at all?
- (e) Did the claimant report the problem with the vehicle for the first time only in 2006 to his lawyer?
- (f) Was the claimant driving his diesel motor vehicle between 2005 and 2006 or was it parked?
- (g) What sum of money if any, did he expend for alternative transportation if diesel motor vehicle was out of use.
- (h) Was the motor vehicle having the same problem it had in 2008 that it had in 2005?

(i) Did the claimant take reasonable steps to reduce his loss arising from lack of use of his motor vehicle?

[15] The claimant has the burden to prove as a balance of probability the cause of the damage to his motor vehicle as well as his loss.

[16] The claimant's conduct on the 26th January 2005 and thereafter towards the motor vehicle and will as the proprietors of the gas station is relevant to determining the issues of facts in question.

[17] I accept the claimant's evidence that he did try to start his diesel motor vehicle right there at the fuel pump immediately after the gasoline was put in the fuel tank of the car. The pump attendant did not realize, I find, this detail. He quite understanding was taken up with pushing the vehicle from the fuel pump to the car park to correct his error.

[18] I also find the claimant did leave his motor vehicle to go to the snack shop after the vehicle was pushed to the car park to rectify the pump attendant mistake. This fact does not disturb the finding that before the vehicle left the pump he started the engine.

[19] The consequences of this far reaching. Both the claimant and the pump attendant recognize that starting of the engine with gasoline in the fuel tank could be the source of the problem and affect the functioning of the vehicle. This problem would be present even though the fuel tank was cleaned of diesel an additive placed in it.

[20] Although Mr. William Rodway was not appointed as an expert witness under R. 32 of the CPR 2002 his opinion evidence in his report that was served on the claimant did assist the court in one respect. He explained the principle of a

diesel engine is a compression diesel ignition system. Air is compressed to a certain pressure in the engine. When the engine is turned on the fuel is sent to the fuel pump. Mr. Rodway has considerable experience in diesel engine from his working experience for over sixty (60) years in England where he was trained and Jamaica. He admitted in cross-examination he did not physically examine the claimant's vehicle. But he said based on the amount of diesel petrol that was originally in the vehicle and that the fuel tank was cleaned shortly after gasoline was placed in it the fuel pump system would not be damaged as great as the damage to the complainant's vehicle.

[21] The court did not find Mr. Rodway's opinion determinative of the issue of liability of damage to the claimant's motor car. But the system applicable to compression diesel engine which he says is named after its inventor in 1890, is relevant to the fact in issue whether the claimant started the engine of the car at the pump and consequently affected the fuel pump system. I bear in mind parts purchased for the repair of the motor vehicle and the repairs all related to the fuel pump system.

[22] I find that the claimant's motor vehicle did develop the problem of slowing down and shutting off on the 26th January 2005 after he left the defendant's service station.

[23] The complainant did complain to the defendant about his vehicle in 2005 as well as to his lawyer in 2005 who wrote the defendant in 2006. He did not appear to contact the defendant as pointed as may be reasonable expected of someone who believe that it was their employee's action that caused the damage to his car. The response and the lapse of a year before the defendant was really fully engaged about the damage to the car cast some uncertainty as to whether there was proximate link between the damage to the car and the incident of the 26th January, 2005.

[24] Nonetheless, I believe that it was the gasoline placed in the fuel tank that affected the pressure pump and injectors and lead to the malfunctioning of the car.

[25] The car could not drive properly and had to be parked between 2005 to 2006 and 2007 and 2008. During this time, I find the claimant was not driving his car. It is not clear on the evidence what was his mean of transport at those times.

[26] The car dealers Key Motors did repair the car in 2006, but there was still a problem with the car fuel system thereafter. Further cost and expenses were incurred to fix the problem. It may be the repairs were not done to the requisite standard. However, that may be it would not be reasonable to hold the defendant's original breach of duty of care in wrongly putting gasoline in the diesel car in January 2005 was responsible for the cost and expense to repair the car in 2008. Such damages in 2008 would be too remote and not recoverable from the defendant.

Damages

[27] It is a fundamental rule that the claimant must prove special damages. This mean the claimant is required to adduce evidence of actual cost, loss and expense incurred as oppose to merely alleging damages.

Submissions

[28] Mr. Kinghorn in his written submission claim damages as follows:-

Cost of repairs - \$310,821.86 - (Exhibit 3)

Exhibit there was in fact a receipt showing payment of this amount to Key Motors. The sum would be proved and therefore recoverable.

Cost of repairs - \$533,570.00 - (Exhibits 4 & 5)

These sums of money relate to second repairs to the vehicle in 2008 and are to remote and not recoverable.

\$500,000.00 was claimed for loss of use. Presumably this relate to the two periods of the year when the complainant's vehicle was parked. The loss of use is not particularized. One period is already shown to be remote. There is lack of proof to support what sum was incurred for the first period. The claimant did testify on cross-examination that he spent about \$80,000.00 for a car he rented in 2006 from Claudia Brown at \$3,000 per day. He later explained he meant he charter a car to transport him. In any event he did not adduce in evidence any invoice or receipt for this expense.

Counsel Miss Carlene McFarlane in her written submission correctly highlighted the deficiency in the claimant's evidence on damages. She summarized this aspect of her submission thus:-

"The claimant was unable to produce all his invoices, but not his receipts, including wrecker, parts, service, rental of all which he admits are at his house, and all of them paid by cash. He has produced only photocopies of these invoices/documents, as no original has been forthcoming even though he sought and obtained legal advice from very early"

This was an accurate account and analysis of the claimant's evidence of damage. It fell short of proof.

[29] I understand counsel Miss McFarlane criticism of the claimant's evidence in proof of damages did not stop at that. She was also using this lack of evidence to challenge the credibility of the claimant's account about the cause of damage to the car.

[30] Though her duty to her client warranted this challenge I did find the claimant's case that it was the incident of the 26th January, 2005 that caused the damage to her car but not the extent of the damage claimed.

Conclusion

[31] The defendants are liable for the damage to the claimant's car which was caused on the 26th January, 2005. The damage was due to the negligent placing of gasoline in the fuel tank of the diesel motor vehicle by the defendant's pump assistant. This caused damage to fuel pump pressure system.

The claimant is entitled to damages for cost of repairs in the sum of \$310,821.86 which was proved.

Cost to the claimant to be agreed or taxed.