[2017]JMSC Civ. 50

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN CIVIL DIVISION

CLAIM NO. 2012HCV02862

BETWEEN	**MICHAEL LAWRENCE**	**CLAIMANT**
AND	**LEON BELL**	**1st DEFENDANT**
AND	**VAUGHN SMITH**	**2nd DEFENDANT**
AND	**JAMES CLARKE**	**3rd DEFENDANT**

Ms. Christine Mae Hudson & Ms. Renae Barker instructed by K. Churchill Neita & Co. for the claimant

Ms. Racquel Dunbar instructed by Dunbar & Co. for the 1st defendant

Mrs. Kerry-Ann Sewell for the 2nd defendant

Heard: 18th January, 2017 & 7th April, 2017

Negligence – Motor vehicular accident – Disabled vehicle – Collision with the back of a stationary truck – Claimant injured while being a passenger in the bus– Whether the driver of the bus or the owner of the truck breached their duty of care owed to the claimant – The Road Traffic Act – Island Traffic Authority Road Code 1987 – Assessment of damages

EVAN BROWN, J

Introduction and background

[1] Michael Lawrence suffered injuries in a motor vehicular accident while travelling along the Pepper main road, in the parish of St. Elizabeth. He was a front seat

passenger of a Hiace bus when it collided in the right rear of a stationary Ford Cargo truck. The Hiace bus was driven by Leon Bell, who operated it as a public transportation vehicle. The truck was owned by Vaughn Smith, and driven by James Clarke his servant. Having considered the evidence, I find the claim for negligence against the 1st and 2nd defendants proved.

[2] Mr. James Clarke was not served and took no part in the trial. The claim proceeded against Mr. Bell and Mr. Smith. The claim arose in circumstances which follow. On the 22nd November, 2017, at around 6:00pm, the truck became immobilized when it develop engine problems. It came to a standstill in the left lane of the road. This truck was about 10ft high, 8ft wide and 26ft long.

[3] Being informed of the truck's condition, Mr. Smith journeyed to the site and arrived there at around 9:00pm. Both he and Mr. Clarke then left the truck on the road for the night. At about 4:00am, seven hours after the truck was abandoned for the night, Mr. Bell was driving the bus in the area where the truck had been left. He was driving at about 45 kilometres per hour (km/h). The morning was dark and foggy. There were no streets lights along that road.

[4] As Mr. Bell approached the truck, he began to swerve to the right in an attempt to avoid a collision. He, however, was late in the execution of that manoeuvre. His late execution resulted in the left side of the front of the bus colliding in the right rear of the truck. It was during this collision that Mr. Lawrence suffered injuries.

Case for the claimant

[5] Mr. Lawrence said that the bus drove for about 7 minutes in the dark area, and the road was not busy. He saw when Mr. Bell began swerving the bus to the right. It was at this time that he noticed a truck parked on the road. The truck bore no reflectors or flashing lights on it. Neither was there any warning signs erected on the roadway to warn the oncoming traffic of this obstacle.

[6] He recalled that the space between the bus and the truck was about two feet before Mr. Bell began to swerve. He said "everything happened so fast". Although the lights on the bus were on, he could not see far ahead on the road.

Case for the 1st defendant

[7] Mr. Bell gave evidence that while he was driving along the roadway, he encountered a vehicle approaching him. The fog was thick and heavy and the approaching vehicle had on its high beams. He said: "it was like the light spread out over the fog. Those lights dazzled my vision". As a result, he reduced his speed. As that oncoming vehicle drove pass, he was able to see a "darker object" before him.

[8] He later realized that this object was the truck with its lights turned off and without reflectors. The truck was parked under a large tree and there were other trees along the sides on the road. These were the factors that contributed to his view of the truck being obscured. Mr. Bell was only able to see the truck when he was about 10 ft to 13 ft away from it.

[9] He did not swerve sharply from it. Instead, he said: "I took my time as I was travelling slowly". He did not apply the brakes as he was too close to the truck. Though his visibility was impaired by the thick fog, he paid proper attention to the road. Mr. Bell said that the low beams of his bus better aided him to see the road through the fog rather than high beams.

Case for the 2nd defendant

[10] Mr. Smith was in Kingston when he received information about the state of the truck. Though he was not a mechanic, he knew that it was in need of mechanical assistance. He also knew that a wrecker would be required to remove it. Mr. Smith also did not have any intention of taking it back to Kingston.

[11] He journeyed to the Pepper main road to the location of the truck. He drove one of his other trucks to that scene. Though he knew of his responsibility to remove the

truck, he did not travel with a wrecker. He intended that evening to have the truck repaired in St. Elizabeth because it would cost him $100,000.00 to take it back to Kingston. He was concerned that the goods onboard the truck would be stolen, and so he unloaded them to the truck he drove.

[12] He testified that the disabled truck could not be towed away by the truck he drove. He explained that that truck used an air brake system which is operated by the engine. When the engine failed, the braking system locked rendering the truck immobile. Therefore, if one should manually release the braking system when the engine failed, there would be no way to stop the truck.

[13] Mr. Smith arrived there at around 9pm and left at around 11pm and Mr. Clarke was there. The truck was on the extreme left hand side of the road. The road was wide enough to accommodate two trucks and there was a street light. The street light was in the vicinity of the truck and it was on. The visibility at that time was good.

[14] As it was late in the night and they were in St. Elizabeth, they could not retain the services of a mechanic. They decided to leave the truck until the morning when they would be able to acquire the services of a mechanic to effect the necessary repairs. Before leaving the truck however, Mr. Smith turned on its four way flashers. There were also four red and white reflective strips on the back of the truck.

[15] Mr. Smith said that he had no reflective triangle to place behind the truck to warn oncoming vehicles. He however placed green bushes behind it in an attempt to erect a barricade. He sought the assistance of a friend, who resided in St. Elizabeth, to procure a wrecker based in that parish. That friend had the contact information for the wrecker service, and he did not know the number of times his friend attempted to contact them.

[16] Both Mr. Smith and Mr. Clarke spent the night in St. Elizabeth, and on the following morning they returned to the truck and saw police officers on the scene. The truck was also on a wrecker. He then identified himself as the owner of the truck, paid the wrecker fee and gave instructions for the truck to be taken to his friend’s house. It

was at this time that he observed that the truck had minor damage to the right rear lights.

Submissions for the claimant

[17] Ms. Hudson submitted that the evidence of the claimant was largely unchallenged. Liability in this case would turn on the veracity of the evidence received. Mr. Bell failed to keep a proper lookout and failed to drive with due care and attention at the material time which caused the collision with the rear of the truck. This was evidenced by his testimony that he slightly swerved to the right on seeing the truck, and that he did not apply his brakes.

[18] Mr. Smith also did not explore all the options he had opened to him in having the truck removed from the roadway. This failure caused the truck to remain on the roadway and thereby presented a dangerous obstruction for all road users. He sought to secure the services of a wrecker through a friend, and did not make any other attempts to get a wrecker when that option failed. Mr. Smith did not discharge his duty of care to fellow road users.

[19] In the circumstances, Ms. Hudson submitted, liability should be shared between Mr. Bell and Mr. Smith. She did not make any submissions on the apportionment of liability between them, but submitted that it will depend on the findings of the witnesses' credibility.

Submissions for the 1st defendant

[20] Ms. Dunbar argued that Mr. Lawrence's evidence does not show negligence on the part of Mr. Bell. His evidence, however, pointed solely to the negligence of Mr. Smith. She directed the court's attention to section 42(1) of the ***Road Traffic Act*** which mandates motor vehicles to have reflector placed on them. Mr. Smith's truck was in contravention of this provision, upon the evidence of both Mr. Lawrence and Mr. Bell.

[21] Mr. Bell's evidence substantially accords with Mr. Lawrence's evidence. They both agreed that the morning was foggy, the truck's hazard lights were off and Mr. Bell was driving slowly. Counsel posited that as Mr. Smith was not present at the time of the accident, he was unable to say with any certainty, the conditions that existed at that time. He was also not able to say whether the hazard lights were on at that time. For these reason, Ms. Dunbar continued, the court should reject his evidence.

[22] Mr. Bell took all the precautions any reasonable driver would have taken in the circumstances. These precautions were: (i) he drove slowly, (ii) he drove with his low beams, and (iii) he was attentive to the road before him. The difficultly he experienced was that the truck was not visible until he was close to it. Mr. Lawrence supported this point as he, like Mr. Bell, did not see the truck until it was very close.

Submissions for the 2nd defendant

[23] Mrs. Sewell on the other hand, submitted that the full responsibility Mr. Lawrence's injuries must be borne by Mr. Bell. The truck was parked to the extreme left of the road. There were reflective strips on the truck in addition to the flashing hazard lights. Mr. Bell, she said, did not keep a proper look out.

[24] Counsel argued that the left side of the bus was damaged upon impact. This damage occurred while Mr. Bell swerved slightly to the right lane which indicated that the truck was stationary to the extreme left of the road. The truck being stationary to the extreme left of the road, and the efforts made by Mr. Smith to secure a wrecker, were both reasonable in the circumstances.

Issue to be determined

[25] The issue for my determination is: whether the duty of care owed to Mr. Lawrence was breached by either Mr. Bell or Mr. Smith, or both, when the Hiace bus collided with the back of the abandoned truck?

A brief statement of the law

[26] The requirements of the tort of negligence are: (i) the existence of a duty of care, (ii) a breach of that duty, (iii) a causal connection between the breach and the damage, and (iv) foreseeability of the particular type of damage caused: ***Shtern v Villa Mora Cottages Ltd and Cummings*** (2012) JMCA Civ 20, at paragraph 49.

[27] Drivers of motor vehicles are required to exercise reasonable care towards persons using the roadway so as to avoid injury to them and cause damage to property. To this end, drivers are required to obey the rules of the road. Those rules are contained in the ***Road Traffic Act*** "the RTA", and the ***Island Traffic Authority Road Code*** 1987 "the Road Code".

[28] One such rule is to be found at section 51(2) of the RTA, and it imposes a duty on motorists to take such action as may be necessary to avoid accidents: ***Elizabeth Brown v Daphne Clarke et al.*** [2015] JMSC Civ. 234, paragraph 33. In respect of a stationary motor vehicle, section 53(1)(a) states that the vehicle must be placed with its near side as close to the left of the road way as possible. Also, section 53(1)(b) provides that the stationary vehicle must not be an obstruction to traffic.

[29] Additionally, the Road Code provides guidance to users of the road: ***Rudolph Kennedy v Wheels & Wheels Auto Brokers Ltd, et al.*** [2016] JMSC Civ 169, paragraph, 24. Section 95(3) of the RTA provides:

> *The failure on the part of any person to observe any provisions of the Road Code shall not of itself render that person liable to criminal proceedings of any kind, but any such failure may in any proceedings (whether civil or criminal and including proceedings for an offence under this Act) be relied upon by any party to the proceedings as tending to establish or to negative any liability which is in question in those proceedings.*

The Road Code directs drivers on how to treat with stationary vehicles. It states the following at paragraph 41:

> *41. If your vehicle has broken down on the roadway observe the following rules: -*

> *a) If possible get the vehicle to the nearest point where it will be of little inconvenience to other road users.*
>
> *b) If at night turn on your park lights before attempting any repairs and always look out for other speeding vehicles. Some cars are equipped with hazard flasher lamps, turn them on.*
>
> *c) If you believe your vehicle will require major repairs have it removed from the highway as soon as possible and avoid leaving it parked on the roadway overnight.*
>
> *d) Do not abandon a broken down vehicle on the highway, let alone, for an indefinite period*

Analysis

[30] Mr. Lawrence's evidence regarding the accident, and the injuries he suffered resulted from it, was largely unchallenged. He averred that the accident resulted from the negligence of either Mr. Bell or Mr. Smith, or both. Notwithstanding the unchallenged evidence, the burden of proving the claim rest solely on the claimant.

[31] I accept that Mr. Lawrence was injured in a motor vehicular accident whilst being transported as a passenger in the Hiace bus driven by Mr. Bell. That accident occurred at or around 4:00am on 23rd November, 2010 along the Pepper main road, St. Elizabeth, when the said Hiace bus collided with the rear of a stationary truck. The conditions that morning were foggy and dark.

[32] Mr. Lawrence gave additional evidence that, in his words, "everything happened so fast". That, in my view, indicates that he did not anticipate the collision. That was so especially in light of his undisputed evidence that Mr. Bell was driving at about 45km/h. Mr. Bell was not speeding. The truck, on the other hand, was left on the Pepper main road overnight by Mr. Smith.

[33] The duty imposed by section 51(2) of the RTA required Mr. Bell to exercise such actions as may be necessary to avoid the accident. This duty exists as he also bears responsibility to take reasonable care for the safety of his passengers. In so far as the accident occurred, and Mr. Lawrence suffered injuries as a result, Mr. Bell was prima facie in breach of that duty of care.

[34] Mr. Smith, as well, had a duty to remove the truck from the road as mandated by paragraph 41(c) of the Road Code. He left the truck on the roadway which presented a hazard to the motoring public. This also contributed to the accident that morning. To the extent that the truck was abandoned for the night, Mr. Smith was also in breach of the duty placed on him.

[35] With these findings, the circumstances are such that an explanation is required of both Mr. Bell and Mr. Smith sufficient to displace the prima facie finding of negligence. Both defendants, averred that the other was either fully responsible for the accident, or substantially caused its occurrence.

[36] Mr. Bell averred that the truck was parked in a dark section of the main road by Mr. Clarke, Mr. Smith's servant. This, the averments continued, was done without any warning or proper lighting which resulted in an obstruction to him and other road users. Mr. Smith on the other hand, averred that the accident was caused by Mr. Bell's negligent driving.

[37] Mr. Bell gave evidence, which was accepted, that the morning was dark and foggy with no street lights. He also gave unchallenged evidence that there was a vehicle approaching with its high beams, and that the glare from those lights spread across the fog and dazzled his eyes. His further unchallenged evidence was that he was driving at 45km/h with his low beams, as this aided him to see and navigate through fog easily.

[38] His vision was temporarily impaired by the dazzling high beam lights, which was compounded by the foggy, dark conditions of that morning. In response, he reduced his speed and continued driving until he observed "a darker object" between 10ft to 13ft away. He did not swerve sharply, but he took his time as he was driving slowly.

[39] Did Mr. Bell do that which an ordinary, reasonable, and careful driver would have done in the circumstances of that particular emergency?: ***Parkinson v Liverpool Corporation*** [1950] 1 ALL ER 367, at 369. To my mind, an ordinary, reasonable and

careful driver who was temporarily visually impaired, would have halted the vehicle and awaited the full and complete restoration of his sight.

[40] The conditions that Mr. Bell faced that morning required an increase in carefulness and heightened awareness to safely navigate along that roadway. This level of awareness would be achieved with no less than good visibility which called for his recovery from the dazzling lights. In other words, Mr. Bell should have stopped the vehicle and pulled over to the soft shoulder, if there was one, and await the dazzling effects to wear off. Mr. Bell did not do this.

[41] Now driving at a speed below 45 km/h, Mr. Bell saw a “darker object” between 10ft to 13ft ahead of him. He was able to see this object through the fog and while the dazzling effects yet lingered on his eyes. An ordinary, reasonable and careful driver in his position would have applied his brake. He would have approached that object, slow enough, so that he may be able to stop if the need arose. Mr. Bell did not do this.

[42] I therefore find that Mr. Bell has not displaced the prima facie finding of negligence against him. In contravention of section 51(2) of the RTA, Mr. Bell failed to discharge his duty of care to take such actions as may be necessary to avoid the accident. Though I find that Mr. Bell did not drive as an ordinary, reasonable and careful driver in his position would, I will go on to assess Mr. Smith’s case.

[43] Mr. Smith’s unchallenged evidence was that, whilst he was in Kingston, he had knowledge of the mechanical problems affecting the truck. He knew that those mechanical problems related to the engine and that the truck could only be moved by the intervention of a wrecker. He knew of his general responsibility, by law, to remove the truck from the roadway, and to avoid leaving it there overnight.

[44] There was no evidence, on his part, that he attempted to locate a wrecker to move the truck whilst he was in Kingston. There was only his assertion that he asked a friend, who resided in St. Elizabeth, to locate a wrecker based in that parish. There was also no evidence that he took the wrecker service’s number from that friend to make the

calls himself. There was, further, no evidence of the number of times that that friend attempted to call that wrecker service.

[45] Can it be said that, in those circumstances, Mr. Smith did all that he reasonably could to obtain the wrecker service? In my view, he did not act as a reasonable man faced with his circumstances would have acted. Though Mr. Smith would have this court believe that he did all that he reasonably could to remove the truck from the roadway, his evidence did not lend him support

[46] After unloading the goods, Mr. Smith said that he turned on the hazard lights and built a barricade of green bush behind the truck. Both Mr. Lawrence and Mr. Bell gave evidence, which was accepted, that there were no lights on the truck. Mr. Smith gave no evidence of seeing the lights flashing on the truck when he returned to the scene in the morning. Since the batteries worked even when the engine failed, if the hazard light had been left on at 11:00am there was no reason for them not to be on at 4:00am the following day.

[47] Neither Mr. Lawrence nor Mr. Bell gave evidence of a barricade of green bushes. Green bushes are of doubtful efficacy to warn on-coming motorists of an obstruction. Mr. Smith agreed that the truck should have been equipped with reflective triangles to be used in these very circumstances. He however had none in the truck.

[48] Mr. Smith asserted that there were reflective strips placed on the back of the truck, which Mr. Bell should have seen when his lights hit them. Again, both Mr. Bell and Lawrence denied that there were reflective strip on the truck. Mr. Smith's assertion was bald. It is a trite principle in law that he who asserts must prove. It was well within his purview to have provided the necessary proof of those reflective strips. This he did not do.

[49] In all the circumstances, Mr. Smith's evidence has failed to displace the prima facie finding of negligence. Mr. Smith did not do all that an ordinary, reasonable and careful driver, placed in his position, would have done.

Conclusion

[50] I have come to the conclusion, on a balance of probability, that both Mr. Bell and Mr. Smith were negligent. Liability is apportioned equally.

Assessment of damages

Special Damages

[51] Special damages were agreed at $55,350.00. The award for Special damages is, therefore, $55,350.00 with interest at 3% from 23rd November, 2010, to 7th April, 2017.

General Damages

[52] Mr. Lawrence was treated at the Mandeville Regional Hospital by Dr. Joyce Deterville-Thames on 23rd November, 2010. In her report dated the 7th March, 2011, the examination revealed a 10x3 cm laceration to the left shoulder including muscle. The treatment prescribed was:

1. *Tetanus Toxoid 0.5cc IM Stat*
2. *Voltaren 75mg IM Stat*
3. *Suturing of laceration*
4. *X-ray of left shoulder, Chest – normal*
5. *Prescription for:*
    a) *Amoxil 500mg pot id x 1/52*
    b) *Nise 100mg po bdx 1/52*
    c) *Bactroban Ointment for dressing*

[53] On 14th December, 2010, he was examined by Dr. Peter Swaby at the Apex Medical Centre. That examination revealed: (i) Muscle spasm and tenderness over both sides of his lower back, (ii) 4cm laceration to the left, and (iii) whiplash. The treatment recommended was muscle relaxant and a topical anti-inflammatory.

[54] He was again examined on 22nd August, 2014. This examination was done by Dr. Wayne Palmer at the Alkatec Medical. The results of that examination was:

> *(i) A 6cm scar to the anterior shoulder with mild anterior deltoid wasting*
>
> *(ii) 1 cm scar to the superior aspect of his shoulder.*
>
> *(iii) He complains of pains when the shoulder is abducted above 100 degrees and flexed beyond 100 degrees. He also complains of pains with internal rotation.*
>
> *(iv) He was tender to the left chest wall, but there was no specific again that the tenderness was localised to.*
>
> *(v) X-rays of his shoulder were reported as showing a dislocation of the acromioclavicular joint.*

Dr. Palmer assessed Mr. Lawrence as having a laceration to the anterior shoulder with some deltoid muscle injury which was now fully healed with associated shoulder pains possibly related to the acromio clavicular joint. He also had chest pains which were non-specific. The permanent partial disability (PPD) as a result of his injury would be at 3% upper extremity which is equivalent to 2% whole person.

[55] Ms. Hudson submitted on behalf of Mr. Lawrence that an award ranging between $1,800,000.00 and $2,000,000.00 would be appropriate in the circumstances. Counsel placed reliance on ***Jotham Treasure v Thomas Bonnick et al.*** CL. 2001/T 026, (unreported), delivered 28th March, 2008. The claimant in that case sustained a fracture to the right clavicle (collar bone) resulting in pains to that shoulder. He was awarded the sum of $650,000.000, which updates to $1,257,689.18.

[56] She argued that Mr. Lawrence's injury exceeded those of the claimant in ***Jotham Treasure v Thomas Bonnick et al.*** *supra,* case. Ms. Hudson argued that consideration should be given to the 10cm laceration to Mr. Lawrence's shoulder, along with a 6cm scar and the evidence of wasting of the deltoid muscles. She, again, submitted that further to those, Mr. Lawrence experienced soft tissue injuries to the neck, back and chest with pains four years post the accident. These resulted in 2% PPD. These additional considerations were absent from the ***Jotham Treasure v Thomas Bonnick et al.*** case.

[57] Counsel further submitted ***Trevor Benjamin v Henry Ford & Ors,*** Claim No. HCV 02876 of 2005, delivered on 23rd, March 2010, as guidance on the appropriate award for those additional considerations. The claimant here suffered from, what was characterized as "soft tissue injuries". The claimant was awarded the sum of $700,000.00, which updates to $1,062,963.00

[58] Ms. Dunbar submitted on behalf of Mr. Bell that an appropriate award for general damages to Mr. Lawrence was $1,000,000.00. She relied on ***Turkhiemer Moore v Elite Enterprises LTD & Ors,*** CL 1995/M168, delivered 29th February, 2000. Here, the claimant suffered a fracture of right clavicle, multiple bruises to upper limb, multiple bruises to head with haemotoma & possible cerebral concussion, and loss of consciousness. Mild functional disability was assessed at 3% of the upper left limb, equivalent to 2% PPD. The claimant was awarded $275,000.00, which updates to $1,234,800.00.

[59] The final case relied upon by counsel was ***Barrington Walford v National Water Commission & Dunn***, CL 1996/W 073, 12th April, 1999. The claimant here suffered a dislocation of the shoulder, trauma to the back, abrasion to the left posterior shoulder & scapula, and pain up left side of neck to left side of head. The claimant was awarded the sum of $325,000.00, which updates to $1,574,033.00.

[60] Like Ms. Dunbar, Mrs. Sewell also submitted that an appropriate award for Mr. Lawrence in the circumstances would be $1,000,000.00, and she placed reliance on ***Turkhiemer Moore v Elite Enterprises LTD & Ors*** *supra*. She argued that Mr. Lawrence's injury was not as serious as those of the claimant in this case.

[61] The court must bear in mind the principle of *restitutio in integrum* in arriving at an appropriate award. That is, the claimant must be placed in the position he would have been, had the incident not occurred on December 1, 2006. This must be done as far as money can do it. Equally to be borne in mind is the dictum of Lord Reid in ***H. West & Son Ltd. V Shepherd*** [1964] A.C. 326, 341, that "compensation should be based much less on the nature of the injuries than on the extent of the injured man's consequential

difficulties in his daily life". Further, in as far as reference to previous awards is concerned, the reasoning in ***Beverley Dryden v Winston Layne*** SCCA 44/87 delivered 12th June, 1989 is that awards are to be reasonable, moderate and comparable.

[62] Mr. Lawrence, like the claimants in those cases, suffered an injury to his shoulder. However, the evidence was that he suffered that injury when Mr. Bell collided with the right rear of Mr. Smith truck. He was a front seat passenger in Mr. Bell's bus. I did not find ***Trevor Benjamin v Henry Ford & Ors*** *supra,* to be of any assistance as the characterization of the injuries to the claimant as "soft tissue injuries" were not comparable with Mr. Lawrence's injuries. I also did not find ***Barrington Walford v National Water Commission & Dunn*** *supra,* to be any assistance as Mr. Lawrence's injuries were not as extensive as the claimant's in that case.

[63] The extent of Mr. Lawrence's injury is comparable to those of the claimants in both ***Jotham Treasure v Thomas Bonnick et al. s****upra,* and ***Turkhiemer Moore v Elite Enterprises LTD & Ors*** *supra, a*s those claimants' clavicle was fractured. Mr. Lawrence, however, suffered a 10x3 cm laceration to the left shoulder including the muscle. While, in the x-ray to his shoulder disclosed a dislocation of the acromioclavicular joint.

[64] Having considered the matter, the court is of the view that a just award for general damages should be $1,200,000.00 with interest at 3% from 12th May, 2012 to 7th April, 2017.

[65] Costs are awarded to the claimant, to be taxed if not agreed.