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Judgment: approved by the Court for handing down | *Delivered:* **09/12/10**
*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION

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BETWEEN:

GEMMA STOKES

Plaintiff/Appellant;

-and-

ROBERT JAMES McAULEY

Defendant/Respondent.

_____

McCLOSKEY J

I INTRODUCTION

[1] This is the Plaintiff's appeal against a decree of the Deputy District Judge for the County Court Division of Ards. By her Civil Bill, the Plaintiff claimed damages arising out of a road traffic accident which occurred on 4th June 2009. Liability was admitted. Furthermore, the Defendant agreed to compensate the Plaintiff for the amount specified in a credit hire company's invoice: this totalled some £848 with constituent elements of £600 (for hire of a replacement vehicle), £82.50 (a collision damage waiver charge) and £50 (in respect of delivery and collection). The issue decided by the District Judge and the sole issue to be determined in this appeal concerned the amount claimed by the Plaintiff for the cost of repairs to her vehicle, a fraction under £2,300. The District Judge made a decree of £2,848.13, of which £2,000 represented vehicle repair costs and the Plaintiff appeals accordingly.

[2] While the amounts involved in this appeal are, on any showing, of extremely modest dimensions, the central issue to be determined requires the court to

ascertain, and then apply, the principles which govern the measure of damages where the victim of a tort seeks compensation for the cost of repairing his goods damaged by the Defendant's tortious conduct. Since claims of this kind are so recurrent, some reflection on the governing principles might be beneficial and will hopefully reduce the number of appeals to the High Court in small value cases.

II THE DISPUTED ISSUE

[3] The sole issue in dispute between the parties may be summarised as whether the Plaintiff should properly have had her vehicle repaired at a cost of almost exactly £2,300, having regard to its pre-accident value. This is the issue on which the evidence adduced from the parties' respective motor assessors focussed.

[4] On behalf of the Plaintiff, Mr. Bonar testified that he inspected the Plaintiff's vehicle on 11th August 2009. He recorded the particulars of the manufacture, registration number, date of registration and mileage of the vehicle. He reported in writing to the insurers that the cost of repairing the vehicle was an estimated £1,955 plus VAT. He further advised that the repair costs had been agreed with the repairing garage. The damage to the vehicle was concentrated in the offside front area.

[5] In justification of the decision to repair the vehicle for some £2,300, rather than declare it a write off, Mr. Bonar testified that the retail value of a vehicle of this model, age and mileage was specified in "Glass's Guide" to be £2,850. According to his evidence, he also tested the local market, with a view to ascertaining the "showroom" purchase price which the vehicle could be reasonably expected to achieve. This impelled him to the view that the vehicle had a value of £3,000 approximately. He measured its maximum salvage value as £500, testifying that a person in the Plaintiff's position would be "*at the mercy of*" vehicle salvage merchants. He was disposed to accept that the "showroom price" might be no more than £2,850/£2,875, but no less. He was prepared to agree these figures with the Defendant's motor assessor. When asked whether the repair of this vehicle was an economically viable proposition, he replied, firmly and confidently "*very much so*". Elaborating, he testified that the Plaintiff's vehicle was "*much below*" the level where salvage would even be considered.

[6] Mr. Bonar acknowledged that the variables involved in the retail price of a used vehicle included its mileage and the car dealer's trade in profit margin, where applicable. He did not dispute that the notional, hypothetical used car purchaser who is not also trading in a vehicle can negotiate a price below the retail price. However, the main variables in play here are the negotiating skills and abilities of the purchaser and the prevailing market conditions. He did not dispute that the *trade price* specified in Glass's Guide was £1,500. On this basis, it was put to him that the "*mid book*" value of the vehicle was about £2,200. However, he retorted that the mid book price is not the "*right*" price for this particular vehicle. He espoused the proposition that in *every* case the retail price is the correct price.

[7] The Defendant's motor assessor, Mr. Donnelly, testified, in accordance with his report (which was not prepared until June 2010), that, having regard to the "Glass's Guide" figures, the retail price [i.e. the notional motor dealer's sale/asking price] of the Plaintiff's vehicle was measured at £2,850, while its trade price [i.e. what one motor dealer would pay to another] was £1,500. The "*mid book*" price was in the region of £2,150 - £2,350. Ultimately, Mr. Donnelly adhered to the firm figure of £2,350. Thus both parties' assessors were *ad idem* as regards the basic figures. The sole issue which divided them was *how*, applying these figures, the estimated pre-accident value of the Plaintiff's vehicle was to be measured. Mr. Donnelly espoused the thesis that the "*mid book*" valuation measure is "*normally accepted as a reasonable market value*". His evidence was that, deducting salvage of £500, the estimated pre-accident value of the vehicle was, therefore, £1,850. Mr. Bonar, in contrast, espoused as the appropriate valuation mechanism the *retail* price of the vehicle, £2,850, less salvage of £500, producing an estimated pre-accident value of £2,350.

[8] It seems to me that neither of the motor assessors was disposed to acknowledge any *via media* between their respective positions. Thus, the evidence before the court established a contest between the competing figures of £2,350 (Plaintiff) and £1,850 (Defendant). The evidence adduced included a publication of the "Financial Ombudsman" relating to motor insurance and vehicle valuation. In Section 2 of this publication, under the rubric "Our General Approach", it is stated:

> "*In most cases, we assess the market value as the retail price which the policyholder would have had to pay for a comparable vehicle at a reputable dealer, immediately before the date of the damage/theft.*
>
> *This may be lower than the price at which the vehicle is advertised, as the dealer may have built in a margin for negotiation.*
>
> *It is likely to be higher than the price payable in a private sale or at an auction and higher than the trade value (which is the price a dealer would pay before adding its mark up).*"

The publication emphasizes that the exercise of valuing a used vehicle is not an exact science. The propriety of taking into account motor trade guide valuations (such as the Glass's publication) is confirmed. It is suggested that evidence from an independent engineer can be "*helpful*". Where there is evidence from an insurer's engineer, it will be necessary to consider the independence of such a report. The publication also acknowledges:

> "*An engineer's report can be useful evidence, from someone who has actually inspected the vehicle, of what its precise details are. We welcome this from either party, as it can help in assessing the fair market of the value of the vehicle.*"

III GOVERNING PRINCIPLES

[9] This being a claim in tort, the overarching principle is *restitutio in integrum.* This principle requires the court to place the Plaintiff in the position which she would have occupied and enjoyed but for the Defendant's tort, insofar as money can achieve this. (McGregor on Damages, 18th Edition, paragraph 1-023). Where the Defendant's tortious conduct has damaged the Plaintiff's goods, it is long established that the normal measure of damages is the amount by which the value of the goods has been thereby diminished (McGregor, paragraph 32-003). It is clear that this principle applies irrespective of whether the damaged goods are a ship, a private vehicle or some personal possession.

[10] How is the diminution in the value of the damaged goods to be assessed? In ***Darbishire –v- Warran*** [1963] 1 WLR 1067, the Plaintiff elected to spend £192 on repairing his second hand vehicle, notwithstanding advice from both his insurers and the repairing garage that the cost of repairs would be uneconomic, in circumstances where the motor trade guide price for the vehicle was £85. The particular vehicle was not readily available in the second hand market. However, there was evidence that comparable vehicles were available for £80 - £100. The Plaintiff readily accepted that he had made no attempt to source a comparable vehicle. The County Court judge awarded the Plaintiff the cost of repair. The Court of Appeal reversed this finding. Harman LJ, having recited the principle of *restitutio in integrum*, continued (at p. 1071):

> "*It has come to be settled that in general the measure of damage is the cost of repairing the damaged article; but there is an exception if it can be proved that the cost of repairs greatly exceeds the value in the market of the damaged article. This arises out of the Plaintiff's duty to minimise his damages. Were it otherwise it would be more profitable to destroy the Plaintiff's article than to damage it. In the latter cases the measure is the value of the article in the market and this, of course, supposes that there is a market in which the article can be bought. If there is none, then the cost of repairs may still be claimed.*"

Later, the learned Lord Justice continued (at p. 1072):

> "*The true question was whether the Plaintiff acted reasonably as between himself and the Defendant and in view of his duty to mitigate the damages.*"

Answering this question in the negative, Harman LJ drew on a passage in the judgment of Lord Sterndale MR in an Admiralty case, "***The Minnehaha***" [1921] 6 Lloyds Law Reports 12, at p. 13. The clear thrust of this passage is that a ship owner "*... does not act reasonably in repairing the ship if the repaired value is very much less than*

the cost of repairing her". The thrust of the passage is that the onus rests on the Plaintiff to establish that he acted reasonably.

[11] One finds a somewhat different emphasis in the judgment of Pearson LJ, where the Plaintiff's duty to mitigate his damage features prominently (at p. 1075):

> "*For the purposes of the present case it is important to appreciate the true nature of the so-called duty to mitigate the loss or duty to mitigate the damage ...*
>
> *The true meaning is that the Plaintiff is not entitled to charge the Defendant by way of damages with any greater sum than that which he reasonably needs to expend for the purpose of making good the loss.*"

Pearson LJ concluded (at p. 1076):

> "*But he was not justified in charging against the Defendant the cost of repairing the damaged vehicle when that cost was more than twice the replacement market value and he had made no attempt to find a replacement vehicle.*"

Delivering the third judgment of the court, Pennyquick J devised a general principle of reasonableness and married this with the Plaintiff's obligation to mitigate his damage. He observed that the two competing restitutionary methods are, typically, repair of the damaged article or the purchase of a comparable replacement. His Lordship continued:

> "*In such a case the measure of damage is restitution by whichever method it would be reasonable for the owner of the chattel to adopt in the particular circumstances. In considering what is reasonable one must, I think, having regard to the owner's obligation to mitigate damage, treat him as looking only to his pecuniary interest and leave out of account matters of mere taste or convenience ...*
>
> ***Where the cost of repairs would exceed the market value of the article and in the absence of special circumstances, the reasonable method must be to purchase a comparable article.***"

[My emphasis].

[12] In a further decision of the English Court of Appeal, ***Payton –v- Brooks*** [1974] RTR 169, Edmund-Davies LJ adverted to the "*guiding principle*" of *restitutio in integrum* (at p. 173) and approved the formulation in the 13th Edition of McGregor on Damages (at paragraph 946):

> "*The normal measure of damages is the amount by which the value of the goods damaged has been diminished. This, in the ship collision cases, has invariably been taken as the reasonable cost of repair ...*
>
> *In the case of goods other than ships the cost of repair has now become established as* ***prima facie*** *the correct measure of the Plaintiff's loss. This has been accepted in a number of cases at first instance and is confirmed by* ***Darbishire –v- Warran... .***"

[My emphasis].

I would observe that the corresponding passage in the current edition (18th) of McGregor [paragraph 32-003] is couched in identical terms. Continuing, Edmund-Davies LJ, citing the decision in ***Darbishire*** with approval, observed that its rationale was that the Plaintiff –

> "*... had failed to mitigate his loss in a reasonable manner and was entitled to recover not the cost of the repair but only the diminution in market value.*"

[At p. 174].

Roskill LJ stated (at p. 176):

> "*There are many cases which arise, whether in the field of contract law or of tort, where* ***the cost of repairs is a prima facie method of ascertaining the diminution in value. It is not, however, the only method of measuring the loss.***"

[My Emphasis].

The court concluded that, *in principle,* any duly proven diminution in the market value of the damaged goods is also compensatable.

[13] In ***Dimond –v- Lovell*** [2002] 1 AC 384, where the House of Lords considered, *obiter*, the measure of damages for the use of a replacement vehicle supplied by a credit hire company, Lord Hobhouse stated, at p. 406:

> "*Mrs. Dimond was at the time of the accident the owner and person in possession of her car. It was damaged. Its value was reduced. This can be expressed as a capital account loss. This loss can be measured as being the cost of making good the damage plus the value of the loss of its use for a week.*

> *Since her car was not unrepairable and was not commercially not worth repairing, she was entitled to have her car repaired at the cost of the wrongdoer.* ***Thus the measure of loss is the expenditure required to put it back into the same state as it was in before the accident.***"

[My emphasis].

Lord Hobhouse added:

> "*However, one of the relevant principles is that compensation is not paid for an avoided loss. So, if the Plaintiff has been able to avoid suffering a particular head of loss by a process which is not too remote (as is insurance) the Plaintiff will not be entitled to recover in respect of that avoided loss. If the loss has only been avoided by incurring a substituted expense, it is that substituted expense which becomes the measure of that head of loss.* ***Under the doctrine of mitigation, it may be the duty of the injured party to take reasonable steps to avoid his loss by incurring that expense.***"

[My emphasis].

A correct understanding of the highlighted words is essential. It seems to me that, properly analysed:

(a) The "*avoided loss*" of which Lord Hobhouse is speaking is the loss of use of the Plaintiff's vehicle, which has been damaged by the Defendant's tort and must be repaired in consequence.

(b) The "*substituted expense*" is, in this context, the expense incurred in securing a replacement vehicle.

(c) In incurring this substituted expense, the Plaintiff is to be regarded as mitigating the loss which would otherwise occur, namely the loss of use of his damaged vehicle.

[14] In ***Clark –v- Ardington Electrical Services*** [2003] QB 36, Aldous LJ referred to the above passage in the opinion of Lord Hobhouse with the following preface:

> "*[84] In our judgment a fundamental distinction must be drawn, for present purposes, between repair costs and hire charges. Where a vehicle is damaged by the negligence of a third party, the owner suffers an immediate loss representing the diminution in value of the vehicle.* ***As a general rule, the measure of that damage is the cost of carrying out***

> ***the repairs necessary to restore the vehicle to its pre-accident condition ...***
>
> *[88] In a case of direct loss, subsequent events will operate to reduce or extinguish the loss only insofar as such events are referable to the claimant's duty to mitigate his loss and hence referable in a causative sense to the commission of the tort ...*"

[Emphasis added].

The highlighted words require no elaboration: they are enunciating a general principle. As regards the quotation from paragraph [88], it seems to me that this chimes with Lord Hobhouse's statement in ***Dimond*** (*supra*), and hence, yields the same analysis as that conducted above. Thus while every tort victim is obliged to mitigate his loss arising out of the tort, the law of evidence intrudes to the extent that the onus rests on the Defendant to prove that the Plaintiff failed to take reasonable steps to mitigate his loss and/or acted unreasonably in purported mitigation thereof.

[15] Finally, some brief reflection on the principles of mitigation of damage are appropriate. While the concept of mitigation of loss/damage is familiar to most practitioners, its precise contours are a little more intricate and elusive than might at first blush appear. As acknowledged in McGregor (*op. cit.*, paragraph 7-003), this is "*a difficult topic*". This duly acknowledged, the author advances three basic rules:

(a) The Plaintiff cannot recover for any avoidable loss, applying the barometer of reasonableness.

(b) The cost incurred by the Plaintiff in taking reasonable steps to mitigate his loss is recoverable.

(c) Where the Plaintiff's mitigation efforts efficaciously avoid a loss, the resulting benefit accrues to the Defendant: in short, the Plaintiff cannot recover for avoided loss.

In a later passage, the author addresses the topic of burden of proof:

> "7-019. *The onus of proof on the issue of mitigation is on the Defendant. If he fails to show that the claimant ought reasonably to have taken certain mitigating steps, then the normal measure will apply. This has been long settled ...*".

Commenting on a series of reported cases, the authors of **Clark and Lindsell on Torts (**20th Edition**)** suggest that judges "*... are reluctant to impose excessive demands on claimants*" [paragraph 28-09]. Thus, in its retrospective review, the court will not be unduly censorious of the conduct of the tortfeasor's victim in reaction to the tort.

[16] Furthermore, context is everything. This is illustrated in ***Lagden –v- O'Connor*** [2004] 1 AC 1067, where the impecunious victim of a tortfeasor's negligent driving received a measure of sympathetic and special treatment. There, by a majority, the House of Lords held that where the victim vehicle owner has a reasonable need to hire a replacement vehicle but is constrained by limited financial means to do so through a credit hire company, thereby incurring greater expense (on account of higher commercial rates and certain inbuilt additional benefits), the consequential loss is recoverable. Thus, in that particular context, there exists a dichotomy of impecunious Plaintiffs and affluent Plaintiffs. The former are characterised by their "*... inability to pay car hire charges without making sacrifices the Plaintiff could not reasonably be expected to make*".

IV <u>CONCLUSIONS</u>

[17] What is the correct approach in principle to the measurement of damages where the Plaintiff's goods are damaged by the Defendant's tort? From the decided cases considered above, I distil the following principles:

(a) The guiding principle is that of *restitutio in integrum*.

(b) As a general rule, the appropriate measure of damages is the cost of repairing the damaged goods. In common with every general rule or principle, this is not absolute or universal in character.

(c) Whether the general rule applies will depend on the evidential matrix in the particular case.

(d) The general rule contains a discernible element of objectively assessed reasonableness.

(e) In tort proceedings, the onus of establishing his entitlement to damages rests on the Plaintiff and the standard of proof is the balance of probabilities.

(f) The court's resolution of disputed issues in litigation belonging to this sphere must give full effect to the burden and standard of proof, while acting on *evidence*, as opposed to judicial instinct or suspicion. Furthermore, it seems to me that there is limited scope for the operation of the doctrine of judicial notice in this sphere.

(g) In any litigation context where a Defendant bears an onus of proof, this can be discharged by a variety of media : cross-examination of the Plaintiff, the adduction of agreed documentary evidence, resort to the

Civil Evidence (NI) Order 1989 and the calling of witnesses – singly or in combination.

(h) It is conceivable that in a particular case the general rule, as formulated above, will be displaced without any evidence on behalf of the Defendant. However, in practice, the more likely scenario is that both parties will adduce evidence and the court will be required to resolve any conflict (as in the present case).

[18] In those cases where the victim of the Defendant's tort arranges to obtain a replacement vehicle, as the House of Lords' decisions make clear, this is to be viewed through a particular legal prism: it constitutes a course of action which mitigates the damage which the Plaintiff would otherwise sustain through loss of use of his damaged vehicle. Thus, in so-called "credit hire" cases, this gives rise to the general principle that the amount specified in the credit hire company's invoice is *prima facie* the measure of the Plaintiff's loss. This is subject to "*stripping out*" any additional benefits **and** any issue of mitigation of damage **and** any issue of impecuniosity. However I would formulate two propositions. The first is that where "*stripping out*" is not agreed between the parties (a rare occurrence), the court can only undertake this exercise on the basis of *evidence*. The second is that where mitigation of damage is canvassed, the burden is on the Defendant to establish that the Plaintiff failed to take reasonable steps to mitigate his loss - bearing in mind that the loss, properly analysed, is the loss of use of his vehicle - or acted unreasonably in purported mitigation thereof.

[19] Logically, I consider that where the Plaintiff claims damages for the cost of repairing his vehicle, the same legal prism applies. In electing to repair his vehicle, the Plaintiff is mitigating the loss which would otherwise be suffered by him viz. the loss of use of his vehicle. Thus, where his action for damages incorporates a claim for vehicle repair expenses, the amount thus claimed is *prima facie* the measure of his damages. The court will award this amount, unless the Defendant discharges his burden (via any or all of the media outlined above) of proving that, in incurring this expense, the Plaintiff failed to take reasonable steps to mitigate his loss (being a loss of use of his damaged vehicle) and/or acted unreasonably in purported mitigation of such loss. While I acknowledge that in some of the decided cases considered above certain of the judicial formulations may not be crystal clear, this conclusion seems to me consonant with established principle. Furthermore, it possesses the attractions of logic, coherence and certainty, all intrinsic values of the common law.

Application to the Present Case

[20] As the judgments in ***Darbishire –v- Warran*** make clear, the exercise to be performed by the court in a case of this kind is not a rigid, arithmetical one. The question posed by Harman LJ is whether the cost of repairing the damaged article *greatly exceeds* its estimated market value. The test devised by Lord Sterndale MR in

*"**The Minnehaha**"* was whether the repaired value is "*very much less than*" the cost of the repairs. Thus, in this kind of case, there are flexible margins. Accordingly, I reject the Defendant's argument that where the cost of repairing a damaged vehicle exceeds *by any amount* its estimated pre-accident value, the former is never recoverable and the latter must invariably be the correct measure of damages. The authorities make clear that this absolutist proposition is unsound in principle.

[21] For the same reason, I cannot accept the evidence of the Plaintiff's motor assessor, Mr. Bonar, that the assessed "retail" price of the vehicle is *invariably* the appropriate measure of its pre-accident value. This proposition makes no allowance for the acknowledged variables *and* the inexact science in play. Mr. Donnelly's approach was more flexible: he was prepared to accept as a reasonable possibility that the "retail" value of the Plaintiff's vehicle *could* represent its pre-accident value. While he maintained that this was unlikely, since the notional purchaser not trading in a vehicle would have good prospects of negotiating some discount on the retail price, he did not dismiss it as a reasonable possibility. Furthermore, based on Mr. Donnelly's evidence, I find that "mid book value" is a mechanism of convenience for settling claims between insurance companies, a recognised practice in the insurance industry. However, the question for the court will always be: what is the pre-accident value of the Plaintiff's vehicle *based on all the evidence adduced*? The two contexts – insurance industry practice and judicial adjudication - differ.

[22] In the present case, I find that the pre-accident value of the Plaintiff's vehicle was £2,850. I base this finding on three principal factors. The first is the concessions which Mr. Donnelly was disposed to make [*supra*]. The second is that Mr. Bonar had the advantage of inspecting the Plaintiff's vehicle at the material time viz. in the aftermath of the subject accident. The third is my acceptance of Mr. Bonar's evidence that, at that time, he researched the "retail value" viz. the motor trader's asking price for vehicles comparable to the Plaintiff's vehicle and found that this was around £2,850. Since the parties' respective motor assessors are agreed about the allowance to be made for salvage, it follows that the pre-accident value of the Plaintiff's vehicle was, in my view, £2,350. Thus there can be no basis for awarding the Plaintiff anything less than the cost of repair, which is agreed in the sum of £2,298.97. It follows that I disagree with the deputy District Judge's conclusion that the Plaintiff should be awarded £2,000 only for this head of damage. I allow the appeal and vary the decree accordingly to £3,147.10.

[23] It is appropriate to add that even if I had preferred the evidence of Mr. Donnelly that the "mid book" value should prevail, this would have made no difference to the outcome, given the modest financial margin separating the figures of £1,850 and £2,298.97 [circa £450]. In short, the difference between these two figures would not have been sufficient to displace the normal measure of damages, namely the cost of repairing the vehicle. In the language of Lord Sterndale MR, I would not have considered the repaired value of the Plaintiff's value to be "*very much less than*" the cost of repairing it. Adopting the comparable formulation of

Harman LJ, the cost of repairs did not "*greatly exceed*" Mr. Donnelly's preferred pre-accident market value.

Costs

[Following argument]

I award costs above and below to the Plaintiff, the appeal costs to be taxed in default of agreement. I further order payment out of the lodgement of £2,900, on the usual terms.