CV 03924

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

BERNARD VAN HEES and L.K. VAN HEES

Plaintiffs

- and -

XEROX CANADA LTD. and BRIAN K. PETTIFOR

Defendants

Action for damages resulting from a motor vehicle accident.

REASONS FOR JUDGMENT OF THE HONOURABLE JUSTICE J. Z. VERTES

Heard at Yellowknife, Northwest Territories
on September 17 & 18, 1996

Reasons filed: October 1, 1996

Counsel for the Plaintiffs: Michael D. Triggs

Counsel for the Defendants: Noel Sinclair

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REASONS FOR JUDGMENT

1 This case requires an assessment of the damages suffered by the plaintiffs as the result of a motor vehicle accident. The damages claimed are strictly for out-of-pocket expenses. While the amounts are not great, the claims were contested and therefore more trial time than one would normally expect necessary was consumed by this case.

2 The accident occurred on April 10, 1992. The plaintiffs' vehicle, a 1981 Datsun, was being driven at the time by the plaintiff Bernard Van Hees (whom I shall refer to expressly as "the plaintiff"). It was struck by the defendants' vehicle. A statement of claim was filed on June 16, 1992. A statement of defence was filed in which liability was denied. The matter was eventually set for trial. In the pre-trial brief filed on behalf of the defendants, mere days before the trial date, liability was admitted. This admission was formally confirmed by defendants' counsel at the opening of trial.

3 The plaintiff is a professional engineer living in Alberta. He had come to Yellowknife on a three-month contract to supervise several construction projects. He

brought with him a motorhome in which he planned to live. He also brought the Datsun vehicle. This vehicle had been modified, at the plaintiff's expense, with a hitch and wiring as well as an automatic clutch so it could be towed. It had been purchased second-hand in 1990 for both personal and business reasons. First, it was a vehicle that Mrs. Van Hees could use with comfort and also one that the plaintiffs would take, towed behind their motorhome, when they went to the southern United States for lengthy vacations in the winter months. Second, it was a vehicle used by the plaintiff in his work to go off-road to job sites and was outfitted with a portable desk and other supplies. It was apparently in good condition with only 80,000 kilometres recorded on its odometer.

4 Many more facts were adduced during the trial but I will touch on the pertinent ones in my discussion of the specific claims.

Costs of Repair:

5 The day after the accident the plaintiff reported the loss to his own insurer. Because of the age of the vehicle they offered to reimburse him only the book value, approximately $700.00. The plaintiff then took matters into his own hands. He communicated extensively with the defendant Xerox and then with that defendant's insurers. He obtained a repair estimate of $3,984.11. The defendant's insurers wanted their own independent appraisal. The appraiser regarded the vehicle as a total loss. His opinion as to actual cash value was $2,814.10. The plaintiff went ahead with repairs. The total cost came to $5,089.12. The difference between the final repair bill and the initial estimate was due to higher than anticipated costs in obtaining parts and the fact that the original estimate did not include the cost of refinishing.

6 The plaintiffs claim the cost of repairs. The defendants submit that the plaintiffs are only entitled to the actual cash value. On February 24, 1993, after this action was commenced, the defendants paid the amount of the actual cash value to the plaintiffs.

7 Much of the argument before me was over the question of whether it was "reasonable" for the plaintiff to repair the vehicle. The issue of "reasonableness" applies as well to some of the other claims advanced by the plaintiffs.

8 The principle of "reasonableness" was noted in *Nan v Black Pine Manufacturing Ltd.* (1991), 80 D.L.R. (4th) 153 (B.C.C.A.), a case involving the destruction of a home. Wood J.A., at page 157, referred to the long-established principles applicable to the assessment of damages in tort actions:

> The first of those principles is reflected by the maxim *restitutio in integrum*, the damages shall be such as will, so far as money can, put the plaintiff in the same position as he would have been had the tort not occurred. The second is that the damages awarded must be reasonable both to the plaintiff and to the defendant.
>
> The result of the application of these principles, in most cases involving the tortious loss of or damage to property, will be that replacement costs will at least be the starting point for the assessment of damages. Whether or not the damages based on such costs should then be adjusted, either for pre-loss depreciation or post-reinstatement betterment, will depend on what is reasonable in the circumstances. No rules can be fashioned by which it can invariably be determined when such allowances should be made. It must, in all cases, turn on the facts peculiar to the case being considered.

9 In situations where property is damaged to such an extent that the cost of repairs exceeds its market value, the general rule has become that the plaintiff is only entitled to the actual market value of the property. But this does not apply to all situations. What is required is an objective assessment of the reasonableness of a plaintiff's conduct if

repairs are effected that are higher in cost than the value of the property. Personal considerations peculiar to the plaintiff are relevant, but the decision to repair must still be objectively reasonable. This was explained by Professor S.M. Waddams in The Law of Damages (2nd ed., 1995) at para. 1.2430:

> In many cases it has been held that the plaintiff is not entitled to the cost of repair, where this is uneconomic. This conclusion rests on the assumption that a replacement is reasonably available in the market; where this is not so, repairing the damaged chattel may be reasonable, and in some such cases the cost of repair has been allowed. Plainly, there must be limits on the plaintiff's right to recover the cost of repairs even if the plaintiff will certainly or has actually spent money on having them done. The cost of actually restoring a seriously damaged automobile might be astronomical. The plaintiff who claims the cost of repair must show that she has not acted (or would not act) unreasonably in actually effecting the repairs. The possibility of actually carrying them out (or actually having carried them out) is evidential but not conclusive that the repairs are reasonable. It may be added that in the case of property for personal use, such as an automobile or residential land, it is probable the courts will be sympathetic to the plaintiff whose personal preferences, though not conclusive, are worthy of some protection. (citations omitted)

10 Finally, as a general point, it must be remembered that whether a plaintiff has acted reasonably is in every case a question of fact and not of law: *Moore et al. v. Der Ltd.*, [1971] 1 W.L.R. 1476 (C.A.).

11 In my opinion, based on all of the evidence presented, the plaintiffs acted reasonably in effecting repairs. The vehicle had particular attributes for the plaintiffs' personal and business use. It had been specially modified for those uses. To obtain a similar replacement vehicle to satisfy all of those uses would have required much time and effort. It would undoubtedly have cost much more than the actual cash value to purchase another used car and have it modified in similar fashion.

12 I am also not satisfied that the evidence warrants the necessary conclusion that the vehicle was a total loss. The defendants' appraiser testified that generally if the cost of repairs exceeds the value of the vehicle, or comes within a certain percentage of the value, after deducting the salvage value, then the vehicle may be considered a total loss. I accept the witness' evidence but, in this particular case, he made no calculation of salvage value and, while he included the two hitch and wiring modifications in his estimates, he did not account for the clutch adaptation. His estimate of market value was hampered by an inability to test-drive the vehicle. The estimate is also based in part on estimates obtained from dealers who did not actually inspect the vehicle. Even if all of these factors had been accounted for the vehicle may still be regarded a constructive total loss, but I do not think that is the only possible conclusion.

13 I therefore award the total cost of repairs as damages to the plaintiffs.

Rental of Replacement Vehicle:

14 After the accident, the plaintiff rented a replacement vehicle. He claims for the cost of the rental, at $70 per day for 40 days, but with an actual total cost of $2,771.30. The defendants say the cost is excessive.

15 The plaintiff required a vehicle to fulfill his contractual obligations. He also required a vehicle that could go off-road to job sites. He did not find a rental automobile that was practical, so he rented a truck. I find this quite reasonable.

16 The daily rate of $70 included a fee for storage of the motorhome on the rental company's lot. The defendants say that there should be a breakdown and an adjustment for that component. I do not agree.

17 First, there was uncontradicted evidence from the plaintiff that in his experience $70 was a reasonable rate for this type of vehicle. Second, on February 24, 1993, the defendants also paid to the plaintiffs the sum of $1,470.00 to cover rental costs for 21 days. There was no evidence before me that this payment was made on a without prejudice basis nor as to why the period of 21 days was acceptable. It seems to me that having already reimbursed $70 per day for 21 days, it is now too late for the defendants to resile from acceptance of the daily rate.

18 I therefore award the full amount claimed for this item.

Claim for Lost Income:

19 The plaintiff spent a great deal of time on this claim after the accident. First, he was looking around town for the defendants' vehicle because the defendant driver did not report to the police for over 24 hours. Then he ran around getting estimates. Then he had numerous exchanges with representatives of the defendants. I think it should not be surprising that a layperson, unaccustomed to dealing with insurance claims, facing the prospect of being unable to perform his contractual obligations because his vehicle was damaged through no fault of his own, and then wanting to repair this specific vehicle as opposed to going to the expense and effort of purchasing another one, would go to great personal effort to try to get his claim resolved quickly.

20 The plaintiff, being a professional engineer, is used to keeping log books. Produced for me to examine were time records kept by the plaintiff. The plaintiff estimated that he spent 117 hours in total related to this claim. Of that total 96 hours were recorded in his records. Of this, the plaintiff calculated that he lost 61 hours from his contract work. His contract provided for remuneration at $40 per hour. The 61 hours taken away from his contract commitments were 61 lost billable hours.

21 The defendants submit that the time lost is speculative, excessive and unnecessary. I do not agree. My comments above address these points. Whether someone else would have put in as much time is irrelevant. I find, in the circumstances of this case, that it was reasonable and understandable for the plaintiff to do so.

22 The calculation of the 61 lost hours is admittedly an estimate. The plaintiff gave an explanation as to how he arrived at this estimate by a comparison with his billable work. I accept the estimate. Just because the plaintiff has to estimate this claim is no reason to deny recovery. Difficulty in ascertaining the claim is not the same thing as failing to prove the claim. The courts have accepted the proposition that if a plaintiff establishes that he has probably suffered a loss, the difficulty of determining the amount of it is no excuse for not awarding it. The court must simply do the best it can on the evidence available: see *McElheran v. Great Northwest Insulation Ltd.*, [1995] N.W.T.R. 120 (C.A.), at pages 124-125.

23 I therefore award the sum of $2,440 ($40 per hour for 61 hours) under this claim.

24 The plaintiffs, however, claim damages for the full 117 hours expended on this claim on the basis that the plaintiff has foregone other activities and, if he had hired

someone to do this activity on his behalf, he could presumably recover those expenses. That may be so in principle, but here the evidence to support this extended claim is lacking. Was he foregoing other activities (not including the contract work)? What work could he have hired someone else to do? I am left to guess at these points. I will therefore limit this claim to the actual loss of contract earnings.

Accommodation Expense:

25 The accident disrupted the plaintiff's plans for use of his motorhome as his accommodation. The reasons were explained in court and, while convoluted, I think they made perfectly good sense to the plaintiff at the time. He therefore moved in to his son's apartment for a while. To offset some of his son's expenses, he paid one-half of the rent for that period. This amounted to $542.00.

26 The issue here is whether it was reasonable to pay this amount. The defendants did not seriously contest the expense, merely the total.

27 I find the amount excessive. The plaintiff slept on the couch and cooked his own meals. I do not think it is reasonable to pay one-half of the total rent for that use. I will award one-half of the amount claimed, that being $271.00, for this claim.

Travel Expense:

28 The plaintiffs also claim reimbursement for the cost of travel by the plaintiff to his home to make arrangements for an extension to his credit line so as to enable him to pay for the repairs. I considered the evidence on this point, and the alternatives available to

the plaintiffs, and I do not find this expense to be either reasonable or necessary. I therefore deny it.

Communications Expenses:

29 The plaintiffs claim $240.00 as the cost of telephone and fax charges incurred on this claim. This claim is accepted by the defendants who, back in 1993, paid $203.52 toward its satisfaction.

Conclusion:

30 I award the following damages to the plaintiffs:

(a)	repair costs	...	$ 5,089.12
(b)	rental vehicle	...	2,771.30
(c)	lost income	...	2,440.00
(d)	accommodation	...	271.00
(e)	communications	...	240.00
	Sub-total	...	$10,811.42
(f)	less already paid	...	4,487.52
	Total	...	$ 6,323.90

31 The plaintiffs will also be entitled to prejudgment interest, in accordance with the provisions of the *Judicature Act*, such interest to be calculated on the sum of $10,811.42 up to February 12, 1993, being the date of the partial payment, and on the sum of $6,323.90 thereafter.

32 Counsel requested that the issue of costs be addressed after delivery of this judgment. I will therefore invite counsel to set down a motion before me to address costs.

J. Z. Vertes

J.S.C.

Dated at Yellowknife, Northwest Territories
this 1st day of October 1996

Counsel for the Plaintiffs: Michael D. Triggs

Counsel for the Defendants: Noel Sinclair

CV 06129

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Reasons for Judgment of the Honourable Justice J. Z. Vertes