Claim No: 416950

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA

Cite as: Moffitt v. Harris, 2013 NSSM 33

BETWEEN:

PHILLIPPE MELVIN MOFFITT

Claimant

- and -

MELVIN HARRIS

Defendant

REASONS FOR DECISION

BEFORE

Eric K. Slone, Adjudicator

Hearing held at Dartmouth, Nova Scotia on August 6, 2013

Decision rendered on August 12, 2013

APPEARANCES

For the Claimant self-represented

For the Defendant Tipper McEwen, counsel
Daniel MacKenzie, law student

BY THE COURT:

[1] This claim arises from a relatively minor though untimely fender bender. The Claimant had been driving his new 2013 Volkswagen Passat for all of one day when it was hit by the Defendant's vehicle in the parking lot of the mall on June 5, 2013.

[2] Although the Defendant denied any degree of liability in its defence, counsel for the Defendant admitted liability before the hearing. Given that the Claimant's vehicle was parked at the time of the impact, while the Claimant himself was outside the vehicle watching in horror and screaming to try to get the Defendant's attention, it would be hard to place anything else other than 100% liability on the Defendant.

[3] The wrinkle here is that the Claimant is not suing for the cost of repair. The repair was fully funded by his own insurance company to the tune of $704.38. What the Claimant seeks here is a further amount for what he anticipates will be advance depreciation. In other words, he expects that when he comes to sell his vehicle at some point in the future, it will be less valuable because it has been an accident.

[4] The Claimant correctly points out that purchasers of secondhand vehicles are probably more keenly aware than they were in other times of the accident history of the vehicle. In fact, it is now possible using the VIN (vehicle identification number) of a vehicle to trace its accident history over the Internet.

[5] The Claimant chose to ask for a further $704.38, based upon a theory that the actual repair cost would be the probable amount of depreciation in the future. He claims to have received this information from someone at the Volkswagen dealership.

[6] The court has to base its decision on evidence. The Claimant produced a letter from Mr. Steve MacDonald, the sales manager of Steele Volkswagen, who states:

> “the damages and subsequent insurance claim by [the Claimant] in regards to his 2013 Volkswagen Passat … will in fact have a negative impact on the resale value of his Passat. In terms of a certain percentage or value, it is hard to predict given constant changing market conditions in the automobile industry. The severity of the damage and the amount of the insurance claim will determine the overall resale value to the vehicle.”

[7] The Claimant called another Steele Volkswagen employee as a witness, Lori Sveibjornson, who testified that in assessing the amount of the trade in that it might offer, the dealership would take into account the accident history, but could not say by how much the price might be depressed. She conceded on cross examination that there are many factors, including supply and demand that will determine the future value of a used vehicle.

[8] The Claimant himself testified that he cannot say when or even if he might trade the vehicle, only that he might possibly do so somewhere down the road.

[9] The Defendant resisted the claim on two different basis. First of all, it was argued that damages on these facts would be total speculation. A second argument was purely legal. It is argued that some relatively new legislation,

namely the December 15, 2011 amendments to the *Insurance Act*, would preclude this claim being made altogether. Specifically, it is argued that what is now section 138A of the *Insurance Act* creates a regime whereby collision claims as between insured parties are determined internally by those insurers according to a degree of fault under certain "fault determination rules" prescribed by Regulation. On counsel's reading of that *Act*, it would preclude a claim being made directly by someone such as the Claimant against someone like the Defendant.

Determination on the facts

[10] There is authority for a claim for the diminished value of a chattel caused by the negligence of another person, upon proper proof.

[11] An example of a successful case is *Machek v. Willcocks* (1996) 148 N.S.R. (2d) 116, a decision of the Nova Scotia Court of Appeal arising out of what was initially a claim in the Small Claims Court. The Small Claims Adjudicator had awarded $5,000.00 for accelerated depreciation in the value of a one-year-old Mercedes which had been valued at $50,000.00 and was to be used as a trade-in on a newer model. Prior to the trade-in occurring, an accident occurred and the vehicle was repaired at a cost of almost $10,000.00. As a result of the accident, the Mercedes dealer reduced the amount it was willing to pay by way of trade-in by $6,000.00. The Claimant sought $5,000.00 as damages, which was at the time the maximum amount which the Small Claims Court could order for damages. The Adjudicator awarded damages in that amount.

[12] The matter was appealed to the Supreme Court, which upheld the Adjudicator's decision. The matter was further appealed to the Court of Appeal, where the principal arguments against the award were that the damages claimed did not properly represent special damages but were masquerading as such in order to avoid the problem with the court's lack of jurisdiction to award general damages. The holding of the case was that accelerated depreciation is properly categorized as special damages, which <u>if proved</u> may be awarded by the court.

[13] An example of an unsuccessful claim is found in the British Columbia Court of Appeal case of *Reinders v. Wilkinson* [1994] B.C.W.L.D. 2901, which dismissed an appeal from a trial court which had refused to make an award for accelerated depreciation. A used car dealer had testified that this particular vehicle might be devalued by something between $1,000.00 and $1,500.00. He had earlier testified that 10 to 15% was the usual range of depreciation for a vehicle that had been in an accident of this severity. The trial judge refused to make an award stating:

> There are a number of difficulties with the plaintiff's claim. First, Mr. Reinders has not sold the vehicle but simply states that he plans to sell it within the next six months. Secondly, there is no explanation of why the amount of the loss ($1000-$1500) differs from that generally suffered (10 to 15%). Thirdly, [the witness] gave no facts upon which his opinion could be assessed other than his observation that the disclosure of damage depressed selling prices of vehicles. He did not explain if the amount of the discount increased or decreased as time passed following the accident and repair. He offered no statistics to buttress his estimate of the decrease in value, nor did he indicate that there was any solid empirical basis for his opinion. It was simply a "bare" opinion and, as such, difficult to assess in terms of its reliability.

[14] The Court of Appeal refused to interfere with this conclusion.

[15] What I take from these authorities is that an award may be made, where the evidence supports it. There are several elements to the evidence that would support the making of an award. The easiest case would be where the Claimant had a firm plan to sell the vehicle in the short term, and could produce evidence from qualified experts (or a potential buyer) to the effect that the vehicle was truly worth less than it would have been worth prior to the accident. To the extent that the Claimant does not know when or even if he will sell the vehicle, the claim becomes highly speculative.

[16] Another element which I consider to be common sense, as much as anything else, is the severity of the damage and its location on the vehicle. Here, the damage was to the rear bumper. The cost to repair was relatively minor, in this day and age of expensive repairs. An informed buyer, knowing of a minor repair years ago would surely be less concerned than he or she would be about a more major repair, perhaps involving the frame or other critical structures. It is well-known that vehicles that have been "written off" for insurance purposes may yet be repaired and find their way into the used car market. I expect that most buyers would be influenced in their decision, and would pay much less for a car that had been repaired to that degree.

[17] In the case here, not even the witness called by the Claimant nor the sales manager who provided a letter, would go sufficiently out on a limb as to say that a loss would surely be experienced. To their credit, they were honestly willing to say no more than that it is possible that the value might be impacted. Further, given that the Claimant has no idea when or even if he would sell this car, any

loss that might be experienced is far into the future and totally speculative. In the result, the Claimant has simply failed to prove damages.

[18] Absent damages proved to a sufficient degree that the court can confidently make an award, the claim must fail.

[19] The question raised about the *Insurance Act* is one better left to another case, where something would turn on it. Since I have rejected the claim, my comments would be mere *obiter dicta.* There is accordingly little benefit to my wading in and attempting to interpret this rather complex piece of legislation.

[20] I note that the Claimant has also claimed $100.00 for general damages. I am willing to accept that he was upset about the fact that his brand-new vehicle was damaged. Anyone would be. However, I do not believe that it is appropriate to assess general damages in this kind of the situation. The Claimant was not driving his vehicle, and had no possibility of physical injury. Although $100.00 is a token amount of money, I believe that it would be a dangerous precedent to award any general damages for the emotional impact of having one's chattel damaged. In another court, with no limit on general damages, I can envision claims being made of a more significant amount. What would it be worth to discover that someone had totalled your Mercedes-Benz? Is that worth more than if someone destroyed your ten-year-old beater, to which you were nonetheless attached? Is it the inherent value or newness of the chattel? Or is it more personal, in terms of the emotional attachment? I believe this is a slippery slope which the courts have simply not been interested in testing. I accordingly reject the claim for general damages.

[21] Given that the Claimant has been unsuccessful, there is no principled basis upon which to allow him any costs.

[22] The Claim is accordingly dismissed.

Eric K. Slone, Adjudicator