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IN THE HIGH COURT OF NEW ZEALAND
ROTORUA REGISTRY

A.55/82

BETWEEN GRAHAM JOHN OLLIFF
of Ohope,
Electrician

Plaintiff

AND JOHN CROWNSHAW
of Tauranga,
Launch Master

First Defendant

AND THE OWENS GROUP LIMITED
a duly incorporated company having its registered office at 14 Rata Street, Mount Maunganui

Second Defendant

AND ROBERT ARTHUR OWENS
of Tauranga, Company Director

Third Defendant

AND STARS TRAVEL NEW ZEALAND LIMITED
a duly incorporated company having its registered office at 83 Devonport Road, Tauranga

Fourth Defendant

Hearing: 10, 11, 12 September 1984

Counsel: J.P. Gittos for Plaintiff
P.A.D. Davies for Defendants

Judgment: Delivered 13 NOV 1984

M. ENTWISTLE
Deputy Registrar

JUDGMENT OF GALLEN J.

Early in 1973 the plaintiff Graham John Olliff began to build the boat, the subject of these proceedings. He was

then 20 years of age living with his parents at their orchard at Tokoroa and employed as an apprentice electrician. He obtained what was described as a frame pack for a 39' Hartley RORC craft and began building the hull with the assistance of his fiancee, working at weekends and in the evenings. The plans for the vessel concerned were standard and the hull construction was what is known as ferro concrete. The method of construction involves setting out the frames for the hull, laying reinforcing rods, laying wire mesh and then plastering the hull. One of the advantages of the method of construction was that it was suitable for amateurs to build, but this had the consequence that a number of vessels of this kind were constructed of very varying standards. The plaintiff joined an association known as the Waikato Ferro Cement Club, the purpose of which was to endeavour to ensure that the standard of construction was high because of a generally felt concern over the low standard of construction which it was considered had occurred in some cases. The plaintiff had the plastering done professionally and the evidence establishes that the construction of the hull was good and that the resulting vessel was of a good standard.

The plaintiff continued to construct the boat using almost all his spare time to do so. Having qualified as an electrician, he took shift employment to give him more time to work on the boat. He gave evidence that while he was building the boat, he did not own a motor vehicle. Every spare cent he earned appears to have gone into the vessel. He claims

that he also used almost all his spare time on the boat having very little social activity as a result. Because he was concerned that the general standard of the vessel should be high, he bought the best fittings that were available to him and used more expensive materials and installed more expensive equipment than would ordinarily have been the case. In the end, it took the plaintiff 7 years to complete the vessel. During this time he clearly enough developed what might best be described as a dream relating to his future lifestyle. He intended when able to do so, to use the vessel as a floating home to cruise the Pacific and probably more widely than that, intending to live aboard the boat for as long as he was able. This plan influenced the design and he actually constructed the vessel to a different pattern than that which was standard for boats of the kind. In particular, he designed a smaller cockpit because he considered that with the cruising he had in mind, the number of persons available to sail the boat would always be limited and it was therefore better and safer to have a smaller cockpit area. By contrast, since the boat would be his home, he designed and built the cabin and living accommodation as more roomy and extended than was usual. The result of this was that the boat did not conform to the normal specifications and was designed for living rather than racing or weekend cruising.

Eventually when it was completed, it was transported to Tauranga and placed in the water. The photographs which were produced suggest that it was an attractive craft and the evidence

is clear that it was of at least a good standard, in some respects, of a very high standard. The plaintiff used the vessel for cruising in the Hauraki Gulf and generally on a weekend basis, but he still had in mind that he was eventually going to adopt cruising as a lifestyle and with this in mind he and a friend went to Australia to take higher paid work with a view to accumulating the necessary funds for the purchase of stores and provisions and to enable them to set off for an unlimited period in the vessel. During this time, it was moored in the Tauranga Harbour at a berth made available by the Tauranga Harbour Board.

On 30 September 1981 while the plaintiff was in Australia, the motor vessel "Nereides" which is owned by the third defendant while under the command of the first defendant, ran into the plaintiff's vessel causing extensive damage.

The defendants have conceded liability and the action proceeded as an action for damages to assess quantum. Special damages were agreed at $5,666.46.

The plaintiff claims general damages under two heads - principally a capital loss in respect of the loss of his boat and secondly, general damages for hardship, anguish and inconvenience resulting from the loss of the vessel and for loss of use from the date the vessel was damaged until resolution of the claim.

Following the collision referred to, the vessel was twice inundated by seawater with the rising of the tide and eventually on expert advice, the plaintiff decided that the best course was to sell the vessel as it was by tender, rather than attempt to repair it. The defendants were advised of the plaintiff's intention and no issue is taken as to this. The vessel was eventually sold by tender for a price of $17,000.

Assessment of damages is difficult. The evidence as to value, cost of repairs and replacement cost ranges over a wide spectrum and it is impossible to reconcile the views which have been expressed. It appears that ferro concrete vessels are subject to a degree of prejudice from boat purchasers. The evidence establishes that this has occurred because a number of unsatisfactory vessels were built by amateurs. There is a feeling by boat owners that minor damage is difficult to detect, but there is also a concern that deep seated damage may occur and exist but be effectively covered up and exceedingly difficult to trace. A collision such as that which occurred in this case can result in fine hair cracks developing in places other than the site of the collision. Captain Dunsford gave evidence that the only way to be sure that a vessel so damaged is completely repaired, is to remove all the paint and to apply a dye which will show up in any cracks which have occurred. It is important that such cracks should be discovered because although they may not result in water getting into the interior of the vessel, they may result in water reaching the reinforcing which could rust

and cause serious deterioration. Further, there is a risk of what is referred to as racking which effectively means that the vessel is in some respects twisted out of line as a result of a collision. Such a result can be serious and requires very careful inspection to ascertain whether or not it has occurred. A combination of these facts has resulted in ferro concrete vessels being worth approximately half the value of similar vessels built in wood or fibreglass and they are more difficult to sell because intending purchasers are worried about these aspects.

The result is that the actual sale value of a ferro concrete yacht may be less than the cost of construction. Captain Dunsford and Mr Williams gave evidence that in their view the pre-accident value of the vessel would have been in the vicinity of $75,000. The evidence called for the defendants was to the effect that the value varied between $37,500 and $45,000. The plaintiff produced figures which suggested that he had spent on the cost of materials in construction, in excess of $60,000. While some of these amounts were disputed, it seems clear that a sum in this vicinity would have been spent and no allowance is made in that figure for the labour cost which, in the plaintiff's case, extended over 7 years.

The defendants say that the plaintiff is entitled only to the value of the vessel at the date of its loss together with some appropriate sum by way of interest to recognise the loss of use. The plaintiff says that he is

entitled to a sum which represents the true value of the boat to him, or at least to a sum which would enable him to purchase a replacement of equivalent use to him and that the damages should be assessed on this basis.

There was evidence available that a ferro concrete yacht built to a 39' Hartley RORC specification in good condition was available at a price of $47,000. The plaintiff considered that this was not an adequate replacement. It was some 7 years older than his boat and built to a different design in that it did not incorporate the small cockpit and large living quarters which his plans for the future had caused him to incorporate in his own boat. He also pointed out that he could not know whether or not the hull was sound - it might have the latent defects to which reference has been made and which did not apply in the case of his own vessel, which of course he had constructed. As against that, the defence pointed out that the interior had been professionally built and achieved a higher standard than that of the plaintiff's boat. The defence contended that by the expenditure of some $5,000, this vessel could be made suitable for the plaintiff's purpose, but it was accepted that to change the proportions of the cockpit and living quarters would be prohibitively expensive.

The plaintiff on the other hand drew attention to the price of vessels which he considered would be the reasonable equivalent of that he had lost and referred in

particular to yachts described as Pacific 38's and Cavalier 39's. These would cost between $90,000 and $120,000. The defendants say that they cannot be regarded as reasonably suitable because they are very much better boats, constructed in fibreglass and much more in demand. The defence also points out that being built to standard specifications, they are built with the larger cockpit and smaller living accommodation which the plaintiff rejected in his own construction. It was accepted that if the plaintiff were to have a boat built, the equivalent of that which he had lost with a ferro cement hull and a professionally constructed interior, the actual cost of construction would probably be in the vicinity of $100,000 or more.

The classical decision on the measure of damages in Tort is to be found in the speech of Lord Blackburn in the House of Lords' decision of Livingstone v. The Rawyards Coal Company (1880) 5 A.C. 25 at p.39, where he referred to the measure of damages as being:-

> ".....that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation."

That was a case where coal had wrongfully been removed from land occupied by the plaintiff. The difficulty in determining the measure of damages was occasioned by the fact that the plaintiff would not have been able to extract or market

the coal himself. The dispute turned on the question of whether or not he was entitled to recover the value which the defendant had obtained for the coal wrongfully extracted or whether it should be some lesser sum representing the actual loss to him bearing in mind that he could not have himself realised upon it as the defendant had done. The House of Lords effectively held in favour of the proposition that the value is to be assessed in terms of the loss which the plaintiff had actually sustained, that is, in terms of the value which the coal in situ had had for him. The House of Lords therefore did not consider that the actual price realised by the coal correctly measured the loss of the plaintiff. There is an important emphasis on the value to the plaintiff rather than the value of the property as realised.

Perhaps the other major decision on the assessment of damages is the Owners of Dredger Liesbosch v. Owners of Steamship Edison 1933 A.C. 449 where the House of Lords was concerned with the appropriate measure of damages in a case where a dredger used for a specific purpose had been damaged by the negligence of the owners of the defendant. While the case is more often cited on the aspect of remoteness of damage, it is also significant for the general statements on damages which appear in the various speeches. Lord Wright considered the authorities in detail and said at p.463:-

> "The true rule seems to be that the measure of damages in such cases is the value of the ship

to her owner as a going concern at the time and place of the loss."

He was, in that context, referring particularly to the difficulties which arose in determining whether or not the profits which the vessel might have been expected to yield could be taken into account. Lord Wright specifically rejected the concept that the only sum to which the plaintiffs were entitled was the market value of the vessel at the time of her loss. He accepted the statement of principle in Clyde Navigation Trustees v. Bowring Steamship Company (1928) 32 Ll. L. Rep. 35, to the effect that if the owners were to be placed in the same position as if the injury had not been done them, then a value should be placed on the dredger based on three elements:-

1. The cost of procuring a comparable dredger;
2. The cost of adapting it to their requirements;
3. Compensation for loss of user.

As in Livingstone v. The Rawyards Coal Company, in this case there is an emphasis on the value to the plaintiff of the particular vessel. The plaintiff's right is frequently summed up by the use of the Latin phrase, restitutio in integrum, a term borrowed from the law of contract. The market value of the goods concerned is not necessarily the measure of damages. That was emphasised in the decision of the Court of Appeal in J. and E. Hall Limited v. Barclay (1937) 3 All E.R. 620, where the concept of value is discussed. That decision was followed by Cooke J. in Mademoiselle Limited v. Oliver Enterprises Limited

(1974) 2 N.Z.L.R. 532. It is clear that there cannot be any general principle which requires value to be assessed on a market basis rather than the special value to the plaintiff. Such a principle would have been impossible to apply in the case of the old action per quod consortium amisit. In view of the generally accepted view as to the gender of yachts and the plaintiff's relationship with this one, the analogy may be thought apposite.

It is worth noting in passing however, that the amount paid as distinct from the value of the article may be affected by the duty to mitigate damages. Where a similar article can be bought in the market, then the cost of that article provides the measure, but it is the value of that article which is significant - not necessarily the value in the eyes of the market of the article which has been lost.

An example which assumed some importance in motor accident claims was damage to clothing. The plaintiff who possessed one suit reserved for formal occasions, in a claim for the loss of that suit is not, in my view, to be met with an assertion that the total amount to which he is entitled is the sum of money that suit might have yielded had he been minded to sell it in some secondhand clothing store.

That example raises a further consideration. It may equally be no answer to say to a claimant in such a case that the only amount to which he is entitled is the sum which would purchase a suit of similar age and style from an Opportunity Shop. Having regard to the circumstances, a Court would need to assess whether, for reasons of fastidiousness or other

acceptable motivation, that person who had been accustomed to buying new clothing, should be expected to accept someone else's cast off clothing. That would be a matter for determination in the particular circumstances of the case and it is no answer to such a contention to say that a claimant may be better off if he is given a sufficient sum to buy a new suit, where the purchase of a new suit is reasonable having regard to the circumstances - betterment of that kind is not a basis for a reduction in the amount of damages payable. See Harbutts "Plasticine" Limited v. Wayne Tank and Pump Company Limited (1970) 1 Q.B. 447.

The Harmonides 1903 P. 1, was a case where the value of an Atlantic liner was considered. Evidence was given that its value was 18,000 pounds. There was also evidence that the ship was an obsolete boat which would fetch little more than scrap iron price if sold. There was evidence that there was practically no market for Atlantic liners, as when they ceased to be worked at a profit, they were sold at a breaking-up price. Gorell Barnes J. fixed the value at 31,000 pounds as being the value to the owners, but it should be noted that this decision was made in a situation where there may well have been no market value to obtain a comparison.

In O'Grady v. Westminster Scaffolding Limited 1962 Ll. L. Rep. 238, Edmund Davies J. was concerned with a situation where scaffolding had collapsed on a motor vehicle.

The motor car concerned was an elderly M.G. of special sentimental value to its owner. It had been carefully maintained and in fact had the engine replaced on more than one occasion. The owner chose to have the vehicle repaired and claimed the cost of repairs as well as the cost of obtaining a substitute vehicle while the car was being repaired. It was argued that the cost of repairs was greater than the value of the vehicle; that the plaintiff should have bought an equivalent vehicle in the market which would have been cheaper and since this could had been done immediately, would have avoided the necessity to obtain a substitute vehicle. The Court held that having regard to the circumstances and the particular value of the vehicle to the owner, he had acted reasonably in having it repaired and he was awarded the cost of repairs as well as the cost of substitute transport.

By contrast, in Darbishire v. Warran (1963) 1 W.L.R. 1067, the Court of Appeal held that it was unreasonable to repair a second-hand Lea Francis shooting brake when it would have been possible to acquire a vehicle suitable for the plaintiff's purposes at a lower cost. It is to be noted that Pearson L.J. at p.1077 noted that the exact figure of the market price might not always be appropriate because where there was evidence as to good maintenance and reliability, the vehicle destroyed might effectively be better than the market equivalent. He stated there should be an element of flexibility in the assessment of damages to achieve a result which is fair and

just as between the parties in the particular case. That is a further illustration of the principle that the matter is to be considered from the point of view of the plaintiff rather than the monetary value indicated by the market.

I was referred to the decision of Ormerod J. in Uctkos v. Mazzetta (1956) 1 Ll. L. Rep.209. In that case, the vessel concerned had certain special features as it had been an Admiral's barge. It was of a quite unusual type and was irreplaceable as such. To construct a ship to replace it would have involved the expenditure of a very large sum of money. The Court held that the claimant was not entitled to damages on a replacement basis, but only on what was the reasonable cost of another craft which reasonably met his needs and which was reasonably in the same condition.

It is against this background that the claim in this case must be determined.

In summary then, the general principle is clear. The plaintiff is to be put in the position in which he would have been if the defendants' wrongful conduct had not occurred. In every case the circumstances will be different. In some situations the market value of the goods damaged or destroyed will be the appropriate measure. In others, the cost of repairs will be an appropriate award; in others still, the cost of buying a reasonable equivalent will meet the plaintiff's need and at the same time preserve fairness to the defendant.

The test to be applied is what reasonably restores the plaintiff's position and it is the plaintiff's position which must be considered. Therefore any particular case must be considered on its own particular circumstances. In this case, the vessel which the plaintiff had constructed, was constructed for a special purpose and had special advantages to the plaintiff. Both for this reason and others detailed above, including the knowledge he had of the soundness of its construction, the market value of the vessel damaged does not truly represent the value to the plaintiff. To replace it with a vessel of similar construction would equally not represent the value to the plaintiff unless the particular advantages which were important to him were also replaced and I accept that the cost of doing so would be prohibitive. I stress that it is the importance of the particular advantages to the plaintiff which are in the end, decisive. It is this which distinguishes the case from Uctkos v. Mazzetta for example, where the advantages were fortuitous.

Under these circumstances, I think there are two possible ways of approaching a calculation of the plaintiff's loss. The first is to look at the cost of replacement. At first sight the suggestion that the Cavalier 38 or equivalent craft may be considered suitable, has some attraction. These vessels being of fibreglass construction, do not have the disadvantages of concealed defects which may be the case with

ferro concrete. Varying figures were given for such vessels, but I accept that they would be obtainable at a sum in the vicinity of $90,000. However, such vessels would not meet the plaintiff's design needs which are important, not only because the plaintiff placed an emphasis upon them, but because the existence of these is another reason why the defendants' suggestion of equivalent ferro concrete boats is unacceptable.

In putting forward a valuation of $75,000, the plaintiff's advisers in my view took into account those factors which represented the true value of the vessel to the plaintiff. They were undoubtedly influenced by the cost of construction and by the end result. This figure seems to me more nearly to represent the plaintiff's true loss than the market value of his vessel before damage or the cost of a ferro concrete boat built to the same general but not particular design or replacement with a different type of vessel altogether.

In my view therefore, the sum to which the plaintiff is entitled for the loss of his vessel may properly be fixed at $75,000 less the sum of $17,000 recovered on the sale of the vessel.

However, this does not complete the matter. Where a ship which has been damaged or destroyed is not profit-earning, the plaintiff is nevertheless entitled to damages for loss of use. In such cases, there is a line of authority which establishes that such a claim lies - see The "Greta Holme" 1897 A.C. 596 and The "Mediana" 1900 A.C. 113. The measure of damage is generally to be calculated on the basis of interest upon the capital value of the damaged ship see The "Marpessa"

1907 A.C. 241; Admiralty Commissioners v. S.S. "Chekiang" 1926 A.C. 637 and Admiralty Commissioners v. S.S. "Susquehanna" 1926 A.C. 655. The same principles were adopted in The "Hebridean Coast" 1961 A.C. 545. I do not overlook that in those cases, the interest was awarded on the depreciated value. In my view in fact, reference to depreciation was only a means of ascertaining the true value. In this case I have already concluded that the true value of the vessel was $75,000. The interest rate allowed has according to McGregor on Damages 14th ed. para.1029A, normally been 5% but has occasionally been 7% and the paragraph indicates that the 7% rate should now be exceeded. The rate of interest contemplated by the Judicature Act is now 11% and in my view that is the appropriate rate to be applied. Mr Gittos did submit that an appropriate rate was that recovered by solicitors of nominee company mortgages. This would be quite out of line with any of the Admiralty decisions.

I therefore hold that the plaintiff is entitled to interest at the rate of 11% on the sum of $75,000 from the date of the collision until the time he received the $17,000 recovered on sale of the wreck and on the balance until the date of payment.

That leaves the question of general damages relating to the effect on the plaintiff of the accident which occurred to his vessel. Mr Gittos amended the wording of the claim in this regard, but how ever it is formulated, I think Mr Davies

is right when he says it raises a question as to whether or not the claim is one for personal injury by accident within the meaning of the Accident Compensation Act 1972. That being so, on the authority of the decision of the Court of Appeal in L. v. M. (1979) 2 N.Z.L.R. 519, I think I am obliged to refer that aspect of the claim to the Accident Compensation Commission and I note a similar course was adopted by Thorp J. in the unreported decision of Ryall and Hickey v. Sydney Construction Limited and The City of Mount Albert and The New Zealand Municipalities Co-operative Insurance Company Limited a ruling delivered on 23 February 1983 in the High Court at Auckland, (A.378/77, A.379/77, A.1311/77). If the plaintiff wishes therefore to pursue this aspect of the claim, then I consider I am obliged to refer the matter to the Accident Compensation Commission for decision on whether or not the claim does come within the provision of the Accident Compensation Act. If the Commission were to rule that it did not, then presumably the matter would need to proceed.

There will accordingly be judgment for the plaintiff for the sum of $63,666.16 in respect of the claim for general and special damages in respect of the loss of his vessel, together with interest assessed as set out above. The proceedings in respect of the second head of damages are

adjourned sine die. Leave is reserved to any party to apply for further directions.

The plaintiff is entitled to costs on scale, together with disbursements and witnesses' expenses to be fixed, if need be, by the Registrar.

RL Savage J.

Solicitors for Plaintiff: Messrs Sharp, Tudhope and Company, Tauranga

Solicitors for Defendants: Messrs Jordan, Smith and Davies, Auckland

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