18/10; [2010] VSC 175

SUPREME COURT OF VICTORIA

TEHAN v SARIC

Bell J

23 April 2010

CIVIL PROCEEDINGS – MOTOR VEHICLE COLLISION – NEGLIGENCE – DAMAGE CAUSED – DEFENDANT ADMITTED DRIVING NEGLIGENTLY – VEHICLE REPAIRED WITHOUT WRITTEN AUTHORISATION – LEGISLATIVE PROHIBITION ON CHARGING FOR REPAIR WORKS – WHETHER OWNER CAN STILL OBTAIN DAMAGES FOR REPAIR COSTS – CLAIM DISMISSED BY MAGISTRATE ON GROUND THAT NO LOSS SUSTAINED BY PLAINTIFF – WHETHER MAGISTRATE IN ERROR: *ACCIDENT TOWING SERVICES ACT* 2007, SS153, 154.

T.'s motor vehicle was badly damaged in an accident caused by the other driver's negligent driving. The repairer who repaired his vehicle failed to obtain T.'s written authorisation. As a result of s153(2) of the *Accident Towing Services Act* 2007 ('Act'), the repairer was not able to sue for or recover any sum for carrying out the repairs. T. sued the other driver for damages totalling $29,091.67 which included the sum of $4598 for a hire car. In making an award only for the cost of the hire car, the Magistrate dismissed T.'s claim for the damage on the ground that T. had suffered no loss. Upon appeal—

HELD: Appeal granted. Order in T's favour for the full amount of the claim plus costs.

1. While the Act regulates the relationship between towing and repair service providers on the one hand and the owners of damaged vehicles on the other, it does not affect the separate common law obligation of drivers to pay damages for losses caused by their negligence. In a motor vehicle accident, the act of negligence and the damage to the vehicle usually occur at the same time. At that moment, the owner becomes entitled to sue the negligent driver for the loss. According to the established rules governing what losses can be recovered by the owner of the damaged vehicle from the negligent driver, where the vehicle is commercially repairable (not a write-off), the owner is entitled to recover the reasonable cost of repairing it and the measure of loss is the expenditure required to put the vehicle back into the same state as it was before the accident.

***Dimond v Lovell* [2002] 1 AC 384, applied.**

2. The law of damages does not interfere with the owner's freedom of choice in relation to whether or not the vehicle should be repaired. Whatever choice the owner makes, the loss represented by the reasonable cost of repairing the vehicle is recoverable against the negligent driver. That is the law's assessment of the damage caused by the negligence of that driver.

3. T.'s direct and immediate loss was compensable in an award of damages. It is represented by the cost of repairing his damaged vehicle. That loss crystallised and was recoverable when the other driver's negligent driving caused the accident resulting in that damage. It is irrelevant in law that, under the towing and repair legislation, repairers cannot charge or recover fees or charges without the written authority of the owner. Accordingly, the magistrate erred in law in deciding otherwise.

BELL J:

1. Shane Tehan's motor vehicle was badly damaged in an accident caused by Peter Saric's negligent driving. He sued Mr Saric in the Magistrates' Court of Victoria for damages totalling $29,091.67, which included about $24,000 for repairing the vehicle.

2. As Mr Saric admitted driving negligently, his liability to pay such damages would not usually have been in question. However, Mr Tehan did not actually pay for repairing the vehicle. As the repairer failed to obtain his written authorisation, there was a legislative prohibition on charging him for the work. The magistrate who heard Mr Tehan's claim awarded him only $4,598 for a hire car. The claim for repairing the vehicle was refused because, in the magistrate's view, he had suffered no such loss

3. Mr Tehan now appeals under s109 of the *Magistrates' Court Act* 1989 from the magistrate's decision. He contends the magistrate made an error of law. After other grounds were abandoned, there is only one to be determined: whether the magistrate erred in law in refusing the claim for the costs of repair.

4. Turning to the legislation, s153(1) of the *Accident Towing Services Act* 2007 criminalises repairing a vehicle without the approval in writing of the owner. Under s153(2), the repairer cannot sue for or recover any sum or charge for carrying out repairs. If, contrary to these provisions, the repairer recovers such a sum or charge, it must be returned as soon as practicable. Under s153(5), failing to do so is also a criminal offence. Section 154(1) creates a three day cooling off-period.

5. These provisions are in Part 5 of the Act. The purpose of that Part is to regulate the provision of towing and repair services to the owners of damaged motor vehicles. To overcome the 'tow truck wars' which used to occur at the scene of motor vehicle accidents, the legislation now regulates the provision of towing and repair services. A prohibition on charging owners without written authority has been introduced to protect owners. Previously they had to make on-the-spot decisions in difficult circumstances. Now the authority to repair must be in writing, and there is a cooling-off period.

6. While the legislation regulates the relationship between towing and repair service providers on the one hand and the owners of damaged vehicles on the other, it does not affect the separate common law obligation of drivers to pay damages for losses caused by their negligence.

7. In a motor vehicle accident, the act of negligence and the damage to the vehicle usually occur at the same time. At that moment, the owner becomes entitled to sue the negligent driver for the loss. The established rules governing what losses can be recovered by the owner of the damaged vehicle from the negligent driver were stated by the House of Lords in *Dimond v Lovell*.[1] According to those rules, where the vehicle is commercially repairable (not a write-off), the owner is entitled to recover the reasonable cost of repairing it. In the words of Lord Hobhouse, 'the measure of loss is the expenditure required to put [the vehicle] back into the same state as it was before the accident'.[2]

8. Prior to the vehicle being repaired, the vehicle may be destroyed by some later unrelated act. The vehicle may be repaired without cost by the owner themselves, a friend or a relative. It may lie in waste and never be repaired at all. It may be given away, traded in as-is on another vehicle or sold off for its post-accident value. The law of damages does not interfere with the owner's freedom of choice in this regard. Whatever choice the owner makes, the loss represented by the reasonable cost of repairing the vehicle is recoverable against the negligent driver. That is the law's assessment of the damage caused by the negligence of that driver.

9. In some cases, the claim may not be for the cost of repairing the vehicle, but for consequential losses. One common example is a claim by an owner for hiring a substitute vehicle while repairs are being carried out. Such cases can raise complications.

10. In the United Kingdom, the cost of hiring a substitute vehicle is recoverable as damages only if and when the cost of necessary hire is actually incurred.[3] On the other hand, in New South Wales 'injury to property which deprives a party of the use of the thing is compensable. It is irrelevant if a third party provides a substitute for the thing damaged'.[4] I do not need to go into these matters. At issue in this appeal is Mr Tehan's claim for the immediate and direct loss constituted by the damage to the vehicle. His successful claim for the cost of hiring a necessary substitute has not been challenged by Mr Saric.

11. Mr Tehan's direct and immediate loss was compensable in an award of damages. It is represented by the cost of repairing his damaged vehicle. That loss crystallised and was recoverable when Mr Saric's negligent driving caused the accident resulting in that damage. It is irrelevant in law that, under the towing and repair legislation, repairers cannot charge or recover fees or charges without the written authority of the owner. With respect, the learned magistrate erred in law in deciding otherwise.

12. In the events which happened, Mr Tehan got his vehicle repaired without paying for it. Yet, in my view, he can also obtain damages represented by the cost of those repairs. That significant windfall results from the towing and repair legislation, not from the law of damages, which the legislation does not touch.

13. I reject any suggestion that this outcome is objectionable on grounds of public policy.

Drivers should pay damages for the loss caused by their negligence, assessed according to the established rules. Mr Saric would avoid this responsibility if the magistrate's decision was to be upheld. Repairers who fail to obtain the owner's written authority cannot charge for their services, even if they actually do the work. That consequence is deliberately imposed by the legislation to protect vulnerable owners.

14. In conclusion, the magistrate made an error of law in deciding Mr Tehan was not entitled to damages represented by the reasonable cost of repairing his vehicle. There should have been an order against Mr Saric for the full amount claimed of $29,091.67, plus an order for costs in Mr Tehan's favour. I will make orders setting aside the orders of the magistrate and giving judgment in Mr Tehan's favour of $29,091.67. There will also be orders for costs against Mr Saric in the proceeding before the magistrate and in this appeal.

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[1] [2002] 1 AC 384.
2] Ibid 406; see also *Burdis v Livsey* [2002] UKPC 34; [2003] QB 36, [84]; [2002] All ER (D) 155; [2002] 3 WLR 762; [2003] RTR 22 per Aldous LJ, Tuckey and Jonathan Parker LJJ concurring.
[3] *Dimond v Lovell* [2002] 1 AC 384, 400 per Lord Hoffmann; *Burdis v Livsey* [2002] UKPC 34; [2003] QB 36, [86]; [2002] All ER (D) 155; [2002] 3 WLR 762; [2003] RTR 22.
[4] *Anthanasopoulos v Moseley* [2001] NSWCA 266; (2001) 52 NSWLR 262, [58] per Beazley JA.

APPEARANCES: For the appellant Tehan: Mr N Kenyon, counsel. AB Legal, solicitors. For the respondent Saric: Mr GM Randall, counsel. Russell Kennedy Lawyers.
