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SUPREME COURT OF VICTORIA

KHODR v FROST

Lush J — 17 August 1981

CIVIL PROCEEDINGS – SPECIAL SUMMONS – SUBSTANTIAL DAMAGE TO MOTOR VEHICLE – COUNTERCLAIM – SERVICE OF UNSWORN AND INCOMPLETE AFFIDAVIT OF REPAIRER – OBJECTION TO THE SUFFICIENCY THEREOF UNDER THE RULES – REJECTION OF AFFIDAVIT SUBSEQUENTLY COMPLETED AND SERVED ON DEFENDANT – INSUFFICIENCY OF MAGISTRATE'S REASON FOR REJECTION – EFFECT OF NON-WITHDRAWAL OF OBJECTION TO AFFIDAVIT BY DEFENDANT – DETERMINATION OF COMPLAINANT'S DAMAGES – INSUFFICIENCY OF EVIDENCE TO PROVE LOSS (QUANTUM) – DISMISSAL OF COMPLAINANT'S CLAIM – MAGISTRATE NOT OBLIGATED TO INITIATE PROPOSAL ALLOWING CALLING OF FURTHER EVIDENCE – WHETHER "NOMINAL DAMAGES" APPROPRIATE IN CIRCUMSTANCES – MAGISTRATE IN ERROR IN NOT ATTEMPTING TO ASSESS DAMAGES SUFFERED BY COMPLAINANT.

LUSH J: This is the return of an order nisi to review a decision of the Magistrates' Court at Melbourne sitting in its special jurisdiction. The complainant before that court, who is the applicant here, issued a special summons claiming $1,000 damages for the costs of repairing a motor vehicle which had been damaged in an intersection collision with the defendant's motor vehicle. The defendant counterclaimed. The complainant served on the defendant what purported to be a copy of repairer's affidavit. The copy served was not completed with details of the attestation, and, in fact, had not been sworn at the date of the service. In a without prejudice letter dealing with a number of other matters, the defendant's solicitors indicated that objection was taken to the sufficiency of the service of an unsworn copy. The provisions of the *Magistrates' Court Rules* 1976 Rule 118, and, in particular, of sub-rule (7) are in substance that the affidavit, if a copy is properly served, may be used without calling the deponent unless within a stipulated time, the opposite party has given notice of objection.

When the matter came on for hearing, the Magistrate decided the issues of liability by holding the complainant forty per cent to blame and the defendant sixty per cent to blame. On the issue of the complainant's damages, evidence was given that the complainant's vehicle had been fairly recently purchased for an amount of $850 payable by four instalments.

The affidavit, now completed, a copy of which had been served on the defendant, was tendered in evidence but it was rejected by the Magistrate. His ultimate reason for rejecting it was not a good one, it being that the complainant could not rely on the affidavit, because, apparently by the time it was tendered, the complainant had given evidence that he had done repairs or had repaired the vehicle himself. Attention, however, appears to have been drawn to the fact that the copy of the affidavit served on the defendant had been insufficient, the point stressed at the hearing being not so much its incompleteness, as the fact that the original affidavit had not even been sworn at the time of the service.

The complainant's evidence about his own repairs to the car was that he had spent the sum of $700 or thereabouts on obtaining parts, but he produced no list of parts which he had bought and no details of the cost of any of them, no receipts for any money paid, and in fact no documents at all. The car had been burnt after the time when the complainant alleged that he had repaired it and it was no longer available for examination. There was no evidence of the value of the car immediately before the collision, except such as could be inferred from the evidence of its purchase, and no evidence of its salvage value after the collision.

Mr Barton who appeared for the applicant before me, made substantial submissions in relation to the affidavit and its reception by the Magistrate; but I am unable to uphold any ground of complaint about his rejection of it nor can I uphold an argument that despite apparent deficiencies the services of the incomplete and premature copy should have been regarded as sufficient service of a copy to comply with the rules. I have said that the Magistrate's express

reason for rejecting the affidavit was not a good one but there remained the undoubted fact that the copy served did not comply with the rules.

As to the argument that this was a matter of non-compliance which should not have been allowed to render the service void if the Magistrate had exercised his discretion under Rule 172, it appears to me that the Magistrate could not have exercised an discretion under that rule in the applicant's favour unless the defendant had withdrawn his objection to the use of the affidavit. The substantial effect of Rule 118 is that an affidavit received pursuant to its terms can only be used if the opposite party does not object since the opposite party is not required under the rules to state grounds for his objection or to justify grounds which he states. It appears to me that the effect of the rule really is that the affidavit can only be used with the opposite party's consent. It would not be a proper exercise of the Magistrate's discretion to direct in substance the use of the affidavit in the teeth of the opposite party's opposition. The affidavit having been dealt with in this way, and there being no remedy available to the applicant which will alter the situation in relation to the affidavit, I go on to the Magistrate's final disposition of the case. His Honour went on to say as to the Magistrate's final disposal of the case.

I have referred to his decision on the matters of liability. In dealing with the complainant's damages the Magistrate said that he was completely dissatisfied with the complainant's evidence in relation to quantum. He upheld an argument that the amount of damages had to be quantified with some precision, no documentation had been produced, and it was the responsibility of the party to prove its damages and not the court's responsibility to assess them for him. Accordingly he held that the complainant in this case had failed to prove his loss. He went on to say that the attempt to rely on the repairer's affidavit in which the cost of the repair had been stated to be a little over $1,000 was – in the circumstance that the complainant applicant had already repaired the vehicle himself at what the Magistrate said was a lower cost – monstrous. The use of this word suggests that the Magistrate thought that in some way the tender of the repairer's affidavit impaired the general credit of the applicant's case. If he did think so he was in my opinion wrong, as expert testimony relating to the fair and reasonable cost of repair can be led from witnesses who have not carried out the repairs themselves, and their evidence does not become inadmissible because their figure is slightly higher than the actual cost figure which may be proved by other evidence. Further the Magistrate in this statement seems to have omitted the component of the applicant's own work which might be thought to be implicit in his claim in the way in which it was attempted to be proved. However when all that is said, it was for the Magistrate to decide whether he believed the complainant's evidence or not and there were undoubtedly reasons for regarding it with a good deal of reserve.

I mention one argument which was not really pressed but which was indicated in the first ground of the order nisi was that the Magistrate was wrong in not attempting to assess the damages suffered by the applicant or alternatively not giving the applicant an opportunity to call further evidence. The point to which I now direct attention is the suggestion that the Magistrate should have given the complainant an opportunity to call further evidence. No application for that purpose was made to him and in my opinion he was under no obligation to initiate any such proposal himself, and it is impossible to uphold the order nisi on that ground.

The ground of substance that was argued before me and one which has given me a good deal of trouble was the argument that in spite of the lack of precision in the evidence there was still enough in it to require the Magistrate to go ahead and do the best he could. Mr Barton referred of course to *Chaplin v Hicks* (1911) 2 KB 786; [1911-13] All ER 224; 80 LJKB 1292 and to the application in a claim apparently in tort of a similar rule. The illustration given which I have described as apparently in tort is the case of *Bonham-Carter v Hyde Park Hotel Ltd* (1948) 64 TLR 177. That was an action against an innkeeper for loss of property by stealing, the amount of the damage not having been satisfactorily proved. The judgment does not analyse the nature of the action. It was not simply an action to enforce an innkeeper's common law liability as an insurer of his customers' property because that liability was relevantly affected by a statutory modification and the action seems rather to have been treated as an action for damages for negligence, negligence being a concept introduced by statutory modification. At any rate, after a comment on the unsatisfactoriness of the evidence relating to damages, the Lord Chief Justice proceeded to an assessment.

Reference was also made to *Jansen v Dewhurst* [1969] VicRp 53; (1969) VR p421, a decision of Newton J. In that decision His Honour drew attention to the fact that in situations of the kind with which I am now dealing there are two possible methods of assessing damages, that is by diminution of value in the vehicle, quantified by taking the value before the collision and the value afterwards, and the cost of repair. His Honour said that it was for the party initiating the proceedings, the party making the claim, to show which was the proper course to be followed and to produce sufficient material for the assessment to be made. His Honour, however, at p427, also used language indicating that as between the two parties, the complainant was not at liberty, if there was an appreciable money difference between the results of the two methods, to obtain from the defendant the higher of the two sums, To quote a sentence from that page:

> "The fact that before the accident the Zephyr utility was in excellent condition with a low mileage did not mean that the respondent was satisfied to have it repaired at the applicant's expense, if this could be more expensive than buying an equivalent vehicle and selling the Zephyr utility in its damaged condition and applying the proceeds of such sale towards the price of the replacement vehicle."

There were submissions made by Mr Barton, too, to the effect that if all else failed, nominal damage should have been awarded in this case. I do not express any concluded opinion whether nominal damages are really available in a case of this type. ... The ultimate question is whether there was material on which the Magistrate should have proceeded to make the best assessment that he could, or whether he was entitled to do as he did and say that the applicant failed. My opinion is that he should have proceeded, and at the root of that view is the evidence that the applicant's vehicle had suffered substantial damage. If the complainant was sent away with his case dismissed, he suffered an injustice. True, it can be said that it was an injustice that he had brought on his own head, but there is an unsatisfactoriness about saying that when part of the difficulty which developed had not been foreseen and certainly had not been allowed for namely, that his evidence would be rejected.

The evidence which shows that the applicant's vehicle had suffered substantial damage was evidence given by the respondent who offered the opinion that the damage to the applicant's vehicle was probably worth about $400. Now, as opinion on amount that should be disregarded altogether. There was nothing to suggest that the respondent was in any way expert but the statement indicates that the respondent's observation after the accident had been that there was substantial and not merely minimal damage done to the complainant's vehicle. Whether the applicant's evidence about his expenditure of $700 was capable of making any contribution at all to the assessment depends on the question whether the Magistrate took the view that he was not satisfied that the complainant had done the repairs and spent the money at all or whether he merely thought that the amount stated was unreliable and therefore probably exaggerated.

I have no information which would enable me to say what the Magistrate's opinion was, and except for the observation I have already made that the Magistrate had introduced one factor against the applicant's credit without justification, it appears to me it was open to the Magistrate to take either view of the evidence, so that that figure is of no particular help to me in deciding the immediate problem now. The only other positive figure in the case is the purchase price of the car at $850. Now, this is, as Mr Bourke has argued, a long way from being a valuation of the car at the date of the accident, but it is at least admissible evidence of the value of the car at that time, and it is admissible because it is relevant. In the absence of anything else, some use can be made of it. As it was an instalment contract it would indicate that the market value of the car at the time of the accident was something less than the $850 and a figure of some $600 to $700 might be inferred without having recourse to pure guesswork, although perhaps the line between inference and guesswork becomes fine. Again, the fact that the applicant gave evidence of repairing the car or attempting to repair it may be some evidence that it had some value after the accident. Nothing suggested the contrary.

The result is that the best that can be done in assessing damages is to take careful regard to the defendant's position, so that he is not called upon to pay anything more than he should be, to treat the shortcomings in the complainant's case as adverse to the complainant and to take care that they do not become adverse to the defendant, and the result would be – I put the figures only as hypothetical – that the value of the car before the accident could be assessed at something of the order of $600 and the diminution in its value about 50 per cent of that amount. I have said that the margin between inference and guesswork is a fine one in the first figure that I

used, and it is fine, indeed, very fine in the second, but I think that the course I have outlined was open to the Magistrate. If he rejected the evidence of the $700 I do not think that he was left with anything on which he could have fixed a figure except an inference, if he was prepared to make one based on his judicial experience, that appreciable damage to a motor vehicle at the present time is likely to cost several hundred dollars to repair. In my opinion the Magistrate should, on the material before him, at any rate have made an estimate and necessarily a very conservative estimate for the loss of value of the car in the collision, and it follows that I think he was wrong in not making it. I realise that he had even less in the present case than the Magistrate had in *Jansen v Dewhurst.* My opinion however is as I have stated it. Accordingly, I think that the first ground of the order nisi is made out and that the Magistrate was wrong in not attempting to assess the damages suffered by the applicant. ...

The order accordingly will be:- the order nisi is made absolute the order of the Magistrates' Court dismissing the complainant's claim is set aside the complainant's claim is remitted to the Magistrates' Court for rehearing as to damages only.
