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SUPREME COURT OF VICTORIA

DAVID REID MOTORS (ARARAT) PTY LTD v PRETTY TOWER PTY LTD and ANOR

Hampel J

10, 23 May 1994 — [1996] VicRp 37; [1996] 1 VR 514; 19 MVR 586

CIVIL PROCEEDING – CLAIM FOR COST OF REPAIRS – VEHICLE BROKEN DOWN – REPAIRED WITHOUT WRITTEN AUTHORITY – "DAMAGED MOTOR VEHICLE" – WHETHER INCLUDES BROKEN DOWN VEHICLE – WHETHER REPAIRER MAY RECOVER COST OF REPAIRS: *TRANSPORT ACT* 1983, S176.

Section 176 of the *Transport Act* 1983 ("Act") provides (so far as relevant):

> "(1) Where repair work on a damaged motor vehicle is ...carried out without the approval in writing of the owner of the motor vehicle...
> (2) A person cannot sue for or recover any sum or charge for...carrying out any unauthorised repair work."

HELD: (1) The phrase "damaged motor vehicle" in s176 of the Act is limited to cases where there has been a collision as opposed to a malfunction.

(2) Accordingly, where a vehicle which had broken down was repaired without written approval of the owner, a magistrate was in error in dismissing the claim for the cost of repairs on the ground that the vehicle was a "damaged motor vehicle" within s176 of the Act.

HAMPEL J: [1] This is an appeal from the Magistrates' Court by the unsuccessful plaintiff. The appellant is a company which carried out repairs to a vehicle owned by the first respondent, and claimed $3,352.15 as the cost of such repairs. The second respondent is a director of the first respondent.

In the Court below, the respondents argued first, that they were not liable to pay for the repairs to the vehicle as the second respondent had only recently bought the vehicle from the appellant and the repairs were covered by warranty, and, secondly, that by operation of s176(2) of the *Transport Act* 1983 (Vic), the plaintiff was unable to recover any of the cost of the repairs because no written request had been made. The Magistrate concluded that, but for s176 of the *Transport Act* 1983, he would have found for the plaintiff in the sum of $1,479.08. It was therefore conceded before me that, in the event of a finding that s176 does not provide a defence to the claim, the Magistrate's findings of fact would stand, and the appellant would succeed.

On 11 March 1992 the appellant sold to the second respondent, Mr Fraser, a new 1992 Rodeo 4 wheel drive vehicle. It was a term of the agreement that the appellant, on behalf of the manufacturer, would perform a free 1000 kilometre warranty service. There was a term of the warranty that it would subsist for one year or **[2]** 20,000 kilometres, whichever came first. On 8 April 1992 the 1000 kilometre warranty service was performed. On 12 October 1992 the second respondent telephoned Mr Reid, a director of the appellant company, reporting that the vehicle had broken down. Mr Reid dispatched a vehicle to retrieve it. For the purposes of this matter I accept that the appellant's vehicle comes within the definition of "tow truck" in s86. The definition of "tow truck" in s86 is wide, and includes "... any motor vehicle to which is attached (temporarily or otherwise) a trailer or device which is used or intended to be used for the lifting and carrying or towing of damaged or disabled motor vehicles". Although, this question was not in dispute before me, it is a relevant matter for the purpose of considering the effect of s176.

The vehicle was taken back to the appellant's workshop for examination which revealed that the filler plug of the transfer case was missing. The transfer case was removed and found to be empty of oil, the gears were damaged and the bearings were welded to the shaft. The manufacturer

refused to indemnify under the warranty. In early November 1992 the parties agreed that the appellant would carry out the repairs for 50% of their cost. Mr Reid estimated Mr Fraser's share of the repair cost at $1200.00. Mr Fraser agreed to that. Later Mr Reid telephoned Mr Fraser and indicated that his share of the works would be more like $1400.00 to $1450.00. Mr Fraser agreed to this. Some days later **[3]** Mr Fraser requested the 10,000 kilometre service be performed in order to reactivate the manufacturer's warranty. Mr Reid quoted $169.00. Mr Fraser agreed. On 23 November 1992 Mr Reid telephoned Mr Fraser to inform him that the vehicle was ready. He explained that $1479.08 was Mr Fraser's half. Mr Fraser agreed on that figure, plus the $169.00. Next morning, while Mr Fraser paid the $169.00, his wife took the vehicle. The $169.00 was all that was paid by the respondents for the repairs to the vehicle. (at page 3) S176 of the *Transport Act* provides:

> "(1) Where repair work on a damaged motor vehicle is commenced or carried out without the approval in writing of the owner of the motor vehicle or his authorised agent any person who is responsible for the commencement or carrying out of unauthorised repair work shall be guilty of an offence against this Division.
>
> (2) A person cannot sue for or recover any sum or charge for
> (a) commencing or carrying out any unauthorised repair work referred to in subs(1); or
> (b) preparing, without the approval in writing of the owner of the motor vehicle or the owner's authorised agent, any quotation to repair a damaged motor vehicle.
>
> (3) If any sum or charge referred to in subs(2) is recovered, the person on whose behalf it is recovered is guilty of an offence against this Division unless the person repays it forthwith."

[4] Section 176 is in Division 8 of the Act entitled "Tow Trucks". The appellant concedes that no written request for repairs was made by the respondents. The questions of law referred to me are as follows:

> 1. Did the Magistrate err in ruling that the motor vehicle owned by the firstnamed respondent was a damaged motor vehicle within the meaning of s176 of the *Transport Act* 1983?
>
> 2. Did the Magistrate err in ruling that the appellant was required to obtain the prior approval in writing of the firstnamed respondent or its authorised agent to the commencement or carrying out of repairs to the firstnamed respondent's vehicle as a condition of its entitlement to recover the sum or charges due to the appellant for the work?

The appellant submitted that s176 does not apply in this situation, because the disabled vehicle was not a "damaged motor vehicle" within the meaning of s176. Counsel for the appellant, Mr Halpin, argued that the Act draws a distinction between a "disabled motor vehicle" and a "damaged motor vehicle". He relied on s86 of the Act, which defines "damaged motor vehicle" as "a motor vehicle damaged in an accident". No definition of "accident" appears in the Act, but in the *Transport (Tow Truck) Regulations* 1983, "accident" is **[5]** defined in Reg 4 as, "a collision or impact (however caused) occurring on a highway and resulting in damage to a motor vehicle and includes a collision or impact (however caused) occurring off a highway and resulting in damage to a motor vehicle where immediately prior to the collision or impact the motor vehicle had been travelling on a highway". Mr Halpin pointed out that s175 uses "damaged" and "disabled" in a distinct sense and argued that in enacting s175 Parliament envisaged a vehicle owner, distressed due to a collision, at the mercy of unscrupulous tow truck drivers who may exploit their vulnerability. He relied on what Tadgell J said in *Johannes Benjamin Vos and Ors v Vincent and Frank Santoro* (unreported 3 July 1991 at 4) about Division 8 of the Act; "It may be observed that the scheme is apparently designed to avoid the unseemly scramble for custom which one was used to seeing near the scene of road accidents before the scheme was introduced in the early 1980's".

Mr Robinson, who appeared for the respondents, submitted that s176 deals both with vehicles which have broken down due to a malfunction as well as those involved in collisions. He argued that "damaged motor vehicle" did not necessarily relate to one involved in a collision, and no distinction should be drawn with "disabled motor vehicle". He argued that the word "accident" was not limited to incidents which involved a collision, and that the Regulations do not help in **[6]** determining this question, as they were subsequent and subordinate to the Act. As to policy Mr Robinson submitted that a person who drives a vehicle which has broken down is no less vulnerable to an unscrupulous tow truck driver than a person who drives a vehicle involved in a

collision. He argued that s176 of the *Transport Act* is remedial and requires liberal interpretation to the benefit of the person whose car is damaged. In my opinion s176 is limited to cases where there has been a collision, as opposed to malfunction. Otherwise the distinction between "damaged motor vehicle" and "disabled motor vehicle" which appears in the Act and the Regulations would be meaningless. "Damaged motor vehicle" is defined in the Act as "a motor vehicle damaged in an accident". In this context "a motor vehicle damaged in an accident" does not extend to breakdown or a malfunction of the car. I accept that the Regulations cannot be determinative of this matter. However, they do illustrate the distinction. In my view, s176 does not operate where the motor vehicle is merely disabled as a result of a malfunction as it was in this case. The questions of law must therefore both be answered in the affirmative. It follows that the appeal is allowed with costs.

Solicitor for the appellant: Peter Vodicka. Solicitors for the respondents: Baird and McGregor.
