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SUPREME COURT OF VICTORIA

CROCE v STEEL

Hayne J

29 March 1993

CIVIL PROCEEDING – MOTOR VEHICLE COLLISION – PROPERTY DAMAGED – REPAIRER AUTHORISED TO REPAIR VEHICLE – SOLICITORS AUTHORISED TO RECOVER DAMAGES – NATURE OF ASSIGNMENT – WHETHER OPERATED IN EQUITY – WHETHER REPAIRER COULD BRING ACTION IN ASSIGNOR'S NAME.

C's motor vehicle was damaged when it was involved in a collision with a vehicle driven by S. C. signed a document headed "Recovery Authority" which authorised the repair of the car and a firm of solicitors to act for C. in the recovery of damages and costs. When the matter came on for hearing, the magistrate dismissed C's claim on the ground that he had not suffered any monetary loss. On appeal—

HELD: Appeal allowed. Dismissal set aside. Order on the claim for damages.
By signing the Recovery Authority, C. assigned to the repairer his interest in the chose of action being his claim for damages against S. As the assignment operated only in equity, it was necessary for the action against S. to be brought in C's name.

HAYNE J: [1] On 2 October 1991 Robert Croce's motor car was damaged when it was involved in a collision with a car driven by Neville Steel. Croce was not driving the car at the time of the accident – it was being driven by a friend – but nothing turns on this. On 3 October 1991 Croce signed a document headed "Recovery Authority", which read, in part:

> "I, Robert Croce, hereby irrevocably authorise –
> 1. Ellisons Panels (the repairer) to repair my vehicle, registration number DEG-135 for the sum of $ ....
>
> 2. Willberby's, Solicitor, of 52 Playne Street, Frankston, to act for me in the recovery of damages and costs arising from the accident described hereon and to pay, direct from settlement moneys, the repairer, to satisfy in whole or in part the cost of repairs.
>
> Dated this 3rd day of October, 1991. Signed ....."

The document then contained details of the parties involved in the accident and a description of and diagram representing the accident, all of which were set out in a way generally similar to an insurance company claim form. Croce's car was repaired by Ellisons Panels and the car was returned to him before any payment was made to the repairer for the cost of the work. The solicitors named in the recovery authority later instituted proceedings in the Magistrates' Court naming Robert Croce as plaintiff and Neville Steel as defendant, and claiming damages said to amount to $7,247.17, an amount amended at the start of the hearing to $6,204.43.

The proceeding was heard on 16, 18 and 25 November 1992, on the last of which days the learned Magistrate **[2]** published reasons for his decision and ordered that the plaintiff's claim be dismissed; that there be judgment for the defendant on his counterclaim in the sum of $56.40, being 15 percent of his damages; and that the plaintiff pay the costs of the action, which were later fixed at $2,821.30. Thus, the learned Magistrate found that the defendant was 85 per cent responsible and the plaintiff 15 per cent responsible for the occurrence of the accident. The learned Magistrate also found – for reasons that need not now be examined – that the reasonable cost of repairs to the plaintiff's car was $4,736.14; not the significantly larger sum that had been originally claimed when the proceeding was issued.

In his reasons for decision the learned magistrate said:

> "In my view there is no evidence before the court at the appropriate standard to persuade me that Mr Croce had suffered any monetary loss for the damage to his car. In fact, the evidence persuades

> me that the authority he signed was to the effect that his car would be repaired and returned to him free of charge to him. That flows from the document itself, and that which occurred, and that which has occurred thereafter. His car was repaired and returned. The repairer has not exercised his repairer's lien, and has made no demand upon Mr Croce for payment over the time of 12 months. If, as Mr Coppard "[the solicitor appearing for Croce in the proceedings in the Magistrates' Court]" submits, the repairer had merely deferred his right to recover from Mr Croce, then in signing the authority, Mr Croce had put himself in a potentially disadvantageous position by not claiming on his insurance policy and running the risk of paying the exaggerated repair costs, together with the costs of the litigation, and the possible costs of repairs to the defendant's car."

Croce now appeals against the orders made in the **[3]** Magistrates' Court. The questions of law that are said to arise are:

> "(a) Even accepting the Magistrate's ruling that the recovery authority should be accepted into evidence, did that authority amount to an assignment of the right of action or release the appellant from liability to the repairer for repair costs?
>
> (b) Did the appellant's authorisation of payment directly to the repairer absolve the appellant from his obligation to pay such amount, either in whole or in part?
>
> (c) Did the recovery authority amount to an assignment of any cause of action by the appellant to the repairer?
>
> (d) Did the release of the repairer's lien amount to a release of the debt to the repairer by the appellant?
>
> (e) Was there any evidence that the appellant had not suffered loss arising out of this cause of action?"

It will be seen from the passage from the learned Magistrate's reasons that I have referred to that he based his decision, at least in part, upon his construction of the recovery authority document. It was submitted below, and again on the present appeal, that the recovery authority had the effect of releasing Croce from any liability to pay the repairer the cost of repairing his car or, as it was also put, extinguished any liability to pay for the repairs. Of course the document does not say this expressly. What it does say is that Croce authorises the repairer to repair the vehicle for an unspecified sum of money, and the solicitors to act for him in the recovery of damages and costs. It also irrevocably authorises the solicitors "to pay, direct from settlement moneys, the repairer to satisfy in whole or in part the cost of repairs".

But authorising the solicitors to pay money **[4]** received by them in satisfaction in whole or in part of the cost of repairs falls, in my view, far short of an agreement that, in return for the promise of this unknown amount, the repairer will repair the car. By giving the authority in terms described as an "irrevocable authority", Croce may well have thereby assigned to the repairer his interest in the chose in action being his claim for damages against Steel. But that assignment is not said expressly to be in full satisfaction of what otherwise would have been Croce's obligation to pay for work which he had requested to be done.

The recovery authority acknowledges expressly the possibility that the amount received from the action that is to be instituted will not pay the whole of the cost of repairs. This runs directly contrary to any suggestion that the balance of the cost of repairs is not to be recoverable, and to be recoverable from the person ordinarily responsible, namely, the owner of the car, who has requested the performance of the repair work. The case in this respect is very different from that considered by the Court of Appeal in *Brown & Davis v Galbraith* [1972] 1 WLR 997. The words "in part" are, in my view, not to be treated as being otiose and are to be given some meaning and effect. Thus, I do not consider that the repair authority has the effect which the learned Magistrate considered that it did when he said that it was "to the effect that his, Croce's, car would be repaired and returned to him free of charge to him".

However this may be, even if the agreement on its true construction is that the repairer agreed to repair the vehicle in return for Croce giving to him the irrevocable **[5]** authority that I have mentioned, it does not mean that Croce had no action against Steel. As I have said, it may well be that the authority amounted to an assignment of the cause of action by Croce to the repairer. Even if this is so, and even if the assignment was in full satisfaction of any claim that the repairer may have had against Croce for the cost of the work that was to be performed, it does not follow,

as the learned Magistrate seemed to conclude, that Croce therefore has no claim against Steel. The assignment was one of which no notice was given to Steel, and it could therefore operate only in equity, even if a claim for damages for tort can be assigned under the statutory provisions of the *Property Law Act* s134. See *May v Lane* (1894) 64 LJQB 236, 238; cf. *King v Victoria Insurance Company* [1896] AC 250; 74 LT 206; 44 WR 592; 65 LJPC 38; 12 TLR 285.

The assignment being one which could operate only in equity, it follows that any action against the tort-feasor must be brought in the name of the assignor. The assignee would have no right to enforce the claim in his own name. See, for example, *Marchant v Morton Down & Co* [1901] 2 KB 829, 832; *King v Victoria Insurance Company*, (*supra*) 254-256; Vol. 6, *Halsbury* 4th Ed., (Replacement) para.22.

Thus, even if the third question of law posed in this matter is answered "Yes", and even if Croce had assigned his cause of action in full satisfaction of the price of the repair work, it would not follow that Croce's action should have failed. He would still have been the proper plaintiff against Steel, although he would have **[6]** been bound in equity to hold the proceeds of any judgment or settlement for the benefit of the repairer. The extent and nature of the obligations between the assignor and assignee, and the availability to the assignor of any defence to a claim against him by the assignee for the fruits of the cause of action is nothing to the point of whether the assignor had a good cause of action at law against Steel. Some emphasis was laid in argument on the decision of the High Court in *Griffiths v Kirkmeyer* [1977] HCA 45; (1977) 139 CLR 161; (1977) 15 ALR 387; 51 ALJR. If, on its true construction, the recovery authority did discharge Croce from any obligation to pay the repairer, that discharge was not obtained without consideration. It was a discharge given in return for the irrevocable authority to pay the proceeds of the action to the repairer. In these circumstances, I do not consider it necessary then to see what results would have obtained if the repairs had been provided to the plaintiff gratuitously, and I do not consider it necessary to examine the extent to which *Griffiths v Kirkmeyer* is to be seen as permitting recovery for services provided to an injured plaintiff gratuitously.

Again, in the course of argument, there was some emphasis on a comment by the Magistrate that:

> "My impression of the evidence is that by this litigation the repairer was attempting to obtain a sum of money by deception in that he might have recovered $7,736, or $7,247.27, or $6,204.43, as the cost of repairs to a motor car which, in fact, cost no more than about $4,736. If this be a practice common in the motor car repair trade, it ought to be discouraged and referred to the appropriate authorities, as it is clearly not in the public interest".

I express no view at all upon whether the **[7]** characterisation given by the learned Magistrate of this agreement is accurate. In my view it does not matter whether the agreement can be characterised in these terms as an agreement whereby, in effect, the repairer sought at least the chance of recovering an inflated amount for repair work. In my view that characterisation does not affect the legal consequences that flow from the events and agreements that have happened. The learned Magistrate noted that by returning the car to Croce without first obtaining payment, the repairer thereby gave up his repairer's lien. So much may be accepted. Similarly, it is to be noted that the Magistrate found that the repairer made no demand upon Mr Croce for payment of the amount due for the repair of the vehicle.

However, I do not consider that these matters mean that Croce had not suffered loss and damage as a result of the accident, and in the end I did not understand the respondent to seek to support the judgment below on these bases. The fact remains that Croce's property had suffered damage. Whether he had the vehicle repaired or not, *prima facie*, he was entitled to recover the cost of putting it into its pre-accident condition from the party who, by his negligence, had caused that damage. In my view, it is again nothing to the point that Croce was able to make some arrangement, even perhaps some unusual arrangement, with the repairer about the terms on which the repairs would be carried out. It matters not whether, through ignorance, inadvertence or deliberate choice, the repairer chose to give up the security that ordinarily he might be entitled to assert in protection of **[8]** his claim to payment for the work done. The bare facts that the repairer chose not to make any demand for payment from Croce, and that the repairer chose not to exercise any lien that he may have had over the vehicle as security for payment for the cost of repairs, do not conclude the question whether Croce was liable to pay for the repairs. In my

view, the fourth and fifth questions of law that I have mentioned above should each be answered "No". I consider that the appeal should be allowed. Subject to anything that counsel may say, I consider that there should be orders as follows:

1. The appeal is allowed;

2. Set aside the orders below:

3. Order in lieu that there be judgment for the plaintiff on his claim in the sum of $4,025.72;

4. That there be judgment for the defendant on his counterclaim in the sum of $56.40.

I will hear counsel on questions of interest and costs, as well as any submissions that they may make about the forms of the order that I propose. (Discussion ensued re costs.) **HAYNE J:** I have already indicated that in my view there should be judgment for the plaintiff on his claim in the amount of $4,025.72. Counsel for the appellant/plaintiff now seeks damages by way of interest under s60 of the *Supreme Court Act*. The respondent contends that the damages which I propose should be awarded to the plaintiff are wholly compensation in respect of liabilities incurred which do not carry interest as against the person claiming interest, namely the plaintiff, and that accordingly **[9]** s60(3)(a) of the *Supreme Court Act* precludes the grant of the interest which the plaintiff seeks.

The compensation which the plaintiff seeks – and in respect of which I consider him entitled to judgment – is compensation for damage to his motor car and is not, in my view, properly characterised as compensation in respect of any liability which the plaintiff may have to a third party – in this case, the repairer. The damages that I consider the plaintiff should receive are damages that may be measured by the cost of repairing his motor car, but they are referable to the fact that an item of his property has suffered physical damage by reason of the negligence of the defendant. That being so, I do not consider that s60(3)(a) applies in the present matter. The fact that the plaintiff may have made, as is here the case, a special or unusual arrangement with his repairer concerning payment for the cost of repairs does not, in my view, affect the characterisation that should be given to the damages that are awarded. It follows that I am of the opinion that damages by way of interest should be allowed to the plaintiff in this matter. (Discussion ensued.)

HAYNE J: [10] There will be orders as follows;

1. The appeal is allowed.
2. Set aside the orders below.
3. Order in lieu - (a) that there be judgment for the plaintiff on his claim in the sum of $4,025.72, together with damages by way of interest with costs;
(b) that there be judgment for the defendant on the counterclaim in the sum of $56.40 together with damages by way of interest with costs;
(c) the defendant pay the plaintiff's costs of the proceeding in the Magistrates' Court.
4. Otherwise remit the matter to the Magistrates' Court for further hearing for fixing the amount of damages by way of interest and the costs of the hearing.
5. Order the respondent pay the appellant's costs of the appeal including reserved costs.
6. Grant to the respondent an indemnity certificate under s13 of the *Appeal Costs Act*.

APPEARANCES: For the appellant Croce: Mr R Middleton, counsel. Willerbys, solicitors. For the respondent Steel: Mr D Curtain, counsel. Ligeti Nicholson & Co, solicitors.
