9/94

SUPREME COURT OF VICTORIA

ANTRIM v HINKLEY

O'Bryan J

29 March 1994

CIVIL PROCEEDING – MOTOR VEHICLE COLLISION – VEHICLE NOT REPAIRED AT HEARING DATE – AWARD MADE – WHETHER INTEREST SHOULD BE ALLOWED: *SUPREME COURT ACT* 1986, S60.

Where the cost of repairing a damaged motor vehicle has not been incurred at the date on which an award is made, the court must not allow interest in respect of the amount awarded.

O'BRYAN J: [1] This is an appeal from a decision given in the Magistrates' Court at Heidelberg on 28 October 1993. The respondent brought a claim for damages to a motor vehicle arising out of a motor vehicle collision. The appellant admitted negligence and the quantum of the claim for repairs to the vehicle, namely, $2,200. Details of the damage to the vehicle that required repair are set out in a Repair Assessment Invoice attached to the Summons. The respondent also claimed damages for seven days' hire of an alternative vehicle, namely, $525.00. This vehicle was required in the course of the respondent's business whilst the damaged vehicle was repaired. One issue was raised for determination in the appellant's defence. The appellant asserted that the damaged vehicle had been repaired before the hearing date, and that no vehicle had been hired to replace the damaged vehicle. Consequently, the claim for the hire of another vehicle should be disallowed.

This issue was litigated by the calling of the respondent and two witnesses for the appellant. The respondent gave evidence that the vehicle had not been repaired. He produced a photograph showing damage to the near-side front panel of the vehicle taken not long after the accident. The photograph produced in this Court did not show much obvious damage to the bodywork. Nevertheless, no issue arose in the Court below that damage to the extent of $2,200 had been caused in the collision.

Two witnesses for the appellant had inspected the vehicle about seven days before the hearing. They were **[2]** not expert in the repair of body damage to motor vehicles and they made their inspection at night time. Each witness gave evidence of being unable to observe any damage to the vehicle at the time of their inspection. If their evidence was accepted, the inference open was that the respondent had not told the truth when he said the vehicle had not been repaired and consequently, the claim for $525.00 would fail.

The respondent was asked where the vehicle was presently located, in the course of cross-examination. His answers indicated that the vehicle was not conveniently accessible to the Court. This matter was not pursued further. No request had been made to the respondent or to his solicitors before the hearing that he produce the vehicle to the Court, and no request was made during the hearing to adjourn the hearing to enable the vehicle to be brought to the Court for inspection.

The learned Magistrate accepted the respondent's evidence that the vehicle had not yet been repaired and rejected the appellant's witnesses. He gave reasons for doing so, but was not requested to deal specifically with the point now raised in this appeal, namely, that an inference should have been drawn by the Magistrate against the respondent arising from his failure to produce the vehicle.

Mr Gunst on behalf of the appellant argued that the principle stated in cases such as *O'Donnell v Reichart* [1975] VicRp 89; (1975) VR 916 and *Jones v Dunkel* [1959] HCA 8; (1959) 101 CLR 298; [1959] ALR 367; 32 ALJR 395 should have been applied in the Court below. In essence, Mr Gunst argued that the Magistrate should have inferred that the respondent failed to produce the vehicle for inspection because he knew its production would not have **[3]** helped his case.

In my opinion, the point argued by Mr Gunst is not decisive, for two reasons. Firstly, it was clearly open to the appellant to insist that the vehicle be produced to the Court and the appellant failed to do so. The inference said to be open to the appellant and against the interest of the respondent was equally open to the respondent and against the interests of the appellant. Counsel for the respondent could have argued that non-production of the vehicle was not insisted upon by the appellant because he was unsure whether the condition of the vehicle would be helpful. The learned Magistrate was not asked whether he took this argument into account.

Secondly, the principle found in cases such as *O'Donnell* and *Jones* is qualified to this extent; the absence of a witness or a physical piece of evidence one might expect to be called or produced by a particular party can be explained to neutralise the inference. The respondent did offer an explanation for the non-production of the vehicle and counsel for the appellant did not pursue the matter.

The learned Magistrate may have accepted the explanation and not been prepared to draw an adverse inference. In my view, the appellant has failed to show that the learned Magistrate was not entitled to decide the facts as he did. He saw the witnesses, heard them tested by cross-examination and finally, accepted the evidence given by the respondent as more credible than the evidence of the appellant's witnesses. This was open to him, and the first two grounds of appeal must fail.

The second substantial ground of appeal concerns the award of interest on the damages. The learned Magistrate **[4]** awarded interest of $66.34. Mr Gunst argued that because the damage had not been suffered before the Order was made, no interest should have been awarded. Section 60 of the *Supreme Court Act* 1986, which applies in the Magistrates' Court, provides in sub-section (3):

> "If the damages awarded by the Court include any amount for—
>
> (b) compensation for loss or damages to be incurred or suffered after the date of the award;
>
> the Court must not allow interest in respect of any amount so included or in respect of so much of the award as in its opinion represents any such damages."

Unfortunately, when the Magistrate announced his decision and made the award, including the award of interest, the point concerning interest was not raised. Mr Gunst argued that because repairs to the respondent's vehicle had not been carried out at the date of the hearing, and the cost not incurred, no interest should have been awarded in respect of the cost of repairs. It is not disputed that interest should not have been awarded in respect of the cost of hiring a replacement car. It is by no means clear, however, what interest, if any, was awarded in respect of the cost of hiring a replacement vehicle. The Magistrate was not asked to give reasons for his award of interest.

Mr Burchill for the respondent, argued that the test for damage in respect of the car is diminution in value and such damage was suffered when the accident occurred, therefore interest was claimable in respect of the vehicle under s60(1). I am not persuaded that this argument is correct. The nature of the claim was the cost of repairs and the cost of those repairs had not been **[5]** incurred when judgment was given. The Summons states in respect of the question - "What is the nature of your claim?", "Cost of repairs to the plaintiff's vehicle, including assessment fee and the cost of a replacement vehicle".

In my view, the learned Magistrate erred in awarding interest as he did. Accordingly, Grounds C and D of the appeal will be upheld. Grounds A and B of the appeal fail. Accordingly, the appeal will be allowed in part and there will be deleted from the judgment the sum of $66.34. In the circumstances, I do not consider that the appellant is the successful party, the principal grounds of this appeal were Grounds A and B. In respect of these grounds, the appellant has failed. Consequently the order for costs will be that the respondent is entitled to have his costs of the appeal paid by the appellant.
