04/76

SUPREME COURT OF VICTORIA

WRAIGHT v GUNSTON

Lush J

12 September 1975

CIVIL PROCEEDINGS – MOTOR VEHICLE COLLISION – NEGLIGENCE – DAMAGES – RELEASE – CLAIMANT SOUGHT FROM OTHER PARTY THE AMOUNT OF THE EXCESS WHICH WAS PAID – A RELEASE WAS SIGNED IN FULL AND FINAL SETTLEMENT – FINDING BY MAGISTRATE THAT RELEASE WAS CLEAR AND UNAMBIGUOUS DEFENCE OF RELEASE – WHETHER MAGISTRATE IN ERROR.

This was a claim for damages to the complainant's vehicle caused by the defendant's negligence in his own vehicle. Counsel for the defendant admitted that his client was guilty of negligence and liable for the collision and admitted quantum of the resulting damage. Counsel for the complainant in his turn admitted that the complainant had signed a release to the defendant in consideration of payment of $100 and in substance admitted that this sum would have to be applied in reduction of damages. The defendant's counsel then stated the defendant's defence was a defence based on the release. The magistrate upheld the defence of release. Upon order nisi to review—

HELD: Order nisi discharged.
1. There was only one claim, the plaintiff's claim for the total damage which under Condition 3b his insurer was entitled to prosecute for its own benefit. It was not open to the plaintiff by contract with his insurer or otherwise to divide the single claim into two or more claims to be separately prosecuted.

2. The Magistrate was not obliged to find that the complainant intended to settle his $100 excess.

LUSH J: ... In the course of that evidence the complainant said that he held a comprehensive policy in respect of the vehicle damaged in the collision and that that policy was subject to a $100 excess. The policy and the renewal certificate were produced. The renewal certificate included an endorsement establishing the excess provision deposed to by the complainant. The policy was subject to Condition No. 3, in standard form. Paragraph (b) of that Condition said that:

> 'The Company will be entitled to take over and conduct in the name of the Insured the defence or settlement of any claim or to prosecute in the name of the Insured for its own benefit any claim or indemnity for damages or otherwise and the Company will have full discretion in the conduct of any proceedings or in settlement of any claim.'

The complainant's evidence went on to relate that after the accident he had contacted the agent of his insurer concerning the $100 excess. That agent, and subsequently an unidentified person at the head office of the insurer, informed him that everything would be all right. After a few weeks' delay he again telephoned his insurer and was told that he would have to meet the first hundred dollars of the damage. He did not say what interpretation he put on this item of information and, in my opinion, it is susceptible of the interpretation that it implied that the insurer did not intend to pursue the claim against the defendant. I think that it might have had that meaning to the complainant himself, though there is no evidence whether it did or not. It might have had that meaning to the defendant's insurer if they were eventually informed of it or given information from which might have been deduced the substance of what the complainant had been told by his own insurer.

Anyway, the plaintiff went on to say that he was annoyed by this information and in due course established contact with the defendant's insurer. He told them that he was insured but was liable to an excess provision to the amount of $100. He did not tell them what his repair bill was or was likely to be or what he thought it might be. He told them that he was only interested in collecting the $100 excess. He said repeatedly in his evidence that he had no intention of settling what he called the insurer's claim when he signed the release. In fact, he received $100 from the defendant's insurer and signed the release in wide terms.

I shall not read the whole of the release but merely two relevant parts of it. A part described as Section 1, but in fact the second of four parts into which the printed release form was divided, reads:

> 'I', and then the complainant is named, 'agree to accept the sum of $100 in full and final settlement, satisfaction, liquidation and discharge of all claims against the above-mentioned Company and/or Insured in respect of damage arising out of the above-mentioned Motor Vehicle Accident.'

The other passage which I propose to read is in a division of the form called Section A which, in fact, appears at the top of the page. It is difficult to understand the whole of Section A but the final sentence of it is as follows:

> 'It is further agreed that receipt of this discharge may be pleaded in bar to any action, suit or proceeding commenced now or hereafter against the below-mentioned insurance company and/or insured'.

I do not propose to decide whether, when read in full, Section A is part of the release granted by the complainant. It is sufficient for the purpose of this case if Section 1 is recorded as the effective release. ... The Stipendiary Magistrate upheld the defence of release and the note of his reasons which appear in the affidavit on which an order nisi was granted includes these passages:

> 'The release is clear and unambiguous. There is no evidence of misrepresentation, fraud or mistake and the words in the release "the payment shall serve as full and final settlement, *et cetera*," are binding on the parties. It is clear from the evidence that what was being claimed was motor vehicle damage and also that the complainant was prepared to accept $100 from the defendant's insurer. The complainant's evidence was, "I said my excess was $100 and I was only interested in claiming $100". There is no evidence that the damage involved was more than $100.'

May I say in parenthesis that this last sentence seems to require some further explanation because there was an admission that the amount of the damage was $192. It seems likely that the Magistrate meant that there was no evidence that at the time of the release anybody knew that the amount of the damage was more than $100. At a later stage, the Magistrate went on to say, 'there is a strong inference and I find this an inescapable inference that the complainant knew his claim was more than $100. There is no evidence that the defendant's insurer knew that the claim was more than $100.'

After the dismissal of the claim, Mr Wikrama, who appeared for the complainant and who has appeared for him again as the applicant in these proceedings, asked the Stipendiary Magistrate whether he was prepared to find that the complainant intended only to settle his $100 excess. The affidavit records that the Magistrate refused to make this finding. ... The basis of the applicant's argument before me was that there were two claims against the defendant, the applicant's personal claim for $100 equal to the amount of the excess provision of the policy and his insurer's claim for the balance. The argument was that the intention of the parties to the release had been that the former only should be released and so far as this was a matter of fact the stipendiary magistrate was wrong in law in not acting upon what was submitted to be uncontradicted evidence. In my opinion there was only one claim, the plaintiff's claim for the total damage which under Condition 3b his insurer was entitled to prosecute for its own benefit. It was not open to the plaintiff by contract with his insurer or otherwise to divide the single claim into two or more claims to be separately prosecuted.

Mr Wikrama cited to me a decision of the Court of Appeal, *Taylor v O'Wray & Company Limited* (1971) Lloyds LR 497 as authority for the proposition that there could be separate claims by the insured and the insurer. The facts of that case were that the insured brought, as a result of a highway accident and independently of his insurer, a County Court action in which he claimed damages in respect of his personal injuries. The special damage alleged in the case, however, included an item of £10 as the excess payable under his comprehensive policy. The total amount of the claim was £100. The defendants paid £30 into court and the action was settled not by taking the money out of Court under the Rules but by an agreement providing, I think, for some different payment of costs from that which would have been provided for by the Rules and the agreement was confirmed by a Letter by the plaintiff's solicitors that the sum of £30 was accepted 'in full settlement of his claims in this action'. Consequently, the insurer instituted proceedings

for damages for repairs to the plaintiff's vehicle and in answer to this action the point was taken that the settlement of the first action amounted to a release. Of the three judgments given in the case, Mr Wikrama must rely on that of Edmund Davies LJ.

In that judgment at p500, there occurs a passage in which His Lordship might be taken to be adopting the view that the plaintiff may select certain items of damage as the subject of his first action, and reserve other items of damage of the same class for a later action. The debate in that case and the judgments centre upon the well-known decision in *Brunsden v Humphrey* (1884) 14 QBD 141; 53 LJQB 476 and if His Lordship did in fact adopt the view which I have summarised, it is, in my respectful opinion, not justified by anything in *Brunsden v Humphrey*, and subject only to objections as to abuse of process it could result in an accident producing as many actions as there were damaged parts in a vehicle.

Even if that were possible it was not what happened in *Taylor v O'Wray*, or what it is suggested happened in the present case, as in both cases what was claimed was part of a total bill and not particular items of damage claimed separately from other items of damage. The *ratio decidendi* of *Taylor v O'Wray* is to be found in the judgments of Harmon LJ and Widgery LJ. Harman LJ said at p500.

> 'In these circumstances neither party to the agreement made on June 28 could have been in no doubt that the settlement then negotiated intended to exclude what I may call the insured claim and to be confined to the uninsured claim. It was perfectly open to the parties' advisers to act in this way'.

At p501 Widgery LJ said:

> "I can see no possible contention in this case that the agreement extended beyond the claim in the first action which for this purpose did not include the balance of the claim for damage to the motor car."

In effect the decision was that there was no intention to settle the claim for property damages but only to pay ten pounds on account of it without prejudice either to its further prosecution or to its defence. It is clear in that case that the contractual intention embodied in the release put forward as a defence was an intention common to both parties.

Mr Wikrama's argument that the Stipendiary Magistrate was wrong in law in not treating the release in this case as so limited as not to extinguish the claim for $192, calls for further analysis of the evidence. It is possible as I have indicated that the defendant's insurer and even the applicant, in view of the advice which he had been given by his own insurer concerning the excess, thought that no action would be taken by the applicant's insurer and that the defendant's insurer accordingly thought that the payment of the $100 would dispose of the risk that the applicant might sue on his own initiative. The actual fact was that the applicant intended to collect $100 from the defendant's insurer and $92 from his own insurer, as it turned out. The applicant having given evidence that he read the release before signing it, and he being of the age of 36 and describing himself as a 'sub-manager', the Stipendiary Magistrate was, in my opinion, in all the circumstances of this case not obliged to make even the finding requested by Mr Wikrama that the applicant intended only to settle his own claim for $100. What he intended to do was to get no more than $100. That his intention was as to the effect of obtaining the $100 is another matter.

The fact that the defendant did not call any person from his insurer to say what was known or believed or understood at the time of the execution of the release will not, in the circumstances of this case, assist the applicant. In the first place, so far as the Stipendiary Magistrate refused to make a finding concerning the applicant's intention, that was a matter within the applicant's knowledge and a matter in which the burden of proof rested on him.

In the second place, this is not a situation for the application of the rule in *Jones v Dunkel* which may be stated as a rule that silence may indicate that a particular inference founded on the evidence can safely and correctly be drawn. On the applicant's own evidence he did not explain the position to the defendant's insurer. The first proposition which he needed to prove was that the defendant's insurer knew that the applicant's insurer intended to or was likely to press a claim for a larger sum than $100 for the repairs by legal process or otherwise. Without this proposition there would seem to be no reason for inferring in the defendant's insurer one intention rather than another. If it was the fact that the defendant's insurer knew of the possibility

of a claim by the applicant's insurer, it must have been as a result of some communication. No such communication was made by the defendant and no other communication was proved. I have pointed out that King gave no evidence on this matter at all.

Put briefly the defendant's decision to call no evidence in these circumstances was incapable of assisting the plaintiff to escape from the situation which arose from a total lack of evidence. The Magistrate would not have been entitled to draw from the evidence given an inference of knowledge in the defendant's insurer, and in that situation the absence of the defendant's insurer was irrelevant. I refer if I may to my judgment in *Earle v Castlemaine District Hospital* [1974] VicRp 86; (1974) VR 722 at p733.

Mr Wikrama attempted to turn this aspect of the case to his own advantage by arguing that there was then a situation in which the ultimate dispute had not arisen at the time of the release, and accordingly it was contrary to principle to allow the release to extend to it. That argument, however, is destroyed partly by the consideration that there was only one cause of action to be released and partly by the consideration that the obvious purpose of the release on its terms was to get rid of all possible claims arising out of the accident.

Mr Wikrama's argument sought to escape even from this situation by advancing a proposition that the release could go no further than the applicant subjectively intended it to go. He cited to me the cases of *Lyall v Edwards* [1861] EngR 215; 158 ER 139; (1861) 6 H & N 337; *Grant v John Grant & Sons Pty Ltd* [1954] HCA 23; (1954) 91 CLR 112; [1954] ALR 517 and the *London South-Western Railway Co v Blackmore* (1870) LR 4 HL 610; 39 LJCh 713.

The observations in all these cases are concerned with the states of mind of both parties; their common intention, their common contemplation, their common awareness or their common inadvertence. Apart from shared states of mind they refer also to the situation where one party is aware that the other is making a mistake or omitting some matter from his consideration and takes advantage of that situation, or the situation where one party attempts to give the release an effect extending beyond its true purpose.

I do not find it necessary to decide whether there are some circumstances in which Mr Wikrama's argument could succeed. I simply say that I doubt, after reading the three cases cited, whether that could be so. The strongest position from the point of view of the present Applicant is the rule in equity discussed in the judgment of Dixon CJ in *Grant's case*, and even that appears to require an element of sharp practice or unconscionable dealing by the release.

However, that may be, the Stipendiary Magistrate in this case was, in my opinion, under no obligation to make the finding on which this argument depends and, accordingly, that argument cannot succeed here. In the result, the order nisi will be discharged with costs.
