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IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L.1986/B476

BETWEEN	LESLIE BENNETT	PLAINTIFF
AND	VIC BOWEN	FIRST DEFENDANT
AND	VIC BOWEN NEW AND USED CARS LIMITED	SECOND DEFENDANT

John Givans for Plaintiff instructed by Dunn, Cox and Orrett.

Rudolph Francis for the Defendants

Tried: December 2, 3, 4, 1991 and January 22, 1992.

Judgment

RECKORD, J.

The plaintiff is the owner of a 1979 Turbo charge Ford Mustang Motor car which he takes pride in keeping in immaculate condition. It had all the latest gadgets and equipment and despite its age is what is commonly called a "crissers". He is a customer service agent with Delta Airlines and resides in Florida, United States of America.

When he was leaving the island in October 1984, he desired to leave car with a responsible person. He spoke with his aunt, who recommended the first defendant who operated a new and used car agency on Brentford Road. He drove his car to defendants premises, spoke with the first defendant who agreed to keep the car on the premises.

On the plaintiff's evidence he offered to pay the first defendant Twenty Five Dollars ($25.00) per month for keeping the car and in addition would bring a bottle of whisky for him whenever he came to Jamaica. The first defendant's duties were to keep the car on the premises and start it from time to time to keep the battery charged. He was not authorised to drive the car on the public road. On leaving the car he paid the first defendant Twenty Five Dollars ($25.00) and he left with him the keys for the ignition and doors. He did not give the first defendant the keys for the gas tank or the wheel locks.

He returned to Jamaica thereafter and from time to time used the car and returned it to defendants on similar conditions.

In August 1986, he received a telephone call from Wendon Galloway, a handyman, at defendants business premises, and returned to Jamaica on the next flight. He went to defendants premises and saw his car - it was in his words "completely smashed". He saw the first defendant the following day and asked him how car came to be in that condition. The first defendant told him he did not drive the car, it was the watchman Wendon Galloway who did - but that he would be prepared to fix the car. The defendants failed to fix the car and he accordingly had it repaired and instructed his lawyers who issued a writ claiming damages for failing to take proper care of the car and alternatively, damages for trespass.

He had reported the accident to his insurers that first defendant never had any permission to drive the car. He never received any payment from the insurance company.

Mr. Galloway testified on behalf of the plaintiff that the first defendant told him that the plaintiff's car would be kept on the premises and that he should take care of it, clean it, start it and drive it on the premises when that was necessary. He denied that the car was left with him and that he had any authority to drive it on the road.

In August 1986, the Friday before the Independence holidays he saw the first defendant drive out the car - there was no damage on it. He next saw the car the Tuesday morning following on the premises. The first defendant was standing beside it - it was now damaged. The first defendant told him he wanted him to help him. When he asked what help he could give, the first defendant asked him to tell the plaintiff that it is he (Galloway) who was driving the car taking it to a body repairman when it was damaged. The first defendant told him that he was driving the car home that Tuesday morning about 6 o'clock along the Rockfort Road and a bus in front of him pulled up suddenly and he had to pull over to his right side and he crashed into a V.W. motor car coming in the opposite direction. He telephoned the plaintiff some days later telling him about the accident.

The Motor Insurers Adjusters report which evidenced the estimated costs of repairs was admitted in evidence by consent.

In an amended defence, the first defendant denied "that he received the motor car from the plaintiff whether for the purpose of safe keeping or any other purpose, but say that he drove the said motor car on the 5th of August, 1986, along the Rockfort to Harbour View main road in the parish of St. Andrew, when it was involved in an accident with another motor vehicle." He also denied trespass and claimed he had the plaintiff's implied consent and permission to drive the car.

In his evidence the first defendant stated that in October 1984, he had met the plaintiff who asked him to keep his car on his premises. He was happy to do so as his very good friend, the plaintiff's aunt, had spoken to him about it. He admitted that the plaintiff asked him about payment but that he refused to accept any. He introduced Wendon Galloway to the plaintiff as his "right hand man" who would be present to deliver the car to him whenever he arrived in the island. On several occasions the plaintiff would telephone him informing him that he was coming and the first defendant would drive the said car and pick up the plaintiff at the airport. Galloway had also driven the car to take plaintiff from the airport.

In 1986, just before a holiday, Galloway told him that the plaintiff would be coming to Jamaica so he should get the car ready for him. He drove out the car the Friday evening and went to his girlfriend's home. The Tuesday morning "When I going home to Harbour View I going along at Cement Company and a bus stopped below bus-stop suddenly on me and I pressed the brake and it sort of grabbed on the right rear wheel and with the sand it turned across putting the head out. A V.W. was coming at such a speed and it hit the whole complete front of the mustang."

When plaintiff came he told him he was sorry it had happened. He denied that plaintiff ever told him not to drive car on the street. He had no doubt that he had the plaintiff's consent to drive the car. He admitted in cross-examination that "The car was left under my personal responsibility in my premises" and later "I agree car kept there for safe-keeping "and I did not fix the plaintiff's car as it was insured."

Ian Edwards, called by the defence, testified at seeing Galloway driving the plaintiff's car on the road on several occasions.

At the end of the defendant's case Mr. Francis submitted that with regard to the payment of any fees to the defendant the plaintiff had not satisfied the evidential burden of proving payment in the absence of which there would be no enforceable agreement. In contract the plaintiff must fail.

Mr. Francis submitted that the whole issue turns on whether the first defendant had permission to drive the car. He urged the court to accept defendant's evidence and to find that the first defendant had permission. The witness Galloway had an interest to serve and that his evidence must be viewed with the greatest care.

If the bailment was gratuitous Mr. Francis submitted that the plaintiff must prove negligence. The plaintiff having failed to prove negligence his claim in bailment must fail.

Mr. Francis argued that it was plaintiff's case that there was an agreement for first defendant to drive the car, therefore there could be no trespass.

On behalf of the plaintiff, Mr. Givans submitted that the defence settled by the defendants had been completely departed from during the trial.

Based on the first defendant's admission he argued that all the ingredients of bailment existed. Where goods are damaged in the hands of the bailee there is a presumption of negligence. He referred to <u>Crossly Vaines Personal Property, 5th Edition - Chap. 6</u> at page 96, where the learned authors said "A powerful rule of law aids the bailor who sues for loss of or damage to his property while in the hands of the bailee. Once the bailor proves that bailment existed and that the chattel bailed was lost or damaged during the bailment, the bailee must disprove the inference of negligence which thereupon arises. The proof rests upon him that he took reasonable and proper care for the due security and proper delivery of the bailment and whether the bailment is for reward or gratuitous and whether the claim is put in detinue or treated as an action for negligence makes no difference." It was his submission that far from disproving negligence, the evidence of the defendant as how the accident took place was a classic case of negligence.

Trespass to goods consists of any legally unjustifiable act of direct physical interferance with chattel in the possession of another. It was his submission that when the defendant took the car for the weekend and was returning from his girlfriend's home when the accident occurred this was a deviation from his contract - A bailee who deviates from his contract, or otherwise exceeds the terms of his bailment may be liable for loss or damage to the bailee's goods without further default on his part - See Crosby Vaines (supra) at page 103.

FINDINGS

Notwithstanding paragraph 2 of the amended defence filed wherein the defendants deny the plaintiff's claim that the car was left under their control, but in custody of Wendon Galloway, the first defendant testified on oath under cross-examination that "The car was left under my personal responsibility on my premises." Save that he introduced Galloway to the plaintiff as the person who would look after the vehicle and deliver same to the plaintiff if the first defendant was absent, the first defendant gave no evidence that the car was left in the custody of Galloway. Indeed Galloway denied that the plaintiff left the car in his custody. I have no doubt therefore and accept the plaintiff's evidence that the car was left in the custody of the defendants.

Under what condition was the car left with the defendants? On defendants' evidence the plaintiff met him in 1984 and asked him to keep the car for him - because of his long acquaintance with plaintiff's aunt, he would not charge any fees - He asked plaintiff how long the car going to be here and plaintiff said he don't know but he goes and comes quite often. Whereupon he introduce Galloway to the plaintiff as the person who would be looking after the car - He further asked the plaintiff to telephone him whenever he is coming and the first defendant "would run it around the block to see that everything is o.k. and he said perfectly alright Mr. Bowen."

On the plaintiff's case he was paying the defendants Twenty Five Dollars ($25.00) per month to keep the car. On defendants case he was doing so gratuitously. Does it make any difference?

bailment as defined in Halsbury Laws of England, 4th Edition at paragraph 1501, "is the delivery of personal chattels on trust, usually on a contract express or implied, that the trust shall be duly executed, and the chattels redelivered in either their original or an altered form, as soon as the time or use for, or condition on which they were bailed shall have elapsed or been performed - The element common to all types of bailment is the imposition of an obligation, because the taking of possession in the circumstances involves an assumption of responsibility for the safe keeping of the goods."

What is the degree of care and diligence required of the bailee? An ordinary degree of care and skill is usually required when both bailor and bailee benefit from the transaction. Where the benefit is wholly that of the bailor, it appears that a slighter diligence is required. The common law duty of a bailee is to take reasonable care of his bailors goods - (See Halsbury 4th Edition paragraph 1503). The measure of diligence demanded of a gratuitous depository is as a rule that degree of diligence which men of common prudence generally exercise about their own affairs (paragraph 1515).

Because of the good relation between the first defendant and the plaintiff's aunt, I am of the view that although the question of payment did arise, that the first defendant agreed to keep the car on a gratuitous basis. The plaintiff's evidence that he paid Twenty Five Dollars ($25.00) per month is therefore rejected.

The first defendant is the managing director of the Company Vic Bowen New and Used Car Limited - the second defendant. He had been in the used car business from 1958. In 1986 he was the owner of 2 motor cars. He was a Justice of the Peace for Kingston. Undoubtedly he could be regarded as a responsible person. He was therefore required to exercise that degree of diligence which a man of his standing generally exercise about his own affairs.

How diligent was the first defendant when the car was damaged? On his evidence he swung suddenly from behind a bus that had stopped and crashed in an oncoming car. There is no evidence as to the condition of the road at the time or of the amount of traffic on the road. It is reasonable to infer that at 6:00 a.m. there would be very little traffic.

Why then was this accident? Was it because he was driving too near to the bus or because he was overtaking the bus without ensuring that it was safe to do so?

The driver of a motor vehicle following another should allow a sufficient space between the motor vehicles in which to deal with the ordinary experiences of traffic (See Charlesworth on Negligence 4th Edition paragraph 228).

The first defendant says it was caused by (i) the bus stopping suddenly before reaching the bus stop; (ii) when he pressed his brake the right rear wheel grabbed and turned across pulling the front out; (iii) sand on the road; (iv) speed of oncoming vehicle.

After a careful consideration of the first defendant's evidence on how the accident occurred, I find that he has failed to discharge the evidential burden placed upon him to disprove the inference of negligence. Indeed, his evidence in this regard would tend to show that he was driving negligently. The defendants have failed to prove that they took reasonable and proper care for the due security and proper delivery of the car and are therefore liable to the plaintiff for the damage of the car.

Damages for trespass was pleaded in the alternative. Even if it could be implied that the first defendant had permission to drive the car around the block to see that it was in good running condition, this could not by any stretch of the imagination include taking the car out of the premises where it was supposed to be kept for the long weekend - Friday to Tuesday - and driving it all over the corporate area. This certainly was a bailee who deviated from his agreement and would be liable without more for loss or damage to his bailees goods in trespass.

Before closing I must comment on a part of the evidence given by the witness Galloway wherein the first defendant asked him to tell plaintiff that it was he Galloway was driving the car when it was damaged. It is sufficient to say that this was never challenged by the defence and must therefore be accepted as a brazen attempt on the part of the first defendant to distort the facts and to mislead the plaintiff and shift the responsibility of his negligence on the shoulders of the handyman.

There will therefore be judgment for the plaintiff as claimed against both defendants in the sum of Twenty Seven Thousand Five Hundred and Sixty Dollars ($27,560.00) with three days costs to the plaintiff to be agreed or taxed.