Supreme Court – Claim for damages for detinue and/or conversion and/or negligence – Car left with defendant's husband to repair – Husband died – whether defendant became custodian of husband's garage and plaintiff's car with it – whether bailment made – whether demand – whether detinue – whether conversion – whether fraudulent or wrongful act of dealing inconsistent with owner's right – whether negligence – duty of defendant. Judgment for defendant on claim

Case referred to 13(and)

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. 1984 B248

REMOVED

BETWEEN	RICHARD BONNER	PLAINTIFF
A & D	MAYDENE CHUCK	DEFENDANT

W. B.Frankson Q.C. instructed by Gaynair & Fraser for Plaintiff

Dennis Morrison instructed by Dunn Cox & Orrett for defendant.

26th & 27th January, 1989 &
3rd March, 1989

PATTERSON, J.

The plaintiff's claim in this action is against the defendant to recover damages for detinue and/or conversion and/or negligence. In the statement of claim, the plaintiff alleges that in or about June, 1981, he delivered his 1973 Citreon Pallas motor car to the defendant's husband for him to effect repairs thereto at his garage. Before the repairs were completed, the defendant's husband died, and the defendant then assumed control of her late husband's garage and with it, the plaintiff's motor car. The plaintiff, on divers days, demanded the return of his motor car from the defendant who refused to deliver it to him. He further alleges that the defendant, in the course of her occupancy and operation of her late husband's garage, negligently caused or procured the vandalisation of the said motor

car. The plaintiff claims damages and special damages $60,000 being the value of the said motor car.

The evidence discloses that the plaintiff, an Attorney-at-Law, inherited a 1973 Citroen Pallas motor car on the death of his father. His late father had purchased the car in 1975 from a dealer, and probably, it was the only car of its kind in Jamaica at the time. In 1981, the car developed a starting problem and it needed tuning. The electronic computerised fuel injection system was defective. Consequently, the plaintiff delivered the car to one Gary Muirhead for him to have it repaired Gary Muirhead said he spoke to Mr. Chuck, the late husband of the defendant, one Mr. England and one "Bigger" about the problem that the car posed, and that he subsequently delivered the car to Mr. Chuck in June 1981 for him to effect the necessary repairs. Mr. Chuch operated an Esso Service Station on Shortwood Road in St. Andrew, and at the rear of the premises, he along with Mr. England operated a garage. It appears that the service station and the garage were separate businesses althouth both were operated on the same premises.

Mr. Muirhead says that the costs of the repairs had not been agreed on, but he gave Mr. Chuck $500, which he had received from the plaintiff, to purchase a sensor for the car. Mr. Muirhead made regular visits to the garage over the next 3 months, but the sensor was not obtained and so the repairs could not be completed. Sometime after that the car was removed from the covered area of the garage into the open. About a month later, he noticed that the paint on the car had cracked and

the leather upholstery had dry-rotted. Thereafter, on one of his visits to the garage, he noticed that the right rear fender, spare tyre and the radio were missing from the car. He says he spoke to Mr. Chuck about it. On another visit, he saw the car in open land outside the garage area; the bonnet, front fenders, cylinder head, seats, roof, doors and dash-board had been removed by then and only the framework and the engine block remained. This was about the end of 1981 or in 1982, but before Mr. Chuck died. He made reports to the plaintiff about the condition of the car both at the time when he first observed parts missing from it and when it had been scrapped and removed to the open land.

The plaintiff's evidence is that he did not know Mr. Chuck. After he heard of the death of Mr. Chuck, he went to the service station sometime in 1983. He saw his car in front of the service station and he examined it before speaking to the defendant. He noticed the paint on the car had faded- "bleached out" - spare tyre, cooling system and other mechanical parts missing and wires were just "pointing loose". He told the defendant that he had heard that Mr. Chuck, her husband, had died, and that was what brought him to the service station. He asked her "what was the position" - regarding his car and that he had noticed that it had been scrapped. He says that she replied that he owed $800 for repairs done to the car, and he said to her "what is the situation as far as scrapping of the car is concerned? - I cannot take the car like this!;" Her reply was that she was not concerned about that and "I think she said her husband had told her that he had spent some $800 on the car and that it was not be

released until that amount was paid". He says he told her that he had no proof that repairs had been effected on the car and that he would not pay the money until the missing parts had been replaced. He then left.

He went back about a month after. The car was now among old cars and metal parts. The engine block, transmission, all 4 tyres, upholstery, bonnet, rear fenders, front bumper and other parts were missing. He again asked the defendant "what she was going to do about my car" and she replied that she was not concerned about the car, and that he should pay her. The plaintiff told the defendant that he could not suffer the loss of his car over $800 and he left.

The plaintiff when cross-examined, says that the defendant did not tell him to bring the money and take the car; he had asked her for the car and her reply was that she was not going to release the car to him until he paid her the $800. However he admits that the defendant told him she was doing some "Barber-Green" repairs and she wanted the car removed.

The defendant testifies that her late husband operated the service station on contract from Esso Standard Oil S.A. Limited, the owners. After his death, she applied for and was awarded the contract to operate the station since March, 1983. Before her husband died, he along with one Mr. England, operated a garage to the back of the service station. After her husband's death, work ceased in the garage.

In May, 1983 the plaintiff came to the service station. She met him for the first time then. She says she told him that she was glad he had come, as she did not know where to locate him and her husband had died. The car had to be removed as the garage was not in operation. She says she told him she had a bill in the office for $750.00 - could he pay it and remove the car from the compound. She says that the plaintiff agreed, but did not pay the bill. He came back to the station sometime later in the year but he did not pay. It was then that she told him that the Esso Company intended to pave the yard and that the car would have to be placed in the back if he did not come and collect it. The car was in the garage area when the plaintiff visited the station for the first time, but subsequently, it was removed to the back area. She did not know if the car was still there. She did not know of parts being scrapped from the car. She did not tell the plaintiff that he could not remove the car unless he paid the bill.

During the time that her husband operated the service station, the defendant assisted in the office in the mornings. She says she continued the business and that is why she thought the $750.00 should be paid to her, but she did not withhold the car from the plaintiff. She knew that the car had been left in the custody and care of her husband, and at the time of his death, the car was "reasonably well secured" on the premises. The defendant said that she had it removed "to some other place where it was not so well secured", because the premises was being paved. She did not return it to its original position because the owners of the premises, Esso Standard Oil S.A. Limited, wanted the premises cleared

There is no doubt that the husband of the defendant came into possession of the plaintiff's motor car in circumstances which constituted him a bailee for reward. His possession is referrable to his occupation as a garage proprietor and not in my view, to his occupation as the proprietor of the service station. The motor car was delivered to him by the agent of the plaintiff for the purpose of effecting repairs to it, and it is admitted by the plaintiff that some work had been done by the defendant's husband on the car before his death. Where the owner of a vehicle or his agent delivers that vehicle into the possession of a workman for him to effect repairs to it, and the repairs have been done, the workman is entitled to exercise a common law lien over the vehicle in his possession in respect of the cost of the repairs, and such a right may be asserted against the owner of the vehicle and his agent. A demand for the delivery of the vehicle may be resisted by the exercise of the workman's common law lien.

In the instant case however, it is not contended that at any time a demand was made of the garage proprietor for the delivery of the motor car, nor is it suggested that he kept the car in his possession by virtue of the exercise of a lien. It seems to me that what the plaintiff is saying is that the possession of the defendant's husband is referrable to a bailment for reward. He took the motor car into his possession to effect repairs and up to the time of his death, the motor car remained in his possession, the repairs not having been completed.

The plaintiff alleges in the statement of claim that after the death of the defendant's husband, "the defendant assumed control of her late husband's garage and the plaintiff's motor car with it." This is expressly denied by the defendant in the pleadings and in her evidence,

and this seems to be the first real issue that must be resolved.

It is not suggested, nor is there any evidence to show that work was carried on in the garage after the death of the defendant's husband. Neither the plaintiff nor his witness has given evidence from which it can be inferred that the garage continued in operation. There is clear evidence that the service station continued as a business after the death of the defendant's husband; the defendant says she operated the service station, but the garage ceased operations. Her evidence in this regard is supported by her witness, Trevor Edwards. Mr. England, who it is said operated the garage in conjunction with Mr. Chuck seems to have disappeared after the death of Mr. Chuck. I find as a fact that the defendant did not operate the garage after the death of her husband. She did not "assume control of the garage and the plaintiff's motor car with it". She became the proprietor of the service station and as such, the entire premises, including the area that the garage occupied,; came into her possession. But what of the car/ Well, there is evidence that the car remained on the premises in the open part of the garage area, and I accept that to be so.

It cannot be assumed that the defendant took the car into her possession from the mere fact that the car was on the premises when she took possession of the premises in her own right. It is therefore necessary to decide in what right and in whose possession the motor car remained on the premises after the death of Mr. Chuck.

If goods or chattels are received by a person in circumstances where such a person holds as a bailee, even though the goods may have been received from a third person and not the owner, the owner may nevertheless maintain an

action against the bailee if he suffers loss by the negligence of the bailee. How then does a bailment arise?

> "Where one person delivers , or causes to be delivered, to another any moveable thing in order that it may be kept for the person making the delivery, or that it may be used, gratuitously or otherwise, by the person to whom the delivery is made or that it may be kept as a pledge by the person to whom delivery is made, or that it may be carried, or that work may be done upon it by the person to whom delivery is made, gratuitously or not; and when it is the intention of the parties that the specific thing so delivered, or the article into which it is to be made shall be delivered either to the person making the delivery or to some other person appointed by him to receive it, the person making the delivery is said to bail the thing delivered; the act of delivery is called a bailment; the person making the delivery is called the bailor; the person to whom it is made is called the bailee" (Step. Cr.)

There is no evidence in the instant case from which it can be adduced that the motor car was delivered or caused to be delivered to the defendant by the plaintiff or any other person, and I hold that the defendant was not a bailee of the car, and is not answerable by virtue of any bailment whatsoever.

It seems to me that on the death of the defendant's husband, the executors or administrators of the deceased became the persons with a right to the custody and possession of the plaintiff's motor car. I have excluded Mr. England because the evidence points to a delivery to the deceased personally.

The evidence does not support a finding of fact that the defendant assumed possession or custody of the motor car on the death of her late husband. The plaintiff's evidence is that on his first visit, he asked the defendant what was the position as far as the scrapping of his car was concerned and she said she was not concerned about that, and again on his

second visit, she told him that she was not concerned about the car. So, although the defendant may have been insisting that the outstanding bill should be paid, she was not by so doing, assuming possession of the car. In her evidence, she says she expressly asked the plaintiff to remove the car from the premises to facilitate the paving exercise, and I accept her evidence in this regard. I find as a fact that the defendant did not take or asume possession or custody of the plaintiff's motor car.

It is clear that the plaintiff had no intention of removing the car from the premises in the condition that it was in on his first visit, having regard to his evidence. Mr. Muirhead's evidence is that he saw the car scrapped to the extent of that only "the engine block and frame work of car" was left, and that was before the death of Mr. Chuck, and that he made a report to the plaintiff. Yet the plaintiff did nothing then; it was not until he had heard of the death of Mr. Chuck that he went to enquire of the defendant as to the position regarding the scrapping of his car. In my view, he was well aware of the condition of the car before he went to speak to the defendant, and his examination of the car was only to confirm that what Mr. Muirhead had told him was true. The plaintiff asked the defendant what was the situation as far as the scrapping of the car is concerned and told her, "I cannot take the car like this!"

I find as a fact that the car had been scrapped before the death of the defendant's husband, and that what remained of it at the time that the defendant took possession of the premises was "the engine block and frame work of the car," as Mr. Muirhead describes it. The plaintiff did not demand the return of the car nor did the defendant refuse him the right to take what was left of it. The gist of the

action for detinue is an unlawful failure to deliver goods when demanded. In my judgment, the plaintiff's claim in detinue fails.

The plaintiff claims also, damages for conversion. To constitute conversion there must be a positive wrongful act of dealing with goods in a manner inconsistent with the owner's rights, and an intention in so doing to deny the owner's rights, or to assert a right inconsistent with those of the owner. (See Lancashire and Yorkshire Rail Co., London and North Western Rail Co. and Graeger Limited v. Machicoll (1918) 88 L.J.K.B. 601 at p.605, per Atkin J.). Mr. Franksom for the plaintiff, with his usual frankness, has conceded that the evidence adduced does not support this claim and I agree. The plaintiff's claim in conversion therefore fails.

The plaintiff further claims damages for negligence. The statement of claim reads as follows:-

"7. The defendant, in course of her occupancy and operation of her late husband's garage, negligently caused or procured the vandalisation of the plaintiff's motor car.

PARTICULARS OF NEGLIGENCE

(a) Removing or causing the removal of the said motor car from a place of safety and placing it in an exposed and unprotected part of the premises housing the said garage.

(b) Failing to exercise any or any sufficient diligence or care for the safety and protection of the said motor car.

(c) Failing to deliver the said motor car to the plaintiff when requested so to do.

(d) Causing or permitting unauthorised persons to have access to the plaintiff's said motor car.

(e) Causing or permitting persons to strip the plaintiff's said motor car.

(f) Failing to lock away or guard or in any other way so to secure the said motor car as to avoid the same being stripped and vandalised."

Mr. Frankson submitted that "a person who exercises his lien over goods for services rendered assumes a high degree of responsibility to keep those goods safe from harm". That may be a correct statement of law, but in my view, it is not relevant to the facts of this case. As I have already stated, the defendant was not holding the car in exercise of a common law lien over it for the repairs done. When she took possession of the premises, it seems to me that she allowed what there was then of the car to remain at the rear of the premises where it had been prior to her husband's death, to await the owner's arrival to remove it. The plaintiff did not remove the remains of the car on his first visit, and when he returned a second time, the defendant requested him to remove it from the premises to facilitate the paving exercise, but again the plaintiff failed to do so. It was only then that the car was removed to the open land at the rear of the premises. Mr. Morrison submitted that the evidence does not support a finding that the defendant owed the plaintiff a duty of care. He asked the question - "Is she to provide covered secure accommodation (for the car) indefinately?" He submitted that the answer is "no"; What is required is that the defendant must act reasonably, and that in the circumstances of this case, she had done so. Mr. Frankson, on the other hand, submitted that the duty of care owed to the plaintiff arose from the exercise of the defendant's lien.

In the circumstances of this case, I find that the defendant was not negligent in dealing with the motor car. She was not under a duty to secure the car from vandals for the benefit of the plaintiff. The general rule at common

law is that a person is not liable for the acts of an independent third party. Liability for acts of vandalism of a third party will only attach where there is some special relationship between the defendant and the third party, and there is no such evidence to support such a finding. Further, the relationship between the defendant and the plaintiff which the plaintiff contends for does not exist. Where there is a duty to take positive action to protect the goods of another then any breach of such duty will give rise to liability in negligence. But generally such duty will only arise either by contract or by reason of an under-taking by the defendant followed by a reliance by the plaintiff. At its very highest, and on the most favourable view of the evidence, it can only be said that the car remained on the defendant's premises by mere licence, as opposed to her taking lawful possession through contract or through bailment. In such a case the duty of care would be to take such care as not to damage the car. There would be no duty to take positive steps in protecting the car from theft or vandalism. An omission on the part of the defendant would not furnish the plaintiff with any cause or action in the absence of some duty to act owed by the defendant to the plaintiff - (See Zoernsch v Waldock [1964] 1 WLR 675, 685 per Wilmer L.J.). There is no evidence that either the defendant or anyone acting on her behalf removed the parts from the car. In fact, I have found that the car was stripped while in the possession of the defendant's husband. It may be that there is merit in the submission of Mr. Morrison to the effect that the action should have been brought against the personal representatives of the deceased Mr. Chuck and not against the defendant in her personal capacity.

I accordingly hold that the plaintiff has failed in his claim in trover and detinue and in negligence.

Before leaving this part, may I comment briefly on the question of proof of damages as it arises in this action. The plaintiff has "thrown-up" a figure of $60,000 as being the value of his motor car, without showing the basis for such a value. I think that it is no easy task for even a specialist in the field to arrive at the true market value of the car in point, and it may well be that the evidence presented by the plaintiff would not be sufficient to prove the value of the car in question for the purpose of assessing damages, were it necessary so to do.

The defendant has counterclaimed for $750.00 for the repairs which she says is owing by the plaintiff to her late husband. It does not appear to me that the defendant persisted in this claim; no submissions were made in this regard by Mr. Morrison and I think he was well advised. The short answer is that the defendant has no contractual relationship with the plaintiff; the contract for repairs of the plaintiff's motor car rests between the plaintiff and the defendant's husband, and the defendant is a stranger to the contract. The defendant's counterclaim fails.

There will be judgment for the defendant on the claim with costs to be agreed or taxed and judgment for the plaintiff on the counterclaim with costs to be agreed or taxed.

Case referred to
Lancashire and Yorkshire Rail Co, Lancs and North Western Railway Co and Graesser Ltd v Macdonald (1918) 88 LJ KB 601