IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN COMMON LAW
SUIT NO. C.L 1997/F163

BETWEEN	ROBIN FENDER	PLAINTIFF
AND	JOANNA REID	DEFENDANT

Mr. Andre Earle and Miss K. Larmond instructed by Rattray Patterson Rattray for the Plaintiff.
Mr. Lowell Morgan instructed by Miss C. Minto of Nunes, Scholefield DeLeon and Co. for the Defendant.

Heard: December 3, 4, and 7, 2001

HARRISON J

The Action

The plaintiff's action is one in Negligence and she is seeking to recover damages for her motorcar that was involved in a motor vehicle accident.

Summary of the evidence

This accident occurred on Friday the 1st March 1996 at Citibank car park, Kingston. At the material time the plaintiff's Suzuki Swift motorcar was parked on the lower level of the third floor.

The defendant testified that she had parked her Daihatsu Charade motorcar in an assigned slot on the upper level of the third floor during the course of the morning but had left the car park at about 12:00 noon. She returned at about 1:30 p: m and had parked in the same slot. On her way to her office at Citibank, Knutsford Boulevard, a car washer spoke to her but she told him that the car was already washed on the Monday. He was the said person who had washed it but was unable to clean the interior at that time. She stated however, that she had not given him the keys for the car.

Having returned to her office, she placed her handbag and car keys on top of a credenza behind her desk. She attended a meeting in the Manager's office and after leaving that meeting a security guard from the parking garage made a report to her concerning an accident between her car and the plaintiff's car.

The evidence further revealed that the defendant had telephoned her mother and she came to her work place. The vehicles were examined by the parties in the car park. The Suzuki was still parked on the lower level of the third floor but the Daihatsu was parked on the ground floor. Both vehicles had sustained damages.

The parties had discussions and a meeting was held in the office of Violet Wade at Horizon Merchant Bank where the plaintiff worked at the time of the accident. The damages to the plaintiff's motorcar were assessed and action filed subsequently.

The Pleadings

The plaintiff alleges that on the day of the accident the defendant's servant and/or agent, whose identity was unknown, so negligently drove, managed and/or controlled the defendant's Daihatsu motorcar that he caused same to collide with the plaintiff's motorcar which was parked in the Citibank car park. The defendant admitted that on the date and place alleged there was a motor vehicle accident between the two vehicles but says further at paragraph 2 of her defence:

> " Save that the defendant admits that the person who was driving her motor car aforesaid at the material time was frequently engaged in the washing of cars in the vicinity of the Citibank Car Park.....the allegations contained in paragraph 3 of the statement of claim are denied. The defendant will aver that on or about the 1st day of March 1996 her aforesaid motorcar was stolen and the thief, the aforesaid person who washed cars at the location mentioned herein, was driving, managing and/or controlling her aforesaid motorcar without her authority, knowledge or consent".

Interrogatories

Interrogatories were administered and the defendant responded to the several questions asked.

The Issues

Two major issues arise for consideration, viz:

1. Was the driver of the defendant's motorcar her servant and/or agent at the time of the accident? or
2. Was the defendant's motorcar stolen by the car washer who thereafter collided with the plaintiff's motorcar?

Findings

I have had the opportunity of assessing the demeanour of the witnesses and I make the following findings of facts:

1. The plaintiff has impressed me as a witness of truth.
2. The Suzuki motorcar was parked on the lower level of the third floor of the parking garage at the time of the accident.
3. The point of impact to the Suzuki car was to its right rear and left side.
4. The Suzuki motorcar was pinned on to a column to its left due to the collision to the rear end.
5. The defendant knew that the washing of motor vehicles was prohibited in the parking garage.
6. I accept the plaintiff's evidence that the defendant told her that she had given the keys for the Daihatsu to the car washer in order to have the car washed.
7. I also accept the plaintiff's evidence when she said that the defendant told her that she was concerned about making a claim on her Insurance Company as she had just recently made one.
8. I further accept the plaintiff's evidence that the defendant did say on their way to the parking garage "I would say, Mummy you were driving" and her mother said "O.K".

9. The defendant did tell the plaintiff that they did not have to report the matter to the police

10. It is more probable that the accident occurred whilst the Daihatsu motorcar was entering the lower level of the third floor having regard to the damages to the Suzuki motorcar, the pinning of it to the column on its left and the damages to the right front section and right fender of the Daihatsu Charade. Bearing in mind the evidence relating to the layout of the parking garage, the probabilities are that had the Charade been exiting the garage it would have pushed the Suzuki away from the column and more towards the bay to its right (that is, bay number 45).

11. I reject the evidence of the defendant. I find that she has not been truthful and quite frank with the Court. She has been inconsistent on certain important issues. Question (B) of the Interrogatories asked: - "state whether or not the defendant had ever, in the past, requested the person who was driving her motor vehicle at the material time to wash the said motorcar". In her answer to this question she states that she had never. However, the defendant in answer to question (I) of the said interrogatories said she had allowed the thief access to her car on a previous occasion when he was given permission to wash it. There is also a contradiction with respect to the conversation she had with the car washer on the 1st March 1996. She was asked in the interrogatories whether or not she had spoken to the alleged thief on the day of the accident and if so what was said. In her answer to this interrogatory she said yes and that when the thief asked her if he could wash her car she told him no as she had business to attend to which she required the use of her motor car. In her evidence at trial however, she testified that when she spoke to the car washer she told him that the car was washed already on Monday.

12. The defendant's car keys and motorcar were not stolen.

13. .The defendant's motor car was driven at the material time in the car park by the car washer, and he was driving it with her knowledge and/or consent. The probabilities are that he was returning it the to upper level of the third floor when he collided with the parked Suzuki motorcar.

14. Finally, I also reject the evidence of the defendant's mother.

In the final analysis, I do accept that the plaintiff's version of events is more probable of the two. I do agree with Mr. Earle, that the defendant's allegation of theft was nothing more than a mere concoction in order to escape liability.

The question now to be resolved is whether or not the defendant is vicariously liable for the damage done by the driver of her motorcar. Was he her servant and/or agent at the material time? Having regards to the facts of this case and my findings above, the authorities place responsibility squarely on the shoulders of the defendant. See the cases of **Morgans v Launchbury and Ors**. [1972] 2 All E.R 606; **Carberry v Davies** [1968] 2 All E.R 817 and **Omrod v Crosville Motor Services Ltd**. [1953] 2 All E.R 753. I hold therefore that the defendant is liable for the negligent driving on the part of her car washer.

Damages

I turn now to the question of special damages which is the sole head for assessment. The plaintiff is entitled to the sum of $260,000.00 claimed for the total loss value of the Suzuki motorcar. Mr. Morgan did not seriously join issue with this head. Neither did he join issue as regards the sums claimed for the Assessors Fees of $2070.00 and loss of use for the period 4/3/96 – 1/4/96 inclusive amounting to $59,800.00. These items have been specifically proved so, the plaintiff will also receive an award under these two heads.

Mr. Morgan has taken serious issue however, with respect to the loss of use covering the period 2/4/96 – 31/12/96 inclusive and which amounts to $228,000.00. He submitted that the plaintiff was under a duty to mitigate her losses and that in the circumstances, a total of 6 weeks loss of use would be reasonable in all the circumstances. He further submitted that the plaintiff would have had to strictly prove the further loss of use of $6000.00 per week as claimed.

Mr. Earle on the other hand, submitted that the plaintiff had proved her case in relation to the special damages claimed for $549,870.00.He argued that the plaintiff was well aware of her duty to mitigate her losses and that was why she had not extended her claim for

loss of use beyond December 31, 1996 notwithstanding the fact that she did commute by taxi for some period beyond December 31, 1996.

What is the evidence with respect to the claim for loss of use for the period 2/4/96 – 31/12/96 inclusive? Having rented a motorcar for the first four (4) weeks after the accident, the plaintiff testified that after this period she had to take Taxis and that this cost her $6,000.00 per week. She had used the Taxi to commute to and from work and to attend to personal activities. She had an ailing grandmother at the Hyacinth Lightbourne Nursing Home and she had to visit her regularly.

I do agree with Mr. Earle that whilst no receipts had been produced for the Taxi fares, the plaintiff's evidence had gone unchallenged hence, she would be entitled to her special damages. See the cases of **Walters v Mitchell** 29 JLR 173 and **Grant v Motilal Moonan Ltd. And Ors**. 43 WIR 372. The question to be resolved however, is what would have been a reasonable period of time in all the circumstances?

The Defence had called a witness, Marlon Allen who testified that he is a claims associate with Dyoll Insurance Co. This is the company that had covered the plaintiff's motorcar with insurance. The plaintiff had claimed on her policy and he was the person who handled this claim. Upon receiving the report from the Loss Adjusters he decided to settle the claim on a total loss basis. After deducting the costs of salvage that the plaintiff bought, and her excess, a total settlement of $187,000.00 was approved. This sum was remitted to CIBC Bank, the mortgagee that had financed a motorcar loan for the plaintiff. This cheque was sent on the 4th April 1996. The plaintiff had bought the salvage on the 2nd April 1996 for $60,000.00. No repairs were effected by her and eventually the salvage was repossessed by the Bank. Under cross-examination, the plaintiff maintained that she did not have the funds to do the repairs and that she had to continue paying the monthly sums to the Bank for the loan. She did not approach any other bank or financial institution for a loan and neither did she purchase another motor vehicle.

Now, the authorities are clear that the plaintiff is under a duty to mitigate her losses. The evidence of the Adjusters (exhibit 3) revealed that an estimate of repairs (totaling $235,662.60) for the Suzuki motorcar was prepared by Stewart's Auto Sales. Although the parts were all available and the estimate of repairs was found by the Adjusters to be fair and reasonable they did not authorize repairs however. The reason for this seems to be obvious since the Suzuki car had a pre-accident value of $330,000.00. It was therefore based upon the Adjusters' Report why the Plaintiff's insurers settled with her on a total loss basis roughly a month after the accident. Why then didn't the plaintiff re-negotiate the loan facility with her Bankers and either purchase another vehicle or carry out the repairs to the damaged one since they were paid $187,000.00 in settlement? Had she refinanced the loan the defendant would in all probabilities be held responsible for any interest accrued with respect to such a loan. In **Headley Brown and Jacqueline Brown v Linvil Tyrel** Supreme Court Civil Appeal No. 52/90 delivered on the 18th December 1990, Forte J.A (as he then was) stated:

> "The **Liesbosch case** (per Lord Wright) recognizes the common law principle of restitution in integrum i.e. that where a plaintiff's property has been destroyed by the negligent act of another then he should recover "such a sum as will replace it, so for as can be done by compensation in money, in the same position as if the loss had not been inflicted on them, subject to the rules of law as to remoteness of damage." The real question therefore is whether the appellants' payment of interest on the loan used for the replacement of their motor car was in the instant case too remote".

The Court held that the appellants were entitled to recover the interest payments they incurred in purchasing the motor car as replacement of the one destroyed, the interest being the result of an everyday business transaction, which would have been forseeable or in contemplation at the time of the action of the respondent, whether as a tortious act or an act in breach of contract.

I do believe that it was unreasonable for the plaintiff in the instant case to have continued taking a Taxi for such an extensive period after the motorcar were treated as a total loss and the claim settled by the Insurance Company. In **Owen Tharkur v Cleveland Williams** Common Law Suit No. T 118/84 delivered on the 13th April 1989, Bingham J (as he then was) stated inter alia at page 9 of the judgment:

> "...He has claimed loss of use for six weeks at a cost of $600 per week. This is the normal period allowable in cases where a vehicle has been written off as a total loss to enable a plaintiff to secure a replacement vehicle."

It is my considered view and I so hold, that an overall period of twelve (12) weeks for loss of use would be reasonable in the present circumstances. She is therefore entitled to a further sum of $48,000.00 for the loss of use claim (8 weeks @ $6,000.00 per week).

Conclusion

There shall be judgment for the plaintiff as follows:

1. A sum of $369,870.00 for special damages with interest thereon at the rate of 6% per annum from the 1st March 1996 up to today.
2. Costs to the plaintiff to be taxed if not agreed.