

JAMAICA

IN THE COURT OF APPEAL

R. M. CIVIL APPEAL NO. 21/78

BEFORE: The Hon. Mr. Justice Leacroft Robinson - President
The Hon. Mr. Justice Henry, J. A.
The Hon. Mr. Justice Kerr, J.A.

BETWEEN - KINGSTON & ST. ANDREW CORPORATION - 1st DEFENDANT/
APPELLANT

A N D - KENNETH BLACKWOOD - PLAINTIFF/
RESPONDENT

A N D - FENTON'S GARAGE & ENGINEERING - 2nd DEFENDANT/
WORKS LTD. APPELLANT

Mr. Howard Malcolm for 1st Defendant/Appellant, instructed by
Dunn, Cox & Orrett

Mr. Horace Edwards, Q.C. for 2nd Defendant/Appellant, instructed
by Williams & Williams

Mr. Eli Hanna for Plaintiff/Respondent/

January 16 & 17, 1979

May 9 , 1980

ROBINSON, P.

In this case the Plaintiff/Respondent had parked his motor car at a prohibited spot and it was towed away to the pound of the 1st Defendant/Appellant by a wrecker owned and operated by the 2nd Defendant/Appellant. While it was being towed to the pound, it fell into a pot-hole and received a blow to its undercarriage. After arriving at the pound, the Plaintiff/Respondent paid the poundage fee charged by the 1st Defendant/Appellant and the car was delivered to him but it could not start. Prior to its being towed away, it was in satisfactory running condition.

The driver of the wrecker, who had left the pound and returned, then tried to get the car to start and in the course of so doing, used the crane of the wrecker to lift the front of the car, went under the front of the car and proceeded to knock some portions of the undercarriage of the car with a hammer. His performance led an onlooker to call to the Plaintiff/Respondent

in the following terms: "Mr. Blackwood come here see the man mash up underneath you car here".

The Plaintiff/Respondent then bent and looked under the car and saw oil dripping from that area. However, after that performance the car started and was later driven to the garage of the 2nd Defendant/Appellant where some further knocking was done under the car (by the same wrecker driver according to one witness).

The car was subsequently moved by another wrecker to another garage where it was found that oil was leaking from the region of the crank case and gear box, that the crank case was damaged, and so were the gear box casing, the fly wheel ring gear and the internal section of the gear box.

An expert witness opined that the aforementioned damage could have been caused by the undercarriage of the car coming in contact with a solid object, that it could have been caused by the car running upon a side walk or dropping into a rut and meeting somewhere solid, and that it could also have been caused if a hammer of good size or poundage was used to hit the parts that were damaged. He also testified that he would expect to find impressions of hammer on crank case if someone struck it with hammer with considerable force but that he was unable to identify any impressions although some impressions appeared to be on the bolt head of the crank case plate and a section of the crank case plate itself but that section was bent, and he would not say if those impressions were caused by a hammer.

The learned Resident Magistrate found, on evidence which entitled her so to find: (a) that the Plaintiff's car fell into a pot-hole hitting the undercarriage and thereby sustaining damage while it was being towed away, from where it had been improperly parked, by the wrecker driver who was at the material time operating as servant or agent of the 2nd

Defendant/Appellant to whom the job of towing away motor vehicles was delegated by the 1st Defendant/Appellant:

(b) that the Road Traffic (K.S.A.C.) (Inspection and Testing of Parking Meters and removal of Vehicles) Regulations, 1974, empower the 1st Defendant/Appellant to remove vehicles as was done in this case but that the Regulations require that the Council in exercising its powers take all reasonable care to ensure that vehicles and their contents are protected from damage and loss and that the wrecker driver was negligent in causing the car to drop into the pot-hole.

Having so found, the learned Resident Magistrate concluded that the 1st Defendant/Appellant cannot discharge its responsibility to owners of motor vehicles towed away merely by ensuring that it employs ^{competent} contractors to do such towing away and the Council is legally responsible for any negligence by such contractors or their servants or agents committed during the towing away of motor vehicles.

She also found, however, that the damage done to the Plaintiff's car was aggravated by the actions of the wrecker driver when he tried to fix the Plaintiff's car by knocking, inter alia, the undercarriage with a hammer, but that in so doing the wrecker driver was not acting as the servant or agent of the 2nd Defendant/Appellant and that therefore neither the 1st Defendant/Appellant nor the 2nd Defendant/Appellant was liable to the Plaintiff for the aggravated portion to of the total damage done to the Plaintiff's car. She thereupon proceeded to estimate the aggravated damage to be 10% of the total damage and it is here and here only that we are obliged to part company with the learned Resident Magistrate.

There is no evidence in this case to justify a finding that the aggravated damage caused by the wrecker driver's independent efforts to repair the initial damage amounted to 10% only of the total damage, and where damage has been caused by two separate sources and it is not possible

to determine the contribution of each source, then it would seem to us that the only equitable solution to such a dilemma is to apportion the damage equally to both sources.

The total amount of damages which the learned Resident Magistrate found to be proved amounted to \$651.97. Judgment should, therefore, have been given against the 1st and 2nd Defendants for a half only of this amount. In the circumstances, the appeal is allowed. The judgment of the Court below is set aside and judgment is now entered for the Plaintiff/Respondent against the 1st and 2nd Defendants for \$325.98 with costs to be agreed or taxed. The Defendants/Appellants are to have the costs of this appeal which we fix at \$50.00 each, these sums to be paid by the Plaintiff/Respondent.