Unyolo J.

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NO. 5 OF 1993

BETWEEN:

C. LEITAO (FEMALE).....PLAINTIFF

- and -

CHEMICAL MANUFACTURERS (PVT) LTD.....DEFENDANT

Coram: D.F. Mwaungulu, Registrar
Msisha, counsel for the defendant
Counsel for the defendant, absent.

ORDER

This is an action in negligence. The plaintiff sues as owner of motor vehicle registration number SA 141. The defendant owns motor vehicle registration number BH 5812. The two motor vehicles collided along Kamuzu Highway on the 21st of April, 1992 due to the defendant's negligence. The plaintiff's motor vehicle was damaged. It was taken for repairs. There were problems with spareparts. It took a bit long to have the plaintiff's motor vehicle repaired. The action is in respect of hire charges of a certain portion of the time when the motor vehicle was undergoing repair. At first the action was going to be defended. There was a defence. The parties agreed to liability and damages had to be assessed. The matter, as it turned in the course of the proceedings, seems to be whether the expenses were in fact incurred.

For torts affecting chattels or goods, the plaintiff is entitled to damages for consequential loss. One of the most common of such losses is the cost of hiring a substitute while the affected goods are under repair. That such expenses are

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recoverable was put beyond question in 1826 when, in a case of hiring a substitute ship, The Yorkshireman, (1826) 2 Hagg. Admin. 30n, was decided.

I must confess that I had considerable difficult following the defendant's perspective. He, through his insurers, paid for most of the hire expenses. He objects to paying for the repairs covering a certain period. It is not clear why the objection is made. Unfortunately there were no submissions after the close of the case to enable me to appreciate the defendant's arguments. The most that I can do then is to look at the evidence and decide on the matter. Going by the cross-examination, one can see the issues that are being raised although, as I have just said, the issues would have been clarified by argument.

First, the defendants, in their cross examination, wanted to show that the mnotor vehicle was not hired at all. The defendant cross examined the plaintiff about her relationship to Mr. Pinhero, the owner of the Pinhero Investment, from who the car was hired. The plaintiff admitted that Pinhero was a friend. The cross examination did not go far. The evidence on the matter is insufficient for the inference that the claim was fixed. This means that the hire was essentially businesslike. The plaintiff's evidence that she hired the car must be accepted. The matter was put to Mr. Pinhero. Mr. Pinhero admitted that he knew the plaintiff. Again, the witness was not taken further than this. I am very reluctant, if the defendants wants me to, to infer that the plaintiff and her witness just hoaxed the hires from just the answers they have given. The matter was not put to the witnesses directly or indirectly. There is a further reason.

Since the accident the plaintiff had been using a hired car. For the most part he had used two established hirers. He changed because they raised the hire charges. I do not think that it was the plaintiff's business that the hire charges were raised. It does seem from her evidence that the defendant's insurers were

paying . It has not been suggested that the defendant's insurers refused to pay higher charges. Whatever the reason there was a misjudgment. The defendant, however, wanted to show that the time the plaintiff switched hirers could be the time when the motor vehicle was retrieved from City Motors.

The plaintiff is adamant, however, that the car was given to her by City Motors on the 16th of November, 1992. Of course, the plaintiff's third witness, an official from City Motors, was not very helpful on the date. In cross-examination he suggested the 4th of November. He only mentioned the date after rigorous cross examination. His earlier remarks, however, betray his prevarication on the matter. Earlier he had said that he could not know the exact date unless he checked his records. He said he could have been better prepared and brought the documents if only his being called to give evidence had not been sudden and unexpected. My evaluation of the witness was that he was not a man set out to lie to the court. He was obviously, as he lamented, unsure of what he was saying. This is in sharp contrast to the plaintiff herself. She was quite sure of the dates the car was given to her. This contradiction in the plaintiff's own case is no reason to jettison the evidence before me. It is not right, I think, that a court should jettison all the evidence before it because of contradictions or omissions on certain aspects of a party's evidence. The court must, I think, look at the evidence as a whole and make a decision on the particular point of departure. If the contradiction can be explained or ignored because of other cogent and credible evidence the court must find as a fact on the matter of contradiction. Lord Justice Davies had this to say in Parocjic v. Parocjic (1958) 1 W.L.R. 1280, 1286.

> "It would not, I think, be right to approach it from the point of view that as she and her witnesses have lied about one thing, so again all their evidence must be equally unreliable. It

is not unknown for people, particularly, simple and uneducated people, such as these are said to be, to fall into the error of lying in order to improve an already good case".

I find that the motor vehicle was handed over to her on 16th November, 1992. Given that her motor vehicle was given to her on 16th November, 1992 and given that for quite sometime she was using a hired car, I find it more probable than not that she was using a motor vehicle from the time she stopped using the cars from established hirers. I find no difficulty in finding tha t she in fact, as she claims, used the motor vehicle from Pinhero Investment.

The defendant, in cross examination, wanted to show that Pinhero Investment had no licence to hire the motor vehicle for reward. Mr. Pinhero admitted that no such licence in fact existed. I think one must start from the premise that the agreement for hire was between the plaintiff and a third party. I have extreme difficulty in thinking that the difficulties, supposed or real, of the contract between the plaintiff and the hirer absolve the defendant for the cost of hiring a substitute vehicle when the plaintiff's motor vehicle, damaged by the defendant, was being repaired. Just as I have extreme difficulty in thinking that as between parties who have no intention to let their motor vehicle for public hire but for their mutual interest arrangements cannot be made for payment for use of a car. Except on illegality for public policy the freedom to contract - and at that with anybody who has capacity - cannot be abridged.

I find no reason in law or logic why developments that have taken place in personal injuries' claims should not apply to costs of repair that have been borne by a third party. In personal injury claims damages claimed by the plaintiff have never been reduced by payments by private persons by way of assistance or sympathy. The Judicial Committee of the Privy

Council considered the matter in Parry v. Cleaver (1970) A.C.1. I am quoting Lord Justice Reid at page 14 for the reasons and history of the principle.

"So I must inquire what are the reasons, disregarding technicalities, why these two calses of receipts are not brought into account. I take first the case of benevolence. I do not use the word "charity" because, rightly or wrongly, many people object to it. I know of no better statement of the reason than that of Andrews C.J. in **Redpath v. Belfast and County Down Railway** (1947) N.I. 167, 170. There the company sought to bring into accounts sums received by the plaintiff from a distress fund. Andrews C.J. said that the plaintiff's counsel had submitted

> "that it would be startling to the subscribers to that fund if they were to be told that their contributions were really made in ease and for the benefit of the negligent railway company. To this last submission I would only add that if the proposition contended for by the defendants is sound the inevitable consequence in the case of future disasters of a similar character would be that the springs of private charity would be found to be largely if not entirely dried up."

It would be revolting to the ordinary man's sense of justice, and therefore contrary to public policy, that the sufferer should have his damages reduced so that he would gain nothing from the benevolence of his friends or relations or of the public at large, and that the only gainer would be the wrongdoer. We do not have to decide in this case whether these considerations also apply to public benevolence in the shape of various uncovenanted benefits from the welfare state, but it may be thought that Parliament did not intend them to be for the benefit of the wrongdoer."

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The situation covered is that where there are gratuitous payments. Where, however, there is a legal obligation to pay a third party the court will award damages (per Lord Goddard C.J. in Inland Revenue Commissioner v. Hambrook (1956) 2 Q.B. 641, 656-657). This case falls squarely in the words of Lord Justice Diplock in Browning v. War Office (1963) 1 Q.B. 750, 770:

> "Cases where the plaintiff has been advanced moneys to meet expenses occasioned by the accident by a third party upon his undertaking to repay the sums advanced, either absolutely or conditionally upon his recovering them from the defendant, raise no problem. The loss he has sustained remains the same irrespective of whether he has actually paid the expenses from his own pocket or converted them into a liability to a third party..."

In this case the plaintiff was entitled to have a substitute car. Mr. Pinhero was willing to have her use his car om promise that she would re-imburse him after payment by the defendant. She is entitled to recover the money from the defendant. It is not open to the defendant to question the validity of her obligation to a third party.

I award the plaintiff the sum of K13,262.08.

Made in Chambers this 29th day of November, 1993 at Blantyre.

D.F. Mwaungulu
REGISTRAR