**BURNS PHILP (SOUTH SEA) CO. LTD.**

*v.*

**RAM RATTAN**

[SUPREME COURT, 1965 (Mills-Owens C.J.), 18th June, 2nd July]

Appellate Jurisdiction

*Practice and procedure—view by Magistrate of damaged vehicle—object of where quantum of damages in issue.*

*Damages—damage to motor vehicle—basis of assessment of quantum—Magistrates' Courts Rules (Cap. 5) 0.36 r.18.*

In a case in which the issue was the quantum of damages to be awarded in respect of damage to a motor vehicle, the magistrate, having personally inspected the vehicle, was not entitled to assess the damage for himself; his view should have been limited to noting the condition of the vehicle generally in order to follow the evidence of value more closely.

The appropriate measure of damage was the cost of repair, or, if the vehicle was a total loss, the pre-damage value thereof less the scrap value.

Cases referred to: *British Westinghouse Electric and Mfg. Co. v. Underground Electric Rys. of London Ltd.* [1912] A.C.672; 107 L.T. 325: *Payzu Ltd. v. Saunders* [1919] 2 K.B.581; 121 L.T. 563: *Darbishire v. Warran* [1963] 3 All E.R. 310; [1963] 1 W.L.R. 1067: *Macrae v. Swindells* [1954] 2 All E.R. 260: *Buckingham v. Daily News Ltd* [1956] 2 Q.B. 534; [1956] 2 All E.R. 904: *Liebosch Dredger v. S. S. Edison* [1933] A.C. 449; *sub nom. The Edison* [1933] All E.Rep. 144: *Watt v. Thomas* [1947] A.C. 484; [1947] 1 All E.R. 582: *Benmax v. Austin Motor Co. Ltd.* [1955] A.C. 370; [1955] 1 All E.R. 326.

Appeal from a judgment of the Magistrate's Court.

*V. P. Ram* for the appellant company.

*H. Kohli* for the respondent.

The facts sufficiently appear from the judgment.

MILLS-OWENS C.J. : [2nd July, 1965]—

The defendants appeal against a decision of the learned Magistrate awarding the plaintiff damages in the sum of £280 in respect of damage caused to the plaintiff's car whilst it was at the defendants' garage on the 13th March, 1964. The vehicle was a private Austin 'A40' car manufactured in the year 1954. The damages are made up of £250 in respect of loss of or damage to the car and £30 representing expenditure incurred by the plaintiff in obtaining alternative means of transport over a period of six months. The loss of or

damage to the car came about in the following way. The plaintiff had put the car into the defendants' garage for certain repairs to be carried out. Whilst it was there it caught fire and one of the defendants' servants emptied a container of benzine on the fire thinking it was water. The statement of claim contains no allegation of breach of contract or negligence on the part of the defendants. It was averred merely that the car was completely burnt and destroyed while in the custody of the defendants. However the action was fought substantially on the question of quantum of damages and it is the matter of quantum which has formed the subject of the appeal. It is accepted that the defendants had on the 5th day of August, 1964, tendered the sum of £200 to the plaintiff and that they paid that amount into Court with a denial of liability. In these circumstances the defendants denied all liability for special damages, asserting that ever since the date of the damage they had been ready and willing to pay the sum of £200.

It is not disputed that the plaintiff bought the car for £125 about six months before the fire, and that he has been holding out for a settlement in the sum of £200 plus the return of the car to him. The defendants, on the other hand, were willing to pay £150 if the plaintiff retained the car or £200 if the car was transferred to their ownership; the tender appears to have been made on that basis. But, it would appear, the payment into Court of the sum of £200 by the defendants was on the basis that the plaintiff would retain ownership of the car. The plaintiff gave evidence that he had been offered £320 for the car and claimed the sum of £340 plus £30 special damages. He gave details of expenditure he had incurred on the car after purchasing it, amounting, according to his evidence, to approximately £178, but he produced no documentary evidence in support thereof. His brother, was is a motor mechanic, gave evidence on his behalf and said that new parts used on the car would have amounted in value to between £60 and £85. The brother agreed that the value at the time of the purchase was approximately what the plaintiff gave for it. He said that the post-damage worth of the car was something less than £50. He supported the plaintiff's claim for £340. A further witness for the plaintiff estimated the pre-damage value at between £300 and £350.

The defendants' foreman-mechanic testified that the fire had resulted only in damage to the unholstery, wiring, the hood, and paint work; neither the engine, the body metal, nor the tyres were affected. He valued the car in its post-damage condition at £50 or a little more, and in its pre-damage condition at £150. He stated that dents previously caused to the body-work had been filled with a cheap plastic which was liable to crumble and fall out. The condition of the car prior to the fire was such that considerable welding work was required to be done to the flooring. Mr. Puddefoot, a Mechanical Supervisor with experience in the examination of motor vehicles, gave evidence on behalf of the defendants saying that he had examined the car after the fire with a view to estimating the amount required to repair it. He gave his estimate in the sum of £150. He confirmed that there was no engine or mechanical damage. He was unable or unwilling to give any estimate of the value of the car in its pre-damage condition. Mr. Ash, who testified that he had experience in

the matter of buying and selling cars commercially, and who gave evidence on behalf of the defendants, also had only inspected the car after the fire. He said that the body-work and paint-work were in a very bad condition. This witness also referred to the vehicle as having considerable pre-fire filling in of the body-work with plastic substance. He said that it would be difficult to obtain spare parts for a car of such an age, and that if its pre-fire condition had been first class its value would have been £150; if in average condition then £125.

The learned Magistrate considered the witnesses for the plaintiff to be biased and that the defendants' witnesses were far more authoritative. He regarded Mr. Ash as the witness best qualified as an expert but, he said, both Mr. Ash and Mr. Puddefoot had seen the vehicle only after the fire. The Magistrate, as he said, adjourned the case to have a look at the car himself and said that it had impressed him as quite a good looking car. He went on to say that he thought that witnesses on both sides had supported the case of the party for whom they had been called and that his greatest difficulty in accepting "any thing like the figures for the plaintiff" was the age of the car. He then said that the figure he had decided on could only be a rough approximation; he would put the value of the car as £250. He considered that the onus was on the defendants to prove that the sum claimed was not justified and this they did not do, but here, I think, he was referring to the plaintiff's claim for special damages.

On the appeal the defendants relied on *British Westinghouse etc. v. Underground etc.* [1912] A.C. 672 at 689 and *Payzu v. Saunders* [1919] 2 K.B. 581 at 588, as to the basis upon which damages were to be awarded; that is to say on the basis of *restitutio in integrum. Darbishire v. Warran* [1963] 3 All E.R. 310 was relied upon for the proposition that if the cost of repair exceeded the value of the car in its pre-fire state, the plaintiff would be entitled to the amount of the value only. As to the duty of the plaintiff to mitigate his loss, reference was made to *Macrae v. Swindells* [1954] 2 All E.R. 260. It was submitted that the Magistrate had made his award on the basis of a total loss, which was a basis not supported by the evidence; the plaintiff was entitled either to the value of the car in its pre-fire condition or to the cost of its repair, which ever was the lesser. It was suggested that the Magistrate had taken a middle course between the figures of each side and arrived at his own valuation. As to the special damages claimed, the plaintiff had acted unreasonably in refusing the defendants' offer in settlement. On behalf of the plaintiff it was contended on the appeal that the matter was largely one of fact and that accordingly the Magistrate's decision should not be interfered with. The defendants' foreman-mechanic was an interested party. Mr. Puddefoot gave no evidence of the value of the car. The Magistrate was justified in not relying on Mr. Ash's evidence as this witness had inspected the car only after the fire. As to mitigation, it was submitted for the plaintiff that a duty lay on the defendants to make a car available to him for his use as he was not in a financial position to provide himself with another vehicle.

In my view the decision of the learned Magistrate cannot stand. *Mayne and McGregor on Damages* (12th Edn) at para. 36 says:

"Where the plaintiff's goods have been damaged, the basic pecuniary loss is the diminution in their value which is normally measured by the reasonable cost of repair, and generally without making any deduction from the damages on account of the fact that after repair the goods are in better condition than they were before the tort. On the other hand, the basic pecuniary loss is the market value of the goods where they have been destroyed or misappropriated."

In *Darbishire v. Warran* (supra) Harman L.J. said :

"The law of damages arising out of collisions on land has been developed out of the admiralty rule on collisions at sea, and the rule of liability is the same in Admiralty and common law cases ..... The principle is that of *restitutio in integrum*, that is to say to put the plaintiff in the same position as though the damage had not happened. It has come to be settled that in general the measure of damage is the cost of repairing the damaged article; but there is an exception if it can be proved that the cost of repairs greatly exceeds the value in the market of the damaged article. This arises out of the plaintiff's duty to minimise his damages. Were it otherwise it would be more profitable to destroy the plaintiff's article than to damage it. In the latter cases the measure is the value of the article in the market and this, of course, supposes that there is a market in which the article can be bought. If there is none, then the cost of repairs may still be claimed ....."

I think it must be the case that the Magistrate treated the car as a constructive total loss, although he did not say so in his judgment and made no deduction for 'scrap' value in favour of the defendants. I doubt whether this was the correct basis. There was cogent evidence that the car retained some substantial value; the engine was not affected and the damage was largely to the interior and hood of the car although, no doubt, it would require to be repainted externally; the plaintiff himself was desirous of retaining it. If in fact the car was not a constructive total loss then the evidence points to a figure of £150 as the amount recoverable in respect of the damage, that amount being virtually unchallenged as the cost of repair. If, *per contra*, it was a total loss and the true measure was the pre-fire value less its scrap value, then, as it appears to me, the Magistrate was not justified in discounting the evidence of Mr. Ash whom he regarded as the person best qualified to speak as to its pre-fire value. The fact that Mr. Ash had not examined the car before the fire was not a valid reason for rejecting his evidence of the market value of a car of that make and year of manufacture; he gave a range of figures — £150 if first class, £125 if average condition. It was not contested that the plaintiff purchased the car for £125. The plaintiff's evidence as to the amount he had spent on it before the fire was at variance with that of his brother; further, it is a matter of common knowledge that an expenditure of, say, £100 on a second-hand car of such a vintage would by no means necessarily increase its value by £100. On the face of it, it was most improbable that the car increased in value from £125 to £340, as the plaintiff alleged, in the 6 months he owned it

before the fire occurred. I think that it would not be doing an injustice to the learned Magistrate to say that the inference to be drawn from his judgment is that he made his own valuation on a personal view of the vehicle during the hearing. If that was the case, in my opinion, it was not a permissible course to take. The limits of a 'view' from the evidentiary aspect are referred to in *Buckingham v. Daily News Ltd.* [1956] 2 Q.B. 534. In a case such as the present where the matter of value is essentially one for expert evidence it would be wrong for a judge or magistrate to assess the value for himself; the view should be limited to noting the condition of the vehicle generally in order to follow the evidence of value more closely.

As to the duty of the plaintiff to mitigate his loss, it is apparent that the car lay unrepaired for at least 6 months; the plaintiff was unwilling to accept the defendants' offer and, as his counsel now says, was not in a financial position to buy or provide himself with another car. Clearly, the plaintiff sat back waiting a settlement. His impecuniousity cannot be an argument for prolonging the period in respect of which he might use an alternative means of transport at the defendants' expense. As was said in argument in *Liesbosch D. v. S.S. Edison* [1933] A.C. 449 the defendant is liable for restitution but not for destitution. The plaintiff's expenses must be limited to a reasonable period within which he could acquire another car if the car in question was a total loss, or otherwise to a reasonable period within which he could have the repairs effected.

In my judgment the appeal must be allowed. The difficulty is in deciding whether the case ought to be remitted to the Magistrate for rehearing or further findings of fact pursuant to 0. XXXVI r.18 of the Magistrates' Courts Rules, or should be dealt with on the record as it stands. I have come to the conclusion that it would merely add further costs if the case were remitted. Although the case is largely one of fact, it is a case, in my view, in which an appellate court is entitled to make its own decision, consistently with the principles laid down in *Watt v. Thomas* [1947] A.C. 484, *Benmax v. Austin Motor Co. Ltd.* [1955] 1 All E.R. 326, and other cases. On the basis that the car is repairable the evidence justifies an award of £150 as the cost of repair. On the basis of total loss the evidence justifies, at the most, a figure of £175 less a sum representing the scrap value of the car. Whichever basis is adopted the result is practically the same. For loss of use of the car a reasonable period would be two months, which at the plaintiff's rate of expenditure on alternative transport, according to his evidence, would produce a figure of £10. On the evidence the car is not a total constructive loss. Accordingly I allow the appeal and substitute for the award made by the learned Magistrate the sum of £160, being £150 for loss or damage plus £10 for loss of use. In addition to judgment for that amount the plaintiff is, of course, entitled to retain the car. The defendants are entitled to the costs of the appeal. As to the costs in the Court below there is no definite evidence that the defendants at any time made a tender which was not accompanied by the condition that they would acquire ownership of the car. In these circumstances the plaintiff is entitled to costs of the proceedings in the Court below up to time of payment into Court by the defendants, and the defendants are entitled

to the costs in the Court below as from that date. Out of the sum paid into Court I order payment out to the plaintiff of the sum of £100; the balance is to remain in Court as security for the aggregate costs hereby awarded to the defendants.

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*Appeal allowed.*