BAILII Citation Number: [1961] EWCA Civ 3

IN THE SUPREME COURT OF JUDICATURE
COURT OP APPEAL
(From Judge Sir Shirley Worthington-Evans,
sitting at Brentford County Court.)

Royal Courts of Justice
28 July 1961

B e f o r e :

MASTER OF THE ROLLS
(Lord Evershed)
LORD JUSTICE HARMAN
and
LORD JUSTICE DONOVAN

Between:

Performance Cars Ltd	**Plaintiffs (Respondents)**
-v-	
Harold James Abraham.	**Defendant (Appellant)**

(Transcript of the Shorthand Notes of The Association of Official Shorthandwriters, Ltd.,
Room 392, Royal Courts of Justice, and 2 New Square, Lincoln's Inn, London, W. C. 2).

Mr. J. D. W. Hayman (instructed by Barlow, Lyde & Gilbert)
appeared as Counsel for the Appellant.
D. Wheatley (instructed by Messrs. . H. Berry & Co., Brentford)
>appeared as Counsel for the Respondents.

HTML VERSION OF JUDGMENT

MASTER OF THE ROLLS: This appeal has raised an interesting and novel point. On 25th February, 1960, the Defendant when driving his own motor car collided with the Rolls Royce motor car of the Plaintiffs, being driven by one of the Plaintiffs' directors. The collision was not serious and the Defendant, the Appellant in this court, has accepted full responsibility for the accident. The Appellant's car struck the offside front wing and the bumper of the Plaintiffs' Rolls Royce and there is no dispute as to the damage strictly attributable to this injury, insofar as it required that the dent in the wing should be hammered out and the bumper straightened and re-chromed. The Plaintiffs' Rolls Royce is of a kind known as "Silver Cloud." The top of the motor car and the bonnet is painted black but the lower part of the motor car, including the wings, is of a pale colour appropriate, I assume, to the description "Silver Cloud". It has been conceded by the Defendant that where damage is done, say to the wing, of a kind which occurred in the present case, it is necessary to respray the whole of the lower part of the body, since if only the damaged wing were resprayed the colour would be in obvious contrast to that of the rest of the lower part of the motor car. The claim for this item amounts to £75.

Now it so happened that a fortnight earlier the Plaintiffs' same motor car had been struck by another motor vehicle, the fault again being solely that of the other vehicle. This accident was also slight, but on this occasion the damage consisted of a bump in the back of the lower part of the Rolls Royce motor car. The Plaintiffs sued the owner of this other vehicle and recovered judgment by default for a sum of damages slightly larger than the claim against the present Defendant. The sum so recovered included the same amount of £75 in respect of respraying the whole of the lower part of the car, and again it is not in doubt, and for the same reason which has already been stated, that such a claim was properly made in part of the damage caused by this first collision. Unfortunately, the Plaintiffs have recovered nothing under their first Judgment and it appears from what we have been told it is extremely unlikely that they will do so. But the vital fact is that when the Appellant hit the Plaintiffs' motor car the work of restoration to the latter as the result of the first accident had not yet been done. In these circumstances, it has been said by the Appellant that he is not liable for the £75 claimed against him, being the cost of respraying the whole of the lower part of the body of the Rolls Royce.

What is said may be quite simply thus expressed. At the date of the Appellant's collision the Rolls Royce's condition was such that it had then in any case to be resprayed, so that the need for so doing did not arise from the Appellant's wrongful act. On the other side it is said that here you have two separate tortfeasors and each must be liable for the consequences of his

tortious act naturally and properly flowing from the respective wrongs. It is conceded by the Plaintiffs that they could not recover the cost of respraying from both wrongdoers, the earlier motorist and the Appellant, and they offer accordingly to assign to the Appellant the benefit of the earlier judgment, at least so far as it relates to this part of the claim.

The point appears, as I have said, novel and interesting, but, with all respect to the County Court Judge, I have come to the conclusion that the Appellant's view is right and that he is entitled to succeed. In Shearman v. Folland ([1950] 2 King's Bench p.43) it was pointed out by Lord Justice Asquith, delivering the judgment of the Court, on page 45 quoting from Mayne on Damages, 11th Edition, p.151, that "matter completely collateral, and merely *res inter alios acta* cannot be used in mitigation of damages." So in that case it was held that the defendant could not deduct from the nursing home expenses incurred by the plaintiff, the cost which the plaintiff might otherwise have expended in hotel bills, though I note that the defendant was entitled to make a deduction representing a sum per week for food. Were it otherwise, Lord Justice Asquith observed, a defendant might be allowed to say that his wrong had in fact conferred a financial benefit upon a person of extravagant tastes who by his sojourn in a nursing home had saved himself what he might otherwise have paid at a palatial hotel. On similar grounds it is clear that a wrongdoer such as the Appellant cannot make a deduction because the Plaintiffs may happen to be covered by a policy of insurance against any financial loss which they may in fact suffer. So it was said by Mr. Wheatley that the Plaintiffs' rights against the earlier car owner are something completely collateral. But as Lord Justice Asquith pointed out in the case cited, the maxim which he quoted is easier to formulate than apply. What, for the purposes of cases such as the present, ought to be regarded as "matter completely **collateral** and **merely** *res inter alios acta*" - and it will be observed that I have, in making my reference, emphasised the two adverbs. The fact in the present case is that the Appellant struck a motor car already damaged, the damage including the necessity in any case of respraying the whole of the lower part of the body. The case is to my mind rendered less easy because the respraying is something special to the character of this particular and rather luxurious motor car. But the principle, as it seems to me, is the same as that applicable to the example stated by my Brother Donovan in the course of the argument. Suppose a man wrongfully damages my motor car by splintering part of the windscreen so that, as the inevitable result, I must have a new windscreen, the cost of which is damage properly flowing from the wrongful act I have suffered. Then suppose that before my windscreen has in fact been replaced, if you will, while I am driving my motor car to the place where the new windscreen is to be fitted, another wrongdoer strikes my car and splinters another part of my windscreen. If the Plaintiffs are right, it must follow that I can claim, if I have not already actually recovered from the first

wrongdoer, the cost of replacing the windscreen from the second. and the same result would, as it seems to me, follow if the first damage to my windscreen had been my own fault or if, in the present case, the Plaintiffs had by their own fault damaged the back of their Rolls Royce motor car.

I do not multiply examples but I have in the end felt compelled to the conclusion that the necessity for respraying was not the result of the Appellant's wrongdoing because that necessity already existed. The Rolls Royce, when the Appellant struck it, was in a condition which already required that it should be resprayed in any event. In my judgment Mr. Hayman was able to derive some assistance from the two cases which he cited, namely, The Haversham Grange ([1905] Probate p.307) in this court and Carslogie Steamship Co. Ltd. v. Royal Norwegian Government ([1952] Appeal Cases p.292) in the House of Lords. Both cases were concerned with damage suffered by ships: in the first case the second wrongdoing vessel objected to paying the dry dock charges incurred by the owners of the injured vessel on the ground that that vessel was already damaged and drydock charges at least as great as those with which the second wrongdoing vessel was being charged already had to be incurred by reason of the collision with the first vessel. This court, however, rejected that argument (which had found favour with the President) and held, following The Vancouver ((1886) 11 Appeal Cases p.573) that such charges ought to be apportioned, though they did absolve the second wrongdoing vessel from any claim for demurrage, since the vessel would in any event have been out of commission for the period in respect of which the claim was made as the result of the first collision. But in the second case of the House of Lords considered the Haversham Grange case and certainly both Lord Jowitt and Lord Normand held that no valid distinction could be drawn between the demurrage and dock dues claimed and that the Court of Appeal's decision with regard to the latter could not be supported. Thus at page 303 of the latter Viscount Jowitt is reported to have said: "My Lords, I think that there can be no logical distinction between the claim for damages for delay and for dock dues and, believing as I do, that the decision as to damages for delay was correct, it follows in my view that the latter decision in respect of dock dues cannot be supported." It is true that both these cases were Admiralty cases, but it does not seem to me that any difference of principle can as a consequence arise.

In my judgment in the present case the Appellant should be taken to have injured a motor car that was already in certain respects (that is, in respect of the need for respraying) injured; with the result that to the extent of that need or injury the damage claimed did not flow from the Appellant's wrongdoing. It may no doubt be unfortunate for the Plaintiffs that the collisions took place in the order in which they did. Had the first collision been that brought about by the Appellant and had they recovered the £75

now in question from him, they could not clearly have recovered the same sum again from the other wrongdoer. It is, however, in my view irrelevant (if unfortunate for the Plaintiffs) that the judgment obtained against the other wrongdoer has turned out to be worthless.

For the reasons which I have stated I would allow the appeal.

LORD JUSTICE HARMAN: The only issue before us in this case was the quantum of damage arising from the collision between the Appellant's Triumph motor car and the Plaintiffs' Rolls Royce, negligence on the part of the Appellant being in this court admitted. The particulars of damage are stated in the particulars of claim and the only one relevant here is: "Cost of repainting lower part of Rolls Royce, £75." It was admitted that, taken by itself, this would have been a proper charge because, owing to the nature of the paint used, merely to repaint the damaged portion of the wing would not have produced the uniform colour of the lower portion of the body which characterised the Rolls Royce car. More plebeian owners do not share this privilege and must be content with a mere "bodge." But it transpired in the course of the hearing that a few days previously the Rolls Royce car had suffered damage to the rear part of the paint that would have necessitated a similar operation. The Respondents had in fact a judgment against the other vehicle owner for that sum which was unsatisfied. The Appellant contended that he was not bound to submit to judgment for that sum over again. This argument did not rest on the unsatisfied judgment, but on the fact that the car with which the Appellant collided was in a damaged condition and that the expense of repainting would have been necessary in any case. This is a curious point, but in my opinion it succeeds. It was argued for the Respondents that the already existing damage was a "collateral" matter and ought not to be taken into account. He relied on the decision in Shearman v. Folland ([1950] 2 King's Bench at p.43) where it was held that in assessing damages for injuries to the plaintiff caused by the defendant's motor car, the defendant could not deduct hotel charges which the plaintiff would probably have incurred during the time when she was in a nursing home if the accident had not happened, hotel charges and nursing home fees not being in *pari materia* and a collateral matter. Lord Justice Asquith, reading the judgment of the Court of Appeal, cited Mayne on Damages, 11th Edition, p.151: "Matter completely collateral, and merely *res inter alios acta* cannot be used in mitigation of damages." The way in which the plaintiff chose to live was for her to choose and the defendant could not take advantage of the fact that she was in the habit of living in an expensive hotel. The court did, however, allow a modest sum, namely, the cost of the food she was bound to have eaten. In the instant case the circumstances are quite different. The damage to the Respondents' car had actually happened and what the Appellant collided with was a car already damaged and reduced in value to that extent. Respondents' counsel admitted that his argument would have

been the same if his client had, on leaving his garage that morning, damaged his car by running it into a wall. This seems to me to show the fallacy of the argument.

I would allow the appeal.

LORD JUSTICE DONOVAN: I am of the same opinion. The question, as I see it, is this: What extra burden in the matter of respraying was put upon the Plaintiff Company by the second collision? To my mind the answer must be: None, for the earlier collision had already imposed the burden of respraying upon them.

I agree, therefore, that the appeal should be allowed.

(Appeal allowed with costs in lieu of judgment for £110.15s., judgment for £35.10s. substituted; costs on Sale 3 awarded to Plaintiffs in lieu of costs on Scale 4)