

J & J CONSTRUCTION COMPANY LIMITED v DIEDRICHS (1967) ZR 56 (HC)

HIGH COURT

MCCALL J

18th 15 APRIL 1967

Flynote and Headnote

[1] Tort - Damages - Repair of damaged article - If put in better condition than before damaged, then increase in value must be deducted from damages.

If an article is damaged, and damages are claimed for the cost of repairs by which the article is put into better condition than it was in originally, the plaintiff is not entitled to profit by the defendant's negligence, but some figure must be deducted from the damages to account for the rejuvenation.

Judgment

McCall J: In this action the plaintiff and defendant claim damages of 25 by reason of negligent driving. It is common ground that on the morning of the 2nd January, 1964, a heavy truck driven by one of the plaintiff's servants and a car driven by the defendant were travelling along 22nd Avenue, Kitwe. At the relevant part of the road it is perfectly straight, slightly uphill and all the side roads are stopped with regulation signs. 30 The truck was ahead and wished to turn right into Kantanta Street. The defendant, coming up the hill from behind and travelling faster than the truck, wished to pass it. It failed to do so and there was a collision between the car and the truck almost in the centre of the 22nd Avenue and Kantanta Street intersection, as the latter was executing the right - hand turn. 35 The result was, and is, that the plaintiff claims that the defendant negligently collided with the plaintiff's truck and the defendant claims in the opposite sense. In the conditions prevailing at the time the simple question for me to answer is which - if not both - of the drivers were negligent, for negligence there certainly must have been.

As to 40 the accident itself, on the plaintiff's side I have the evidence of Brown Ngoma, the driver of the truck, and his companion in the cab, and on the defendant's side the defendant himself and a Mr Irwin. According to Mr Ngoma he was returning from tipping waste back to an excavation

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site. To do this he had to travel along 22nd Avenue and turn right into Kantanta Street. He was well used to this journey as he had had to do it several times a day. Going up 22nd Avenue he was travelling slowly, certainly not more than 20 m.p.h. Approaching the intersection he says he put out his indicator and also extended his right arm. Further, he 5 satisfied himself, by looking in the rear mirror, that there was nothing coming up behind him. As he started his turn into Kantanta Street he withdrew his arm and almost immediately afterwards he heard and I quote, "a bang at the back of my lorry" which was thereupon knocked into a ditch on the left - hand side of

the entrance to Kantanta Street. 10 When he got out he saw another vehicle in the same ditch behind and in line with his. In this account of the collision Ngoma is supported by Fortune Tembo, who was in the cab with him, to the extent that he says that as the truck was approaching the Kantanta Street turn - off he saw Ngoma, who was driving slowly, switch on his indicator and put out his 15 right hand. I allowed, at the request of counsel for the plaintiff and without objection from the defendant, these two witnesses to demonstrate distances on St George's Road as it approaches the Independence Avenue intersection outside the High Court. Ngoma's demonstration showed that he started to signal about seventy yards from the intersection and that 20 he moved to the crown of the road for his right - hand turn about 20 - 25 paces from it. In Tembo's demonstration these figures were about 100 yards and about thirty paces, respectively.

The evidence for the defendant is very different. He says he was travelling behind the plaintiff's truck at about 15 m.p.h. and he wished 25 to overtake it. He saw no indication from the truck as he was about 10 - 15 yards behind it, he pulled out to overtake it. As they came very close to the Kantanta Street turn - off the truck was still on its left - hand side but it was and I quote, "Approximately on the middle of the intersection when it turned right. No indication of this was given." The plaintiff says he 30 applied his brakes but it was too late and there was an impact between the front end of the truck and the fenders of the plaintiff's car which overturned into a drain. The defendant's evidence, again as it relates to the accident itself, was supported by Mr Irwin. He was stopped at the shop side on Kantanta Street on the same side as Ngoma and the 35 defendant was travelling. He saw the lorry approach the intersection slowly. Close behind it was the car driven by the defendant who, according to him, was pulling out to overtake. On the intersection the lorry turned sharply to the right without having given any indication of intention to do so either by way of mechanical or hand signal. 40

Having seen and heard these two sets of witnesses I find the question I have to answer is easily determined. Where the evidence of speed, signal and sight is conflicting as between Ngoma and the defendant and his witness I accept the evidence for the plaintiff. I have no doubt whatsoever that the defendant was solely responsible for this collision. I find 45 that, Ngoma travelling slowly along a route with which he was very familiar and which entailed a right - hand turn in the face of traffic behind him, took every precaution to see to it that this turn was executed with

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complete care and attention. Conversely, I cannot accept the evidence of the defendant where he seeks to place the responsibility for the collision upon the plaintiff's driver. I am satisfied that the defendant was travelling at such a speed and in such a hurry that he took the chance of overtaking 5 the truck before a collision was inevitable. This chance did not come off and this was wholly the responsibility of the defendant and the plaintiff's driver must be completely exonerated therefrom. In these circumstances I dismiss the defendant's counter - claim and find the plaintiff's claim for negligence established.

There 10 remains the question of the amount of damages to which the plaintiff is entitled. In this regard I find that the damage to the truck was caused by the defendant's negligence in driving; no

part of it was caused by anything which happened after the accident. The substantial physical remedy to the plaintiff's truck was the replacement of a differential 15 assembly and housing, a rear spring and shackle, a half shaft and a universal joint. To this must be added the labour cost of such replacement and the value of the loss of the use of the vehicle. To take the last of these first I think the estimate of Mr Jupp was very fairly stated and on this head I find the loss to the plaintiff amounts to £120 0 s. 0 d. The labour 20 costs claimed come to £111 0 s. 0 d., and I am told by Mr Dawson, a motor claim assessor called for the plaintiff, and whom I regard as a disinterested witness, that this figure would have been much higher if done at normal workshop cost. Thus I accept this figure also. The main component of the damages is the cost of the replaced parts. The principal one, the 25 differential assembly, is said by Mr Jupp to have cost £460 10s. 1d., duty paid from South Africa. This figure is also supported by Mr Dawson and I accept it. The other replaced parts were proved to have cost £47 8s. 9d. This brings the replaced parts damages to £507 18s. 10d. which, added to the £231 0 s. 0 d., damages for labour and loss of use, comes to £738 18s. 10 d. 30 The plaintiff seeks to increase this by a further £16 0s. 0d. for sundry repairs, which I do not doubt were necessary, and so the total damages I find to be proved are now a few pounds in excess of the amount claimed.

[1] However, I must take into account the fact that as a result of these expensive replacements the plaintiff's truck, which was a very heavy 35 duty one, was in a better condition to stand up to wear and tear in respect of its rear assembly after the collision than it was before it. The plaintiff is not entitled to profit by the defendant's negligence and some figure must therefore be assigned to this rejuvenation if I may so call it. I can only make a speculative estimate in this regard for I have little evidence 40 of its extent. But taking into account the age of the vehicle and the repairs done to it I think the plaintiff's claim should be reduced to £650 0 s. 0 d., and it is for this sum that I award judgment to the plaintiff, who shall also have the costs of this action.

Judgment for the plaintiff