DULY MOTORS (Z) LTD v PATRICK KATONGO AND LIVINGSTONE MOTOR ASSEMBLERS (1986) Z.R. 61 (S.C.)

SUPREME COURT
SILUNGWE, C.J., GARDNER AND MUWO, JJ.S.
7TH NOVEMBER, 1985, 3RD MARCH AND 5TH SEPTEMBER, 1986
(S.C.Z. JUDGMENT NO. 17 OF 1986)

Flynote

Tort - Negligence (assembler) Res ipsa loquitur - New car catching fire - Liability of Manufacturer - "Manufacturer principle"

Damages - Loss by fire of brand new motor car - Calculation of damages -

Inflation - Order against car manufacturer tortfeasor who is capable of supplying new car.

Headnote

The Plaintiff purchased from the first defendant a motor vehicle which was assembled by the second defendant. Ten days after purchase the vehicle developed a fault and was taken to the first defendants garage for repairs which were effected within a day allowing the plaintiff to collect the car and commence a trip to Ndola on the same day. On the way, the car caught fire and was damaged beyond repair. In the court below the judge awarded damages for negligence to the plaintiff against the first defendant who appealed.

p62

Held:

(i) Where there are two defendants who are not responsible for each other's acts the doctrine of res ipsa loquitur applies and it is not for the plaintiff to call evidence in order to eliminate all possible causes of the fire.

(ii) Where there is no evidence of the reasonable probability of intermediate examination, only the second defendant got liable to the plaintiff.

(iii) Where there has been inflation, as there has been in this country, a plaintiff who has been deprived of something must be awarded realistic damages which will afford him a fair recompense for his loss calculated at the value appropriate to the date of the award.

Cases cited:

(1) Roe v Ministry of Health [1954] 2 All E.R. 131
(2) Mahon v Osborne [1939] 1 All E.R. 535
(3) Evans v Triplex Safety Glass Company Limited [1936] 1 All E.R. 283
(4) Reed and others v Dean [1949] 1 K.B. 188
(5) Donogue v Stevenson [1932] A.C. 562
(6) Ozokwo v The Attorney-General (1985) Z.R. 218

For the Appellant: J. H. Jearey, Messrs D. H. Kemp & Co.
For the First Respondent: In person
For the second respondent.: C. K. Banda, Messrs Lisulo & Company

Judgment

GARDNER, J.S.: delivered the judgment of the court.

This is an appeal from a judgment of the High Court awarding damages for negligence to the first respondent against the appellant. We refer to the appellant, the first respondent and the second respondent as the first defendant, the plaintiff and the second defendant respectively.

The history of this case is that on 21st August, 1979, the plaintiff purchased a Fiat 132 GLS motor car registration No. AAD 5145 from the first defendant at the price of K7,440. The assemblers of the motor car were the second defendant and it was claimed that it was under guarantee by the second defendant for six months from the date of purchase. On the 31st August, 1979, the car developed a fault known as preignition, that is the engine continued to run after the ignition was switched off. On the 31st August, 1979 at 0815 hours the plaintiff took the car to the first defendant's garage and requested that the fault should be rectified. At 1245 hours on the same day, the plaintiff collected the car and was told that the fault had been rectified. On the afternoon of the same day, the plaintiff drove the car from Lusaka towards Ndola and, at Kafulafuta, approximately 270 kilometres from Lusaka, the car caught fire and was a complete write-off. The plaintiff, in his statement of claim, set out the above facts and claimed as follows:

p63

"7. The plaintiffs car caught fire due to:

> (a) The First Defendant's negligence, omission and/or failure to repair properly the pre-ignition fault they detected.
> (b) The Second Defendant's fault in manufacturing and/or assembling of the plaintiff's vehicle.
> (c) Alternatively, the second defendant divas in breach of warranty 7 which forms part of the General Selling Terms. AND the plaintiff's claim is against the defendants jointly or one of them for the sum of K7,440 00 or replacement of another Fiat 132 GLS plus damages."

The plaintiff gave evidence in accordance untie the facts we have outlined above and in particular said:"Near

> Kafulafuta, I saw smoke coming out from the side of the bonnet of the vehicle. I thought it was steam from boiling water. The instrument concerning the water on the panel was normal. so I pulled aside and stopped and switched off the engine. I opened the bonnet. When I lifted the bonnet, I saw a blast of fire from the engine compartment."

He then went on to say that he took his child out of the vehicle and obtained a lift from another passing vehicle back to Kabwe leaving his own vehicle still burning. In cross-examination by counsel for the second defendant the plaintiff denied that the vehicle had caught fire because it had no water in the radiator. Further in cross-examination he said that because it was a new car he had been warned by the salesman of the first defendant not to exceed 40 kilometres per hour and he had not exceeded that speed.

The second witness for the plaintiff. Mr. John Edwards, was a workshop manager for Bosch with qualifications in the motor industry. This witness had not seen the engine of the plaintiffs car but he had seen a report on it by Mr. A Stocker with whim he had worked for Diesel Electric Lusaka Limited. He gave evidence as to what would be likely to cause a fire in a motor vehicle and what would be necessary to cure the fault of pre-ignition. In the latter respect he said that pre-ignition could be caused by the maladjustment of the vehicle's ignition timing, maladjustment of the float level in the carburettor or excessive carbon in the cylinder head. He ruled out the last possibility because the car in question was brand new. In particular, this witness said that if there was maladjustment of the carburettor, it would be necessary to strip the carburettor to repair it, and this would entail removing the fuel pipes from it. He said that in this type of vehicle the fuel pipes severe made of plastic and not metal as in some other cases, but he said that this was common practice and would not have caused any likelihood of fire. Front the facts of this case he deduced that the fire had been caused by leaking petrol (and not by art electrical fault) and leakage occurred by incorrect fitting of the plastic pipes or by a pipe being fitted in such a way that it caught a moving object e.g. the fan-belt. Under cross-examination, this witness agreed that if a person tried to repair the engine and used a naked flame while doing so, he could cause fire, assuming that a petrol line had been disconnected.

The first witness for else first defendant. Mr Isiah Miti, gave evidence that he was a mechanic employed by the first defendant and he was called upon to rectify the pre-ignition fault in the plaintiff's car. He said he

p64

first tested the timing with a stroboscope and found that the timing was correct. He then started the engine and adjusted the screw on the carburettor controlling the amount of petrol and found that by so doing he had cured the pre-ignition fault. He said he did not disconnect the petrol pipes and did not bend or break any fuel lines. In answer to a question by the learned trial judge, he said that, although it was necessary when adjusting the petrol mixture screw also to adjust the air mixture screw, in this particular case it was not necessary. In answer to a further question by the learned trial judge he said that, although he had a machine to check the mixture for the carburettor, it was not necessary to use it in this instance. The second witness for the first defendant was Mr Anderson, the Service Manager for Duly Motors, Lusaka, who said that he had instructed Mr Miti to rectify the pre-ignition fault on the plaintiff's car. He described how ignition timing is tested, and said, in examination chief, that the mixture to the carburettor is adjusted by adjusting the air mixture screw. He said that after the repair he took the vehicle out for about twelve kilometres and, apart from a faulty speedometer cable connection, which he thought had been deliberately disconnected, he found that the pre-ignition problems had been cured. When questioned by the counsel for the plaintiff about the job card in respect of the repair he agreed that normally a job-card was opened but that it was not considered necessary in this case for a routine adjustment for pre-ignition which was quite a common problem with this type of car. In future cross-examination by counsel for the plaintiff, this witness said "We have the engine and the gear box. . . Form the condition of the vehicle in which it was after it had caught fire it was impossible to assess the cause of the fire. Mr Bertolini of the second defendant had examined the vehicle after it was burnt down and he made a report as to the possibility of the cause of the fire. "I myself could not have been too sure as to what could have been the cause of the accident. " In answer to a question by the learned trial judge, this

witness said it was not necessary to adjust both the air screw and the petrol screw on the carburettor but it was normal that both screws had to be adjusted to supply the proper mixture.

Defence witness three, Mr Mungaila, was a witness for the second defendant. He said he was the service manager employed by the second defendant and was a qualified automotive technician. He said that a Mr Bertolini was formerly service manager and that he had accompanied Mr Bertolini to Kafulafuta on the 9th of October, 1979, when the vehicle was inspected there. He said that it had been towed there by the police immediately after the fire. He said further that he was amazed to find that the cam-shaft covers were missing. He explained that the cam-shaft covers were also known as tappet covers and were made of aluminium which would melt in a fire but that the cam-shaft holders were made of the same material and although they had melted, there were still traces of them visible. He said that he deduced form this that the tappet covers must have been removed to effect a road side repair before the engine caught fire. The learned trial judge considered the question and found that the plaintiff was n honest straight forward witness. He found that there was no reason to doubt the plaintiff's version as to how the ear

p65

caught fire and pointed out that the first defendant's service manager, who had seen the car after the fire, gave evidence that it was impossible to assess the cause of the fire despite the fact that he must have noticed the absence of the tappet covers. Following this reasoning, the learned judge said: "Taking into account that the engine had caught fire and was fuelled by petrol cannot be ruled that the cam-shaft covers had in all probability melted completely." As a result, the learned trial judge found that the fire had not been caused by any action of the plaintiff. He also found "in absence of any evidence as to the manufacturer's assembly defect, I cannot say whether the said fire was caused by the manufacturer's defect." In considering liability of the first defendant, the learned trial Judge said:

> "Having given careful thought to the matter, I consider that the probable cause of the said fire was due to improper and vague adjustment of fuel mixture and the manner in which the said repairs were carried out."

The reference to repairs was a reference to the rectifying of the preignition fault and, in consequence, judgment was given against the first defendant. This appeal is against that judgment.

Mr Jearey, on behalf of the first defendant, argued that the doctrine of res ipsa loquitur is not applicable where there are two or more defendants who are not responsible in law for the acts of each other, as in this case, since the res does not point to negligence on the part of any particular defendant. He cited the case of *Roe v Ministry of Health* (1). This is an appeal before the Court of Appeal in England but the quotation cited to us was from a recital of the judgment of the trial judge, McNair J, in which he said at page 133, that where an operation was under the control of two persons not in jaw responsible for the acts of each other, the doctrine of res ipsa loquitur could not apply to either person since res, if it spoke of negligence, did not speak of negligence against either person individually. Somervell, L.J., referring to this comment by the trial judge said at p. 135, "The learned judge said that the principle could not apply to a case where the operation was, as he held here, under the control of two persons not in law responsible for each other. Our attention was

drawn to some observations in *Mahon v Osborne* (2) which suggest that this is too widely stated". Denning, L.J., went further at p. 137, and said:

> "If an injured person shows that one or other or both of two persons injured him, but cannot say which of them it was, then he is not defeated altogether. He can call on each of them for an explanation:"

We are not, therefore, satisfied that the case cited on behalf of the first defendant is authority for saying that the doctrine of res ipsa loquitur does not apply where there are two defendants who are not at law responsible for each other as in this case.

p66

Mr Jearey also referred us to the case of *Evans v Triplex Safety Glass Co. Limited* (3). In that case, a motor car fitted with a triplex windscreen was purchased and, about a year after the date of purchase, the windscreen suddenly and for no apparent reason shattered and injured the occupants of the car. It was held by the trial court in that case that the manufacturers were not liable for negligence for the following reasons:

(i) The lapse of time between the purchase of the car and the occurrence of the accident;
(ii) The possibility that the glass may have been strained when screwed into its frame;
(iii) The opportunity for examination by the intermediate seller; and
(iv) The breaking of the glass may have been caused by something other than a defect in manufacture.

In the course of the judgment in that case, Porter, J. said at page 286:

> "It is true that, as Mr Macaskie points out, in these cases he had not got to eliminate every possible element, but he has got to eliminate every probable element. He has not displaced sufficiently the balance of probabilities in this case."

Mr Jearey argued that in this case there were a number of possible causes for the accident, for instance, that the plaintiff may have been carrying spare petrol which leaked and caused the fire. There was also the suggested cause that in view of the absence of the aluminium cam-shaft cover, the plaintiff had been carrying out road-side repair when the fire broke out. In this connection, the learned trial judge believed the plaintiffs account of the outbreak of the fire, namely, that he noticed signs of burning so he stopped the car and, when he opened the bonnet, there was a blast of flame. The possibility that the fire was caused by the use of a naked flame near a leaking petrol pipe when the cam-shaft cover had been removed was not put to the plaintiff. It was only suggested to him that he had put no water in the radiator, and he denied this suggestion. We are satisfied that there is no reason to interfere with the learned trial judge's finding that the fire was not caused by a road-side repair. We are satisfied, as we have already indicated, that despite the fact that there are two independent defendants in this case, the doctrine of res ipsa loquitur applied and that it was not for the plaintiff to call evidence in order to eliminate all possible causes of the fire.

In *Evans v Triplex Safety Glass Co. Limited* (3), the judge gave four reasons why the claim for

negligence against the glass manufacturer could not succeed. Those were the lapse of time; the possibility that the glass may have been strained when screwed into its frame, the opportunity for examination by the intermediate seller, and that the breaking of the glass may have been caused by something other than a defect in manufacture. The first two such reasons do not apply in this case in that the fire occurred ten days after purchase and there is no evidence of any interference with the engine other than the adjustment of one petrol

p67

screw.The third ground in the *Triplex* case is not of course available to the first defendant who was in fact the intermediate seller; and the fourth ground would not appear to apply because no other possible causes of the fire had been put forward except the possibility of a repair in proximity to a naked flame by the plaintiff, and in this respect, having hear the evidence, the learned trial judge accepted the plaintiff's account of the matter.

Mr Jearey then went on to enumerate a number of instances whereby he armed that the learned trial judge had misdirected himself in the evidence in finding that the fire must have been caused by the work done at the first defendant's garage when the pre-ignition fault was rectified. The learned trial judge apparently was of the opinion that in order to rectify the pre-ignition fault it was necessary to adjust the air and petrol adjustment screws on the carburettor. This was evidenced by the fact that he asked all the relevant witness whether it was not the proper course to take, and when he arrived at this conclusion that the probable cause of the fire was due to improper and vague adjustment of final mixture he apparently thought that the adjustment of only the petrol screw was evidence of negligence. In fact, Mr Jearey has properly pointed out that all three witnesses, when questioned by the learned trial judge about this type of adjustment said that, although it was usual for both screws to b adjusted, it was not necessary for both screws to be adjusted. The principal evidence in this regard, which was not contradicted by any other evidence, was that of the mechanic himself who said that when he adjusted only the petrol screw the adjustment cured the defect, and there was no need to adjust anything else. We agree further with Mr Jearey that there was no evidence whatsoever that the failure to adjust the air screw could possibly, let alone probably, have caused the fire. The only evidence in this respect was from the plaintiffs second witness, who was an expert in such matters, who gave evidence that the fire was most probably caused by petrol ignition and this could happen by the plastic petrol pipes being improperly affixed, or so affixed that they could come into contact with a moving part such as a fan-belt. The evidence of Mr Miti, the first defendant's mechanic, was that he did not touch the fuel pipes and did not do more than adjust one screw on the carburettor. The plaintiff's claim against the first defendant was that the car caught fire due to the first defendant's negligence, omission and or failure to repair properly the pre-ignition fault they had detected. There is no evidence to establish the plaintiffs claim alleging negligence by the first defendant and the learned trial judge's finding to this effect cannot stand.

The appeal of the first defendant against the finding and judgment of the High Court is allowed, and the judgment and order for damages against the first defendant are set aside.

We now come to the question of the possible liability of the second defendant for which purpose leave was given to the plaintiff to cross-appeal against the learned trial judge's finding that, in the absence of any evidence as to the manufacturer's assembly defect, he could not say

p68

whether the fire was caused by such defect.

Mr Banda on behalf of the second defendant argued that the learned trial judge was wrong in finding against the suggestion by the witness called on behalf of the second defendant that the fire must have been caused while the plaintiff was carrying oat a road-side repair. We have already dealt with this argument and the suggestion put forward by Mr Jearey on behalf of the first defendant that there could have been a number of possible causes for the accident, for instance, that the plaintiff may have been carrying spare petrol which leaked, and in this respect we would refer to the case of *Reed and Others v Dean* (4), in which there was a hire of a motor launch which caught fire causing damage to the plaintiff. That case was treated as one in which the doctrine of res ipsa loquitur applied so that the onus was on the defendant to show that the fire was not caused by negligence.

That case is applicable in the circumstances of the case at present before us and, as between the second defendant and the plaintiff the doctrine of the res ipsa loquitur applies. In view of the fact that the only explanation for the fire, the possibility of a road-side repair has been rejected, the onus on the second defendant has not been discharged.

The second defendant has been sued as the manufacture of the vehicle. In *Donoghue v Stevenson* (5), at page 599, Lord Atkin set out what has come to be known as "the manufacturer's principle" to the effect that a manufacturer of products which he sells in such a form as to show that he intends them to reach the ultimate consumer in the form in which they leave him with no reasonable possibility of intermediate examination, and with the knowledge that the absence of reasonable care in the preparation or putting up of the products will result in an injury to the consumer's life or property, owes a duty to the consumer to take reasonable care. As is said in paragraph 878 of the 13th Edition of Clerk and Lindsell on Torts, in the light of a number of cases, the phrase probability of intermediate examination" needs to be substituted in place of "possibility" in the formulation of the rule. In this case, there is no specific evidence as to the intermediate examination of the motor vehicle sold to the plaintiff but there was ample factual evidence that the vehicle did pass through the hands of the first defendant as supplier of the vehicle and later as the repairer of a minor defect.

Apart from the rejected hypothesis of a road-side repair in the presence of a naked flame, the only evidence as to the possible cause of the fire came from the plaintiffs second witness who gave his opinion that from the facts of this case the fire had been caused by leaking petrol and the leakage occurred by incorrect fitting of the plastic fuel pipes or by a pipe being fitted in such a way that it caught a moving object such as a fanbelt.

Mr Jearey has argued on behalf of the first defendant that such examination as would take place before the sale of the vehicle would not cover inspection of every fuel line to ensure that there was no possibility .

p69

of future leaks which might cause a fire. No evidence divas put forward by any of the parties as to what type of examination was expected to be carried out by the first defendant as suppliers of the vehicle. There was reference to the probability of the intermediate examination in *Donoghue v Stevenson* (5), in our view refers to an intermediate examination which would be expected by the exercise of clue diligence to reveal the defect which was responsible for the damage. Further, since the probability of an intermediate examination is in the nature of a defence to what would otherwise be the absolute liability on the manufacturer, the onus of proving the expectation that such an examination would reveal the defect is on the manufacturer, in this case, the second defendant. It is apparent that the first defendant is an established seller of the second defendant's motor cars and it may well be that the second defendant, as manufacturer, gave instructions as to exactly what inspection must be carried out before delivery. However, apart from the evidence of the second defendant's witness that pre-delivery inspection involves general checking of all components, there was no evidence as to whether such an inspection would be expected to reveal the defect which caused the damage n this case. There was, therefore, no evidence of the reasonable probability of intermediate examination within the terms of *Donoghue v Stevenson.*

We are satisfied that under the doctrine of res ipsa loquitur and the principle in *Donoghue v Stevenson*, the second defendant is liable to the plaintiff for the loss by fire of the motor car supplied to him.

The judgment as to the liability of the second defendant is set aside and we give judgment for the plaintiff against the second defendant in damages for the loss of the motor car.

As to the quantum of damages, as we said in the case of *Ozokwo v The Attorney-General* (6) where there has been inflation, as there has been in this country, a plaintiff who has been deprived of something must be awarded realistic damages which will afford him a fair recompense for his loss. In this case, the plaintiffs loss is a motor car for which he paid K7,440. The motor car was a Fiat 132 GLS and was lured new at the time of the loss. The alternative to the claim for damages in the writ was replacement of the car and it is probable that such a model is not now available from the defendant. It is our intention that to make an award that will put the plaintiff in possession of a brand new car of as nearly as possible the same value as the one he lost. We, therefore, order that the second defendant do deliver to the plaintiff a new motor car of substantially the same value as the car that was lost bearing in mind the inflation that has taken place since the date of the loss. In default of such a vehicle being available to the satisfaction of the plaintiff, we order that the second defendant pay damages amounting to the present value of a new car approximately similar to the model which was lost. In default of agreement, there will be liberty to apply to the registrar of the High Court to assess the damages in accordance with this judgment. Costs in this court and in the court below will be paid by the second defendant.

Appeal allowed.
