HAPPY MOTORING CO SDN BHD

AND

WONG HEE SING @ BIBIANA WONG

(Court of Appeal of Brunei Darussalam)
(Civil Appeal No. 4 of 2017)

Before: Mortimer P, Leonard and Burrell JJA.
29th November 2017

Headnote: Sale of car. Defects arose. Damages awarded under Sale of Goods Act and for negligence. Appeal allowed on quantum of special and general damages. Awards of aggravated and punitive damages ought not to have been made. Damages reduced. Counterclaim in defamation. No evidence to support a defence of justification in respect of one statement. Appeal allowed. Retrial before a different judge.

Mr Kamal bin Shaari and Mr Eugene Loh Jit Kuan(Messrs Yusof Halim & Partners) for Appellant
Mr Rudi Lee Kim Boon (Messrs Rudi Lee, Annie Kon & Associates) for Respondent

Cases cited in the Judgment:

Denise Marie Wharton v Tom Harris Chevrolet Oldsmobile Cadillac Ltd [2002] BCCA 1;
Hicks and another v the Chief Constable of South Yorkshire 2 All E R 65;
AB and others v South West Water Services Ltd [1993] 1 All ER 609;
Kralj and another v McGrath and another [1986] 1 All ER 54

Mortimer, P.:

This is an appellant's (defendant's) appeal against a total award of $315,757.40 awarded by the Chief Justice for breaches of contract and negligence concerning the respondent's (plaintiff's) purchase of a Honda 1.8 VTI car from the defendant for $33,387 as long ago as 18 November 2006 also, the defendant appeals against the judge's dismissal of his counterclaim in Defamation on the grounds of justification, privilege, fair comment and lack of malice.

The Basic Facts

Having informed the defendant that she needed the car for personal and family use the plaintiff bought the car from the defendant under a written contract for $33,387 on 18 November 2006. Under clause 5 of the contract;

> *"5. No guarantee or warranty of any kind whatsoever is given by the sellers in respect of the vehicle, the subject of the contract, unless such guarantee and/or warranty is expressly added in writing hereto."*

The agreement does not exclude statutory warranties under the Sale of Goods Act that the car was of 'merchantable quality' and 'reasonably fit for purpose'.

It appears to have been accepted that the car had a 3 year warranty with the defendant as supplier but the details of this were not in evidence.

The Gear

According to the plaintiff's chronology she took the car in for two services on the 22 December 2006 and on 18 May 2007. Then on 29 August 2007 when stationary at traffic lights she found difficulty in engaging the gear. She was unable to engage the gear when the lights became green and only managed to do so when the lights became green on the next occasion. She complained about this difficulty to the defendant and on 5 September 2007 a defective part was replaced by the defendant. When the difficulty arose the car had been driven more than 9600 km.

The plaintiff had no further difficulty with the gear and Honda provided a product upgrade to avoid the problem which was fitted on the 23 July 2008.

The Driver's Window

On the 24 October 2008 she had difficulty with the driver's window which would not close properly. She reported to the defendant and was advised to use singer oil and to use it when required. She complains of having to keep singer oil in the car and problems when closing and opening the window for car park tickets and the like when it was raining. However, in spite of having windscreen wiper blades replaced by the defendant on 14 August 2009 and having a service on 16 October 2009 when the car had been driven 26,764 km she made no mention of any continuing difficulties with the window.

It was only after the plaintiff complained about other matters including the window that on 4 March 2011 the defendant replaced window parts free of charge to solve the problem.

The Drive Belt Tensioner

On 14 November 2008 Honda informed the defendant of the need to recall cars such as the plaintiff's to replace the auto tensioner of the drive belt or to re-tighten the belt. The plaintiff was not contacted by the defendant.

On 18 January 2010 (outside the three years warranty) the plaintiff was driving the car at about 5 PM. As accepted by the judge she heard a clanking noise from the engine, the car lost power, she pulled up. In due course the car was towed to Ruza Engineering Company as Honda was closed without after hours service. Ruza remedied the problem with the drive belt and the cost was $188.

On about 25th of May 2010 the same thing happened. Again the plaintiff arranged for Ruza to tow away the car and repair the Belt Tensioner. On this occasion it was repaired using product upgrade parts purchased from the defendant. This repair was seen by the defendant's mechanic on 7 January 2011 and found to be proper.

After the second breakdown the plaintiff was in constant fear of a further breakdown. When she heard any noise when driving even from another car she began to panic and

have palpitations until she slowed down and ascertained where the noise was coming from. She was frustrated by the condition of her car.

Complaints and Negotiations

Detailed evidence was given of the plaintiff's complaints to the defendant and Honda Japan and negotiations for settlement. This evidence was admitted without objection although normally inadmissible.

The Award

The Chief Justice held:

1. That the last two breakdowns were both related to the drive belt auto tensioner recall. In other words the defendant knew that the auto tensioner was liable to fail on the plaintiff's car after 14 November 2008; that the breakdowns were foreseeable; and that damage, inconvenience and loss was also foreseeable and this is what happened.

2. That the defendant was in breach of section 16 (2) of the Sale of Goods Act for selling a defective car not of Merchantable Quality. Also, it was in breach of the implied condition under section 16 (3) of the Act in being 'not reasonably fit for personal and family use'. Since she did not reject the car and repudiate the contract as she was entitled she now must treat the conditions as warranties and claim damages.

3. That 'losing power' as described by the plaintiff was 'due to low power steering assistance' – in other words not loss of engine drive power but only power to the steering.

4. The belt and pulley ought have been provided and installed free of charge by the defendant whereas the plaintiff's mechanic bought it on the second occasion.

5. The defendant failed to properly monitor the sale of product upgrade parts to customers.

6. That whereas during negotiations to satisfy her complaints the defendant had promised the plaintiff to inform other owners of similar cars about the drive belt problem through the media it had not done so. It was not disputed that the defendant was informed to recall the belt tensioner on 14 November 2008 whereas the plaintiff was only informed two years later in December 2010. The judge was not satisfied that the defendant had contacted all its relevant customers.

7. That the defendant had misdiagnosed the window problem and that there were therefore "cumulatively fundamental breaches of contract."

Consequently he awarded damages as follows:

1. For breaches of contract and negligence, the cost of repairs and insurance premium for towing after the 2 drive belt breakdowns caused by the failure to recall the car in a timely manner after the relevant product upgrade notice from Honda Japan.

2. General damages for associated 'loss of enjoyment and inconvenience' citing the Canadian case *Denise Marie Wharton v Tom Harris Chevrolet Oldsmobile Cadillac Ltd.(2002 BCCA 78)*
3. General damages for two years and four months loss of enjoyment of a properly functioning car window. Also two years loss of enjoyment related to the drive belt failure.

On this basis he awarded:

Cost of Repairs:
Repairs: $689.50 being the total amount charged by the plaintiff's mechanic.
Towing charges: being the total premiums paid for car insurance which covered towing.
Total: $757.40.

Damages for Loss of Enjoyment and Inconvenience

For two years and four months loss of enjoyment related to the car window: on the basis of a similar award in the Wharton case: $5000.

For the drive belt problems the judge said:

> *"I agree that a higher sum should be given to the plaintiff for the drive belt problems. The plaintiff and her family faced a serious risk of injury for more than two years. I find the claim of $10,000 in damages for loss of enjoyment and inconvenience in relation to the auto tensioner belt to be reasonable."* Award $10,000.

General Damages.

The drive belt tensioner:

> *"……. For the defendant's negligence on the basis of extreme stress, anxiety and emotional distress suffered by the plaintiff for four years and the fact that the plaintiff was placed at serious risk of injury and death for two years due to the drive belt bolt (auto tensioner) problem."*

Award: $50,000.

Aggravated Damages

The judge held that the plaintiff should be entitled to aggravated damages to compensate for her hurt feelings caused by the nature of the defendant's conduct. In brief this was that in the course of negotiations following the plaintiff's complaints the defendant's general manager refused to speak to her and handed over to the showroom manager. That the manager made a business decision not to publish the product upgrade campaign in relation to the drive belt for selfish commercial reasons in spite of promising the plaintiff that he would publish the campaign in the media. Further, the general manager refused to answer one of the plaintiff's letters of complaint which he said 'aggravates the circumstances more'. The plaintiff received poor service from the defendant, failed to deal amicably with her complaints, was arrogant and mistreated its customers. That in negotiations the defendant was negative and alleging, that she had

defamed the defendant and required a written retraction and apology. For all this the judge awarded aggravated damages of $150,000.

Exemplary (punitive) Damages

The judge said:

> *"I agree that the plaintiff should be entitled to punitive damages. The defendant should be punished for what they did. The defendant has failed to promptly comply with the recall in particular relating to the drive- belt- bolt problem.*
>
> *The design and manufacturing defects could have caused injury and even deaths, as what happened in the Takata airbag problem. The plaintiff was not only driving a car with an auto tensioner belt that has a design defect, she was also driving it with a Takata airbag that may explode. Mr Lowe had admitted that the PUD campaign relating to a Takata airbag is a serious campaign to recall the airbags manufactured by the Takata Company which had caused injuries and fatalities. As regards the defective Takata airbag, the defendant did replace it in 2015 after the defendant informed the plaintiff in the same year (2015).*
>
> *I therefore allow the sum of $100,000 as punitive or exemplary damages."*

The total award was therefore: $315,757.40.

The Appeal on the Claim

In summary the defendant contends:

1. The judge was wrong in finding that the vehicle was not of merchantable quality.
2. That the plaintiff had waived her rights in respect of the window defect.
3. That the plaintiff had incurred no towing charges and no loss in this respect.
4. That the judges awards of general damages in respect of the window and the drive belt were too high.
5. That the plaintiff is not entitled to further general damages for negligence she suffered no injury and has no claim in respect of distress. Authorities on nervous shock do not assist the plaintiff because it is a medical condition and there is none here. Anxiety and the like cannot be the subject of damages in the absence of psychiatric illness.
6. Aggravated damages cannot be awarded for negligence or breach of contract.
7. Exemplary damages cannot be awarded for negligence and damages are not claimable for risk of injury only for injury.

The plaintiff seeks to support the Chief Justice's awards in both the amounts and principle.

We have doubts as to whether the Chief Justice was justified on the evidence in finding that the car was not of merchantable quality when it was sold. See sec 16(6) of the Sale of Goods Act CAP 170. However, having regard to this finding on tortuous liability this did not influence his conclusion.

We turn to consider each of the awards made.

Repairs and Towing Relating to the Drive Belt

When Honda Japan notified the defendant of a product upgrade for the drive belt tensioner it was foreseeable that related breakdowns would happen. It was the defendant's duty to contact the plaintiff in a timely fashion to offer a replacement. In this it failed so the plaintiff suffered the 2 breakdowns of the car.

For this negligent breach of duty the judge awarded the cost of repairs and $67.90 as compensation for being towed. This last sum was vehicle insurance premiums for cover which included towing. She did not pay for the vehicle to be towed and consequently suffered no loss in this respect. She cannot recover the insurance premiums. They would have been paid in any event.

The award of $757.40 is reduced to one of $689.50.

Damages for Loss of Enjoyment and Inconvenience

For 2 years and 4 months loss of enjoyment and inconvenience of a properly functioning driver's window yet the judge awarded $5000. He found that the defendant misdiagnosed the window defect with the consequence that it would not work properly until new parts were fitted without cost after the 2 years 4 months. He did this following the Canadian case *Denise Marie Wharton v Tom Harris Chevrolet Oldsmobile Cadillac Ltd [2002] BCCA 1.*

That case involved a defect wholly different in scale from that involved here. The car radio had a buzzing or whining noise which happened whether the radio was switched on or switched off which the judge found was irritating in normal conversation. The plaintiff had long distances to drive and over 3 years the plaintiff took the car to the dealer numerous times and the fault was not cured. The radio was replaced twice and the defect was not remedied until the fault was found. Damages of over C$7000 were awarded for 'frustration and anxiety' and 'loss of use of a luxury vehicle and for inconvenience'.

In the instant case there is no doubt the plaintiff was entitled to damages for the misdiagnosis and the inconvenience caused, particularly on the occasions when the window failed to function properly when obtaining car park tickets and the like and on the occasions when it was raining. The fact is however that even though this inconvenience continued she never complained to the defendant even though the car had a 3 year warranty which had not expired. We note that the car was taken to the defendant to have windscreen wipers renewed and for a service during this period and the defendant was not informed of the malfunctioning window. She failed during that time to take any steps to mitigate her loss. When the defendant was informed of the continuing problem it was remedied without charge.

In all the circumstances we are of the opinion that $5000 was an excessive award. It was a substantial proportion of the then value of the car. Taking into account all the circumstances we reduce this to $2500.

The reasons given for the award of $10,000 for 2 years loss of enjoyment of a 'properly functioning auto tensioner' and the 'inconvenience of faulty (design defect) auto tensioner was:

> *"……. A higher sum should be given to the plaintiff for the drive belt problems. The plaintiff and her family faced a serious risk of injury for more than 2 years. I find the claim of $10,000 in damages for loss of enjoyment and inconvenience in relation to the auto tensioner belt to be reasonable."*

With respect this reasoning is flawed. Even if the evidence was sufficient to show that the plaintiff and her family faced a serious risk of injury for 2 years no injury or damage flows from this which can be the subject of an award. The car did not break down during this period, it functioned in this respect perfectly properly until the breakdown and the plaintiff was unaware of the potential problem until the 1st breakdown. There was no loss of enjoyment or inconvenience save at the time of the 1st breakdown and even after that the plaintiff had no reason to think or know that this belt drive was at risk.

Bearing this in mind the only damages recoverable for the auto tensioner and drive belt are for the inconvenience and loss of use of the car during the 2 breakdowns. The starting point for such an award must be the cost of hiring a car over the period when vehicle was out of use. Of this we have no evidence but doing the best we can and taking into account the inconvenience we would award at most $2500.

Loss of enjoyment is not a matter which can be compensated for save in contracts such as in the holiday cases where enjoyment is central. This was a commercial contract of sale.

General Damages

"For the defendant's negligence" the Chief Justice awarded $50,000 on the basis of the plaintiff's claim for $70,000. This he described as follows;

> *"….. Extreme stress anxiety and emotional distress suffered by the plaintiff for 4 years and the fact that the plaintiff was placed at serious risk of injury and death for 2 years due to the drive belt bolt (auto tensioner) problem.*
>
> *I have accepted the plaintiff's evidence that she faced the window problem to her car since 24/10/2008 and then this was resolved by the defendant on 4/3/2011. She had to apply oil on the car's windows."*

There can be no award for the tort of negligence unless the plaintiff has suffered damage which may be monetary or physical. No award can be made for emotional distress or anxiety and none for the risk of injury which has not come about, however high the risk and whatever the possible consequence. This is so even if the plaintiff is aware of the risk.

See *Hicks and another v the Chief Constable of South Yorkshire 2 All E R 65 at 69 d;*

> *"It is perfectly clear law that fear by itself, of whatever degree, is a normal human emotion for which no damages can be awarded. Those trapped in the crush at*

> *Hillsborough who were fortunate enough to escape without injury have no claim in respect of the distress they suffered in what must have been a truly terrifying experience. It follows that fear of impending death felt by the victim of a fatal injury before the injury is inflicted cannot by itself give rise to a cause of action…" per Lord Bridge.*

The plaintiff's submissions on nervous shock are irrelevant. Nervous shock is a medical condition. There was none proved in this case.

The general damages award cannot stand. The monetary loss and compensation for loss of use and inconvenience is made in earlier awards for the drive belt and the window defect. There is therefore no basis either in fact or law for the additional award of $50,000 general damages.

Aggravated Damages

Aggravated damages of $150,000 was awarded:

1. To compensate for the plaintiff's feelings caused by the nature of the defendant's conduct in negotiations to settle the plaintiff's claim.
2. For a failure to reply to a letter from the plaintiff making complaints.
3. For the defendant not publishing the drive belt recall for commercial reasons.
4. For the defendant's negative response when trying to reach a settlement.
5. For the defendant's lawyers alleging that she had defamed the defendant and demanding a retraction and apology.

In this respect perhaps the first matter to note is that the defendant was under no duty to try to settle the plaintiff's complaints and claim. Whatever it is said or done in this regard is not usually admissible in evidence and if admitted cannot make the negligence worse even if in itself the conduct in negotiations is reprehensible. It is a separate matter.

No award for aggravated damages can be made in the absence of a justifiable claim for compensatory loss. Further, aggravated damages cannot be awarded for claims in negligence and breach of contract.

See: *AB and others v South West Water Services Ltd [1993] 1 All ER 609 at 624-5 and 629. Also, Kralj and another v McGrath and another [1986] 1 All ER 54 at 61e;*

> *"It is my view that it would be wholly inappropriate to introduce into claims of this sort, for breach of contract and negligence the concept of aggravated damages." Woolf J*

Aggravated damages may be awarded in certain other torts such as defamation, false imprisonment, assault, deceit, nuisance and the like where the tort itself may take a particularly aggravated form but not in negligence.

In the instant case there was no foundation for the award of aggravated damages which must therefore fail.

Punitive Damages

The Chief Justice's award of $100,000 was made because the 1st defendant 'should be punished for what he did'. This was;

1. Failing to comply in a timely manner with the drive belt recall and telling the plaintiff's mechanic not to tell the plaintiff about the recall when he purchased parts from the defendant, and
2. The late recall of the plaintiff's vehicle for the drive belt and a Takata airbag defect (replaced in 2005) causing the plaintiff to be driving her car with design defects which could have caused injury or even death.

Again, no punitive damages can be awarded unless the plaintiff is entitled to an award of compensatory damages. No such award can be made in the absence of the plaintiff suffering injury or monetary damage. In respect of the defects of which the plaintiff was unaware and oblivious therefore of relevant risk and where no damage occurred no general or punitive damages may be awarded.

This is point made with particular force by Lord Bridge in the case of Hicks above. It follows that there was no basis upon which punitive damages could be awarded.

For these reasons which we have attempted to set out this appeal must be allowed against the amount of certain damages and the award of others.

The somewhat dramatic result is therefore that the total award of damages is reduced from $315,757.40 to $5,689.50.

We order therefore:
1. For the reasons given we allow the appeal against the award of damages.
2. We reduce the award of special damages for repair of the plaintiff's drive belt from $757.40 to $689.50.
3. Damages for the window defect and the driver belt failure are reduced from $15,000 to $5000.
4. No other damages will be awarded.
5. We order therefore total damages of $5,689.50.

The Counterclaim in Defamation

We have decided, for brief reasons which we shall give, that the counterclaim ought to be sent back for retrial. In those circumstances we deal with this aspect of the appeal briefly so as not to inhibit any judge hearing the matter in future.

In paragraph 16 a) it is alleged and not denied that among other things the plaintiff published in the official website of Honda Motor Co Ltd., The following:

> *"…… Real Honda lovers have turned away to buy other cars. This has gone on for years."*

This was a statement of fact which potentially would materially injure the defendant's reputation in spite of having regard to the truth of other statements of which complaint is made. The Chief Justice held that the plaintiff had established the defence of

justification. In fact there was no evidence of the truth save that it was the plaintiff's belief or impression. In the circumstances it was not open to the Chief Justice to make the finding and the defendant's appeal, at least to this extent, must succeed.

In the circumstances the order is:

The appeal on the counterclaim is allowed and, the counterclaim, be sent back to be tried by another judge.

Costs

We order nisi that the costs of the appeal on claim and counterclaim be paid by the plaintiff to be taxed if not agreed. Any application by either party concerning this order must be made at 3.00 PM on this day the 29 November 2017.

Mortimer, P.

Leonard, J.A. **Burrell, J.A**