IN THE SUPREME COURT OF TONGA
CIVIL APPEAL JURISDICTION
NUKU'ALOFA REGISTRY **C.APP. NO.616/99**

BETWEEN : 1. LEHOPO POUSINI
2. MRS POUSINI : **Appellants;**

AND : 1. TAUFA LELEA
2. PETELO LELEA : **Respondents:**

BEFORE THE HON. JUSTICE FINNIGAN

COUNSEL : Mr Veikoso for Appellants
: Mr Tu'utafaiva for Respondent

Date of Hearing : 29th July 1999
Date of Judgment : 2nd September 1999

JUDGMENT OF FINNIGAN, J

This is an appeal against dismissal of a claim for damage done to a motor vehicle in a collision. The first plaintiff in the lower court was owner of a taxi that the second plaintiff, his wife, had parked just off the roadway, on the incorrect side. That is, the right side of the road facing oncoming traffic. It was opposite the entrance to the 'api of the defendant. Hearing the sound of a collision, the second plaintiff went to the scene and saw damage to the rear of the taxi, the rear light was broken and the body dented. The first defendant came and the second plaintiff spoke to him. The first defendant said he would change the light and repair the damage. The second plaintiff said in evidence that the vehicle that did the damage was registered in the name of the second defendant. It appears that vehicle had backed out of the 'api into the plaintiffs' taxi. The claim was for $404.50.

The first plaintiff gave evidence that his vehicle had been taken to a local motor repair firm, Kiwi Tonga, 6 days after the incident and after that his lawyer took the claim to the defendants. They paid nothing, and the first defendant did not repair the car as he had said he would. To prove the quantum of damage, the plaintiffs' lawyer produced a document. It was specifically accepted by the Magistrate as evidence of what it contained but not evidence that what it contained was true. The Magistrate ruled that it was for the mechanic to give an explanation of the document, and to explain the damage and to show how the items in the document were valued. The document was from Kiwi Tonga, and was headed as an "Estimate for Panel Beating". It was fully itemised. It estimated a total cost for all items listed, including labour, of $404.50. It said it was for a vehicle T3006, which is the number of the plaintiffs' taxi, and the owner's name is given as that of the first plaintiff. It was undated. After objection was made to the document, the plaintiffs' lawyer sought an adjournment to call a witness from the motor firm, and in the result that application was refused. The lawyer then closed the plaintiffs' case. Upon hearing submissions from the lawyers the Magistrate dismissed the claim. The plaintiffs have appealed.

The grounds of appeal as put to me in submissions are that the evidence shows that the parties (or one of each of them) met immediately after the collision and that the second defendant had said he would repair the damage. The appellants say they showed in evidence what the damage was, and that their evidence made it clear that the driver of the second defendant's vehicle had reversed carelessly. They submit that the document from the motor firm was enough for the Magistrate to make a finding that repairing the damage would cost some money, and so the Magistrate should have found the case made out and awarded some damages.

The arguments for the respondents, as put to me, are the same as those put before the Magistrate. They submit that carelessness by the defendants or either of them was not proved, that the plaintiffs' car was parked illegally

and in public policy they are disqualified from recovering, that the plaintiffs contributed to the accident by parking opposite the defendants' exit, and that the claim is excessive in any event.

DECISION

Though there is no evidence of any eyewitness, it is established by the facts that there was a collision. It is clear that in the collision the stationary vehicle was damaged. It is also clear that the vehicle that was stationary belonged to one of the plaintiffs for the use of them both, and there is evidence that the vehicle that damaged it belonged to the second defendant. There is evidence that the first defendant said he would repair or pay for the damage. There is no evidence whether he had authority to say that, nor evidence of who had been driving (or otherwise been in control of) the second defendant's vehicle, nor whether that person had the authority of the owner. Perhaps inferences could be drawn, but there are major gaps in the chain of evidence.

What is missing is, first, proof that the responsibility for the collision rests with the defendants. There is no witness to say who was driving or controlling the vehicle, or whether the owner, the second defendant, who was not present at any time during the events described by the plaintiffs, should be held responsible for the damage caused by his vehicle. The plaintiffs did not show by evidence that the cause of the collision was, on the balance of probabilities, carelessness on the part of the defendants or either of them. The statements by the first defendant go some way toward proving that he was involved, but how he was involved is not made clear by the evidence.

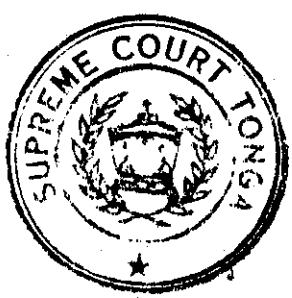
The second thing missing is a link between the Kiwi Tonga document and the damage caused to the vehicle T3006 in the collision with the defendants' vehicle. Since the claim is for a specified amount of repair costs the onus is on the plaintiffs to prove that amount. It is for them to prove that this cost is the result of the collision and that it is accurate and/or reasonable. It is

all for them to prove. The plaintiffs gave evidence of a broken left rear light, which is what is quoted in the document. However, while it may be reasonable to deduce that this is the damage caused in the collision, there is no witness to say that the repairs listed are all necessary and that these repairs were all caused in the collision. There is no evidence to say whether the amounts are accurate and/or reasonable. The document itself says that it is only an estimate.

Thus, in summary, the learned Magistrate was right in rejecting the document as proof, and he was right in finding the claim unproved. He could not order the defendants to pay the costs claimed until he was satisfied on the balance of probabilities that the defendants, or one of them, was responsible for causing or allowing the damage to happen, and that the amount is the true amount of the cost of repairing the damage.

For completeness, I comment on the other arguments of the respondents. The public policy argument cannot succeed. The principle is that where a person has acted contrary to law, e.g. carelessly, or (as in this case) contrary to traffic regulations, that unlawful behaviour will not by itself deprive that person of a remedy against the wrongdoing of another. However, that factor is a contributing factor that may reduce any remedy, if that person suffers damage from the wrongdoing of another.

The appeal is dismissed, with costs to the respondents. These are to be agreed or taxed.



NUKU'ALOFA: 2nd September, 1999

JUDGE