

**Brian Nyaguse
Versus
Skinners Auto Body Specialists
And
Steven Hudson N.O.**

HIGH COURT OF ZIMBABWE
PATEL J
HARARE, 25 January 2007 and 22 May 2007

Opposed Application (Exception)

Mr. Kachera, for the plaintiff
Ms. Mbuye, for the defendants

PATEL J: This is a matter in which the plaintiff left his motor vehicle for repairs with the 1st defendant in August 2004. When the vehicle was returned to the plaintiff in June 2005, its milometer reflected mileage which the plaintiff considered to be excessive. The matter was reported to the police and the second defendant was charged with the offence of using a motor vehicle without the owner's consent in contravention of section 57(1)(e) of the Road Traffic Act [*Chapter 13:11*]. The second defendant was then placed on remand awaiting trial.

The plaintiff subsequently issued summons against the defendants in May 2006 claiming, *inter alia*, damages in respect of the excess mileage. In paragraph 9 of his declaration, the plaintiff averred that the mileage recorded showed an increase which –

"proved beyond doubt that the motor vehicle was wrongfully and unlawfully used without the authority of the owner, by the First and Second Defendants or any other person under their employ to the plaintiff unknown".

On the 3rd of October 2006, the defendants' legal practitioners wrote to the plaintiff's legal practitioners advising that their claim did not state all the requirements for an action in delict. This letter was received by the latter on the 5th of October 2006. Thereafter, on the 18th of October 2006, the defendants filed their exception herein objecting to the plaintiff's claim as embodying no cause of action in the absence of any averment of fault. On the 26th of October 2006, the defendants' legal practitioners wrote a further letter to the plaintiff's lawyers highlighting the nub of their exception.

The principal issue for determination herein is whether fault is invariably a distinct and separate requirement which must be specifically pleaded and proven in every delictual action. The related and ancillary question is whether or not an averment of fault may be implied in the claimant's pleadings.

Fault and Wrongfulness

It is now well-established in our law that the plaintiff in an Aquilian action for patrimonial loss must establish that:

- (i) the defendant committed a wrongful act;
- (ii) the plaintiff suffered patrimonial loss, viz. actual loss capable of pecuniary assessment;
- (iii) the defendant's act caused the loss suffered by the plaintiff and that the harm occasioned was not too remote from the act complained of;
- (iv) responsibility for the plaintiff's loss is imputable to the fault of the defendant, either in the form of *dolus* (intention) or *culpa* (negligence).

[See Lee & Honore : *The South African Law of Obligations* (2nd ed.) at pp. 196-202; Boberg : *The Law of Delict* (vol. 1) at pp. 24-25].

The distinction between wrongfulness and fault is very ably elucidated by Neethling, Potgieter & Visser : *Law of Delict*, at pp. 29, 113, 143. According to the learned authors, the requirement of wrongfulness entails proof of a harmful result occasioned in a legally reprehensible or unreasonable manner. On the other hand, the enquiry into fault focuses on the legal blameworthiness or reprehensible state of mind and conduct of the defendant. While wrongfulness is determined by reference to public policy or the legal convictions of the community, fault is determined by reference to the foreseeability and preventability of harm by the defendant in the circumstances in which he actually was. In other words, wrongfulness relates to the reprehensibility of the harmful conduct, while fault is concerned with the blameworthiness of the defendant himself. It is clear, therefore, that wrongfulness and fault are distinct legal concepts requiring specific and separate proof in order to sustain a delictual claim under the *lex Aquilia*.

Implied Fault

There are many instances of liability in our law where it is not necessary to prove any fault, whether by way of intention or negligence, on the part of the defendant. Such instances include damage caused by wild or domestic animals, conduct constituting nuisance and vicarious liability. In all of these cases, fault is not a requisite element by virtue of the very nature of the harmful conduct concerned, and the defendant's liability approximates a form of strict liability akin to certain statutory offences.

However, in those cases where fault forms an essential ingredient of liability, as in most Aquilian actions, fault on the part of the defendant must be specifically pleaded and proven. This must be so even where the plaintiff is able to establish wrongful conduct and consequential harm and then relies on the principle of *res ipsa loquitur* to prove fault on the part of the defendant. Here, although fault might be inferable from the nature and circumstances of the harm occasioned, it would still be necessary for the plaintiff to plead some form of fault, viz. actual intention or negligence, in order to enable a reasonable inference of liability to be drawn from the proven facts.

In other words, even if fault can be implied from the peculiar circumstances of the case as a matter of *prima facie* evidence, the defendant's reprehensible intention or negligence must be explicitly articulated as a matter of pleading. If the averment of fault is not so specified, it becomes extremely difficult if not impossible for the defendant to comprehend the case against him and thereafter to formulate and put forward his defence.

The Present Case

In the instant case, the plaintiff's declaration clearly imputes wrongfulness on the part of the defendants by stating that the excessive mileage reflected on his motor vehicle can only be attributed to the wrongful and unlawful use of the vehicle by the defendants or their employees. However, the declaration does not proceed to aver or indicate whether this wrongful use of the vehicle by the defendants was intentional or negligent or otherwise legally blameworthy. Having regard to what I have stated earlier, the absence of any such specific averment of fault renders the declaration fatally defective as not disclosing a valid cause of action.

Costs

It is clear from the papers before me that the plaintiff's legal practitioners had ample opportunity to address and cure the deficiency in their pleadings. The defect was brought to their attention two weeks before the exception was filed and thereafter remained unattended for three months before the exception was heard in Court. Be that as it may, I take the view that the exception *in casu* was not entirely incontrovertible on the peculiar facts of this case and that it merited full argument before the Court. I am therefore disinclined to award punitive costs against the plaintiff as prayed for by the defendants.

Order

In the result, the defendants' exception is upheld and it is accordingly ordered that the plaintiff's claim be dismissed with costs on the ordinary scale.

Chinyama & Partners, plaintiff's legal practitioners

Muvirimi, Mbuye & Associates, defendants' legal practitioners (at hearing)

Phiri & Partners, defendants' legal practitioners (for further submissions)