Indemnity costs awarded for running hopeless defence

JC Automotive Repairs Pty Ltd v John Hardy [2017] NSWSC 1218

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Summary

In September 2017, the Supreme Court of NSW upheld a Local Court ruling for the plaintiff in respect of liability and indemnity costs in a property damage case. The defendant's failure to challenge the evidence of the plaintiff, or adduce any evidence of its own, left it open to the court to draw inferences and conclude that the defence was hopeless and that the plaintiff should be awarded indemnity costs.

Facts

Mr Hardy sued JC Automotive in the NSW Local Court for damage to his vehicle, which he alleged was caused by its employees. Mr Hardy gave evidence that a week after he provided his vehicle to the defendant for performance-related upgrades to be carried out, it was returned to him damaged. The tyres in particular had been badly damaged.

An audio-visual recording device installed in the vehicle showed that it had been driven in a reckless manner while in the care of the defendant. Mr Hardy relied upon this footage, his own evidence and the evidence of a motor mechanic that the cost of repairing the damage would be $16,000.

The defendant did not adduce any evidence. Its defence did not make any positive assertions of fact and its counsel did not ask any questions of Mr Hardy or the mechanic. The defence did plead in the alternative that, if one of the defendant's servants or agents had acted negligently or recklessly such conduct fell outside the scope of their employment or agency, with the asserted result being that the defendant could therefore not be held liable for it.

Counsel for the defendant simply made closing submissions that Mr Hardy's case had not been made out on the facts, as there was no evidence that the person driving the vehicle in the footage was an employee of the defendant, or that the driving caused the damage or that any of the damage had actually been repaired.

The defendant also submitted that the court should not determine liability under the law of bailment and that s60 of the Australian Consumer Law (Schedule 2 to the *Competition and Consumer Act 2010* Cth ('the ACL')) should be limited to negligent conduct in connection with a breach of the obligation to provide the contracted mechanical services with due care and skill.

Judgment at first instance

Negligence

Applying the general principles set out in s5B of the *Civil Liability Act* 2002, Magistrate Pierce found that the risk of harm to the vehicle was foreseeable and not insignificant, and that a reasonable person would have taken precautions so that the vehicle was not driven in such a way as to cause significant damage.

His Honour also determined that the subject damage was a probable consequence of the conduct evidenced in the footage and that the seriousness of the harm would have been obvious. His Honour observed that the vehicle "need not have been driven so savagely" in concluding that the elements of negligence had been made out. His Honour also discussed the defendant's

failure to challenge or contradict the evidence of Mr Hardy, and that in adopting a common sense approach it was obvious that the damage occurred in the way that Mr Hardy alleged.

The calculation of damages by the mechanic was accepted and his Honour concluded that "the question of causation is not something that needs to be explored in the circumstances….it is too obvious to require further reasons."

Breach of Australian Consumer Law

Mr Hardy relied on s60 of the ACL, which imposes on a service provider the obligation that services will be provided with due care and skill. Counsel for the defendant argued that s60 was limited to the mechanical work involved with the vehicle upgrade.

In effect, his Honour held that s60 of the ACL is intended to encapsulate not only the contracted work i.e. that involved in performing the vehicle upgrade, but also any improper use during that time.

Breach of Bailment

Although his Honour found it unnecessary to rule that there had been a breach of bailment in light of the finding that negligence had been made out, he held that this was a bailment relationship and that consequently the onus was on the defendant to show that the damage was not occasioned by their negligence. His Honour held that because the defendant had not sought to contradict or challenge the evidence adduced by Mr Hardy, it was open to him to accept the uncontested evidence of Mr Hardy and draw inferences.

In particular, Magistrate Pierce held that it was appropriate for him to conclude that the damage had occurred while the vehicle was in the defendant's care because an undamaged vehicle was dropped off by Mr Hardy and a damaged one was returned to him.

Basis for Appeal

The appeal by JC Automotive was brought on three pressed grounds:

1. That Magistrate Pierce committed an error of law in finding for Mr Hardy in respect of liability and causation.
2. That his Honour committed a further error of law in that he provided inadequate reasons for his findings with respect to liability and causation.
3. That his Honour committed a further error of law in ordering indemnity costs on the basis that the forensic position of the defendant in running the case was hopeless.

Findings on Appeal

Button J of the Supreme Court held that it was open to Magistrate Pierce to infer that the damage was caused by employees of JC Automotive while it was in their care.

The Court also found that the reasons for the Magistrate's findings were adequately provided throughout the judgment and also that it was open to the Magistrate to find that the resistance (or lack thereof) to the claim was indeed such that the defence was hopeless, and thus warranted an order for indemnity costs. The appeal was dismissed with costs.

Implications

The case demonstrates that although a defendant is entitled to run a negative defence and rely entirely upon the requirement that the plaintiff is to discharge its onus of proof, this is a perilous course if the plaintiff's evidence is not challenged at all and is capable of meeting the civil burden of proof - even if that is with the benefit of inferential reasoning to make up for any gaps in the facts.

A determination that a defence was hopeless is not a common occurrence, but it is one inviting an order for indemnity costs and should therefore be avoided by defendants where possible or potentially exploited by plaintiffs where a defendant attempts to take such an approach.

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