



MALTA

QORTI TA' L-APPELL

ONOR. IMHALLEF

EDWINA GRIMA

Seduta tas-16 ta' Dicembru, 2014

Appell Civili Numru. 36/2012

**MONTALDO INSURANCE AGENCY LIMITED (C-1052) ghan-nom u in
rappresentanza tas-socjeta assikuratrici Chartis Europe Limited kif
surrogata fid-drittijiet ta'l-assikurat taghha Anthony Calleja u l-istess
Anthony Calleja**

V

Mark George Cremona (K.I. 550385(M))

Il-Qorti,

Rat il-lodo arbitrali moghtija mit-Tribunal tal-arbitragg fis-06 ta' Settembru
2012 fejn gie deciz:-

“AWARD

1. Facts of the Case

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The case revolves around an incident, which occurred on the 29th June, 2009 at Triq Guze Duca, Qormi at around 20.30. This collision occurred between Toyota Starlet Registration Number EBH297 owned by Anthony Calleja and driven by Rita Calleja and Land Rover Registration No FAI 014 owned and driven by Mark George Cremona.

From the Warden's Report, it results that Rita Calleja stated that she was driving along the main road and turned right into the service road and she noticed a stationary vehicle. The lights were off and the indicator on and the passengers about to alight from the vehicle. As she drove in front of him, he emerged from the parking slot and collided into her.

On the other hand, Mark George Cremona told the Wardens that he was driving slowly in the main road and turned into the service road as there were a lot of parked vehicles. All of a sudden there came the other vehicle from the main road, collided into him and the other driver told him that she thought he was stationary.

In the evidence given before the Arbitrator, Rita Calleja stated that she was driving along Mdina Road, switched on her indicator in order to turn right in the service road known as Triq Guze Duca. There were a large number of parked vehicles. It was not dark yet but since it started dimming she had her headlamps on. As she proceeded to turn into the service road she saw the vehicle of Mark George Cremona parked on the pavement and passengers were alighting from his vehicle. She entered the service road and as she had virtually passed the vehicle of defendant, the defendant drove into her vehicle hitting her in her drivers side rear corner. Prior to the collision she was driving at a distance of around one and a half metres from defendant's vehicle.

The version given by Mrs. Calleja was generically collaborated by her minor daughter who confirmed the general evidence given by her mother.

Attorney for defendant stated that the quantum of the damages sustained by Mrs. Calleja were not being contested.

On the other hand, Mark George Cremona the defendant stated that he was driving his Jeep from the main road. He stopped as indicated in the Warden's Sketch waiting for a parking place as he intended to go to the nearby Take Away Bar. He had been stationary for about three minutes. He was accompanied by his brother. As he was stationary, Mrs. Calleja attempted to enter the service road which was loaded with parked cars and she collided in his vehicle. His vehicle was stationary prior and on impact.

Robert Cremona gave evidence whereby he stated that he was the only passenger in his brother's vehicle and that they parked temporarily in the area of the Take Away awaiting a vehicle to emerge from its parking place. As they were stationary, the vehicle driven by Mrs. Calleja came from his left side and attempted to enter the service road and in so doing she hit their vehicle on the bull bar. He stated that the damages were just a scratch on the bull bar. On cross-examination, he stated that he and his brother had talked about the case prior to the hearing.

2. On Site Enquiry

An On-site enquiry did not appear necessary in this case since the arbitrator is familiar with the roads in question.

3. Conclusions

From a careful examination of the case under examination, it results as follows:-

The versions given by the parties in the case under examination are diametrically opposed to each other. On the one part driver Rita Calleja states that as she drove past Cremona's vehicle, Cremona drove out of his parking place and collided in her vehicle. On the other part Cremona stated that as he was parked, Mrs Calleja collided in his vehicle. His version is comforted by his brother Robert Cremona.

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The question thus remains – which of the parties is most creditable. During the hearings, the undersigned got the distinct impression that Mrs. Calleja and her daughter had been properly drilled before the sitting and this results from too much accuracy on certain points which a non-driver would not be so attentive too.

On the other hand, Robert Cremona showed honesty when he did not hesitate to declare that he had discussed the case with the defendant prior to the sitting.

In the light of the foregoing, I am of the considered opinion that Rita Calleja was solely responsible for the accident in question and thus no liability is attributable to the defendant. For these reasons, the plaintiffs are to settle all the fees in connection with this arbitration”.

Illi appellanti is-socjeta Montaldo Insurance Agency Limited u Anthony Calleja l-assikurat taghhom appellaw minn dan il-lodo arbitrali abbazi tas-segwenti aggravvji:

1. Illi l-apprezzament maghmul mit-Tribunal ta’l-Arbitragg huwa tant superficjali illi jirrendi ingust u jaghmel ingustizzja ma min hu diligenti u preciz fix-xhieda tieghu.
2. Illi ma sarx apprezzament gust u shih tal-fatti tal-kaz, tad-dinamika ta’l-incident u tal-evidenza verbali kif ukoll dokumentali li gew imressqa matul is-smiegh u it-trattazzjoni tal-arbitragg.

Bis-sahha ta’l-artikolu 70C tal-Kapitolu 387 tal-Ligijiet ta’ Malta introdott permezz ta’l-Att IX ta’l-2010, sar possibbli appell mill-lodo arbitrali fuq apprezzament ta’l-fatti rimessi ghal gudizzju ta’l-arbitru. Illi kif gie diversi

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drabi ribadit dina il-qorti ta' revizjoni qajla tissindika apprezzamnt ta' fatti maghmul mill-ewwel qorti, f'dan il-kaz mill-Arbitru, sakemm ma jezistux ragunijiet gravi li iwasslu ghat-twettiq ta' ingustizzja fil-konfront tal-parti sokkombenti ghal tali decizjoni. Iktar u iktar bhal meta fil-kaz in dizamina il-lodo jistrieħ fuq kwistjoni ta' attendibilita u verosimiljanza ta' xhieda li iddeponew *viva voce* quddiem l-Arbitru.

Dak li kien rimess ghal gudizzju ta' l-Arbitru kien illi jigi effettivament stabbilit illi kienet in-nuqqas ta' prudenza, tad-diligenza u tal-hsieb tal-missier tajjeb tal-familja fl-intimat appellat l-kagun ta' l-event lesiv. Huwa ben not fid-dottrina legali u fil-gurisprudenza in kwantu "hu imprexxindibilment mehtieg biex ikun hemm lok ghad-danni, li jkun hemm ness ta' kawzalita` bejn il-fatt kolpevoli u l-konsegwenza dannuza". Ara "**John Debono et -vs- Neg. Joseph Muscat *proprio et nomine***", Appell Kummercjali, 26 ta' Frar, 1960. Issa dan jitnissel f'kaz ta' incident awtomobilistiku kemm mix-xhieda tal-partijiet involuti fis-sinistru stradali kif ukoll minn provi ohra cirkostanzjali u indipendenti li jistghu jaghtu piz lil verzjoni u mhux lill-ohra.

Kif qalet il-Qorti fil-kawza Moira Galea vs Michael Zerafa (App Civ. 06.10.2000):

"fir-rikostruzzjoni ta' tali dinamika jassumu allura rilevanza spiss determinanti dawk il-provi cirkostanzjali, materjali u fattwali li jaghtu piz korroborattiv lill-verzjoni u mhux lill-ohra, u li allura jirrendu versjoni aktar kredibbli u attendibbli mill-ohra. Elementi ta' prova dawn, li proprju ghaliex newtri, oggettivi u mill-fonti indipendenti, spiss iwasslu lill-gudikant biex jirrizolvi l-vertenza independentement mill-verzjonijiet konfliggenti tal-partijiet fejn, bhal dan in ezami, dawn ikunu imptappna jew minn interess jew mill-impressjonijiet zbaljati u konfuzi ta' kif ikun sehħ l-incident jew

sempliciment ghaliex dan isir f'salt tant illi s-sewwieq ma jkunx verament irrealizza x'ikun gara."

Illi maghdud dan madanakollu "hu pacifiku f'materja ta' htija akwiljana illi *"quando in un giudizio di risarcimento di danni l'attore allega di aver sofferto il danno di cui reclama la rifuzione, per colpa del convenuto, egli è nell'obbligo di provare un fatto od una omissione che porti insita la prova della colpa che egli imputa al convenuto medesimo; poiche la colpa è un ipotesi giuridica e generica, finche sta nella disposizione della legge o nei trattati di scienza giuridica, ma deve assumere una forma materiale e specifica quando si imputa ad altri come cagione di danni sofferti e risarcibili."* ("Ingegnere Frank Calafato -vs- Carmelo Grech", Appell Civili, 23 ta' Novembru, 1923). Huwa naturalment jehtieglu wkoll jipprova *"che l'atto o la omissione colposa abbia avuto il nesso di causa ad effetto col pregiudizio sofferto dall'istante"* ("Giovanni Sarè -vs- Carmelo Farrugia et", Appell Kummercjali, 6 ta' Frar, 1928)."

Dan kien mistqarr f'sentenza moghtija minn din il-Qorti kif diversament ippresjeduta fl-ismijiet Emanuel u Carmen Ellul vs Anthony Busuttil (deciza 07/05/2010) fejn il-Qorti kompliet hekk:

"Jibda biex jigi osservat in linea ta' principju generali illi d-disposizzjoni ta' l-Artikolu 562 ghandu l-fondament tieghu fir-regola tradizzjonali *onus probandi incumbit ei qui dicit* u tali jqieghed a kariku tal-parti li tallega fatt favorevoli ghaliha l-oneru li taghti prova konvincenti ta' l-ezistenza ta' dak il-fatt. Din l-esigenza hi imposta sija fuq l-attur ghab-bazi tad-dritt azzjonat minnu (*actori incumbit probatio*), sija fuq il-konvenut ghas-sostenn tad-difiza tieghu mahsuba

biex tikkuntrasta l-pretiza ta' l-attur avversarju (*reus in excipiendo fit actor*). Hekk jinsab ritenut minn zmien antik illi “*qualunque eccezione, purché sia meritevole di considerazione e possa essere apprezzata nel suo merito, bisogna che sia sorretta da prove pel noto assioma che ‘reus excipiendo fit actor’.*” (“**Sac. Innocenzo Zammit -vs- Sac. Alfonso Maria Borne**”, Appell Civili, 23 ta' Jannar, 1925). Konsegwentement, proprju “*ghaliex reus excipiendo fit actor*, il-fatt minnu allegat, li jikkostitwixxi l-kontroprova minnu offerta, ghandu jigi pruvat minnu” (“**Francesco Mallia -vs- Salvatore Guillaumier**”, Appell Civili, 12 ta' Jannar, 1962;

Affermat dan, huwa vevoli bosta li jigi sottolinejat illi l-piz probatorju tal-konvenut in sostenn ta' l-eccezzjoni tieghu tinsorgi fih meta l-attur minn naha tieghu jkun gab prova tal-fatti li jsostnu l-bazi tat-talba tieghu. Dan huwa hekk ghaliex l-insufficjenza jew in-nuqqas tal-provi tac-cirkostanzi dedotti mill-konvenut biex jikkumbatti l-pretensjoni ta' l-attur ma tiddispensax lil dan ta' l-ahhar mill-piz li adegwatament juri u jipprova l-legittimita u l-fondatezza tal-pretensjoni tieghu.”

“Hi mbaghad, sew konoxxuta l-gurisprudenza rapprezentata b'dan il-kwadru ta' valutazzjoni illi ssostni illi “fejn l-assjem ta' provi hu tali li l-versjonijiet tal-kontendenti huma hekk bilancjati, li kull wahda tista' tirrizulta plawsibbli u veritjiera u ma tirrizultax dik ic-cirkostanza determinanti li tissoda l-konvinciment tal-Qorti favur tezi u mhux l-ohra, ma jibqax lecitu ghal gudikant li jiffirma opinjoni motivata fuq preponderanza tal-probabilitajiet. Jehtieglu jasal biss ghall-konkluzjoni li l-attur ma jkunx sodisfacentement u konkludentement ipprova t-talbiet tieghu – *actore non probante, reus absolvitur*. Ara “**Joseph Vincent Rausi nomine -vs- Joseph Muscat**”, Prim’

Awla, Qorti Civili, 5 ta' Ottubru, 1992 per Imhallee Joseph Said Pullicino. Ara wkoll fl-istess sens id-decizjonijiet fl-ismijiet “**Dottor Herbert Lenicker -vs- Joseph Camilleri**”, Prim' Awla, Qorti Civili, 31 ta' Mejju, 1972, per Imhallee Riccardo Farrugia u “**George Mifsud nomine -vs- Philip Micallef**”, Appell Inferjuri, 1 ta' Lulju, 1997.”

Premess dan, fuq l-evalwazzjoni tieghu tal-fatti, hekk rimessi mil-ligi eskluzivament lill-poter diskrezzjonali ta' l-Arbitru, dan irraguna illi ghall-iskontru bejn iz-zewg vetturi kienet tahti Rose Calleja u dana billi attribwixxa attendibilita lill-verzjoni moghtija mill-intimat. Illi l-Qorti tistqarr illi tikkondividi dina l-fehma billi ukoll mill-provi cirkostanzjali u senjalament mid-danni riskontrati fuq il-vetturi rispettivi huwa iktar attendibbli illi kienet Calleja li laqtet il-vettura ta' l-intimat mill-vice-versa billi il-hsara li tidher fuq il-land Rover hija fil-parti tal-genb tal-bullbar u mhux fin-nofs tieghu. Illi anke jekk ghal grazzja ta' l-argument il-Qorti kellha titbieghed mill-fehma ta' l-Arbitru xortawahda quddiemha hemm zewg verzjonijiet konfliggenti li, fl-assenza ta' cirkostanzi indipendenti li setghu ighinuha tasal biex temmen verzjoni wahda u mhux l-ohra, xortawahda t-talba attrici kellha tigi rigettata billi mhux sufficjentement ippruvata.

Kif qalet ukoll il-Qorti ta' l-Appell fil-kawza **Link Hans Jochim et vs Raymond Mercieca**, deciza fit-12 ta' Jannar 2001:

"Huwa principju bazilari ta' dritt illi, f'kaz illi l-attur ma jipprovax il-premessi ghat-talbiet tieghu, dan ikun ifisser ic-cahda ta' dawk it-talbiet u l-liberazzjoni tal-parti konvenuta. L-applikazzjoni tal-principju actore non probante reus absolvitur kienet essenzjalment ezercizzju ta' analizita` provi fil-procedura civili. Dan il-principju mhux biss kien wiehed legalment san, imma

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kien wkoll regolatur fid-determinazzjoni tad-drittijiet u obbligi fil-kamp civili."

In bazi ghal giurisprudenza enuncjata u li tadatta ruhha perfettament ghall-kaz in kwestjoni, mhux il-kaz li din il-Qorti tallontana ruhha mill-konkluzjoni tal-lodo ghaliex dan hu legalment u processwalment fondat.

Ghall-motivi suesposti din il-Qorti qeghda tirrespingi l-appell u tikkonferma l-lodo ta' l-Arbitru, bl-ispejjez jibqghu sopportati mill-appellanti.

< Sentenza Finali >

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