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Fahy v Schofield

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IN THE HIGH COURT OF NEW ZEALAND  
AUCKLAND REGISTRY

28/5

CP 728/89

BETWEEN JUDITH MAY FAHY

Plaintiff

A N D MAREE SCHOFIELD

Defendant

NOT  
RECOMMENDED

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Hearing: 30 April 1990

Counsel: MJ Koppens for Plaintiff  
K Manley for Defendant

Judgment: 30 April 1990

(ORAL) JUDGMENT OF CHILWELL J

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When this proceeding was called Mr Manley advised the Court that his instructing solicitors had been unable to establish contact with the defendant or to get instructions from her. He applied for leave to withdraw. I granted leave.

This is a proceeding for a declaration as to the ownership of a 1984 Ford Escort Cabriolet. The car is rated at 1.6 litres and has fuel injection. Damages for conversion is sought and also aggravated damages and exemplary damages having regard to the way in which and the circumstances under which the car was taken by the defendant from the plaintiff.

The plaintiff and husband, Peter Fahy, married on 7 March 1988. On 31 October 1988 the plaintiff's husband

purchased the car as a wedding present for the plaintiff. That is corroborated by a card which the plaintiff's husband gave her at the time which reads:-

"My Darling Wife

May you enjoy your motoring in this fine sledge.

With all my love.

Peter"

From the time of its purchase the car was driven exclusively by the plaintiff. Her husband had a BMW motorvehicle which he used and which was regarded as his car. The evidence establishes that the plaintiff's husband intended to make a gift of the car to the plaintiff and he carried out that intention by delivering it to her and it remained in her possession thereafter until removed in circumstances later to be mentioned.

In respect of the motor vehicle at the time it was purchased by the plaintiff's husband, it was only the second model of its type in New Zealand. The husband was the second purchaser. The evidence does not establish in whose name the vehicle was registered but whether in the name of the plaintiff or her husband that registration would have indicated that it was a two owner vehicle when it was in the possession of the plaintiff. The evidence satisfies me that at the time of purchase the car was unique and, even as late as August 1989, it was described in an advertisement by another motor vehicle dealer called Elgin as a "beaut example of rare model".

I think it was in December 1988 that the plaintiff and her husband visited Australia. Certain events occurred there resulting in the parties separating soon after their return to New Zealand on 7 January 1989. The plaintiff did not ascertain the whereabouts of her husband for some time. He committed suicide on 26 January 1989. Shortly before then the plaintiff was told by her husband that the car was being driven by the defendant. The husband had, without the plaintiff's consent, taken the car when he left the home earlier in January.

The plaintiff attended her husband's funeral in Invercargill in early February 1989. Upon her return from the funeral she took possession of the car and took it to her home. She was not then aware of a purported sale by her former husband to the defendant for \$500. The plaintiff obtained possession. She commenced these proceedings on 24 April 1989. She had been warned from some source that an attempt may be made by the defendant to take possession. Accordingly she locked the car overnight in her garage which had a lockable roller door; two security chains were placed on the door; she fitted a steering wheel lock; she had had a new ignition key fitted; the gate to her home was chained and padlocked. She was at her home on the night of 31 May 1989. The next day she discovered that the car had been removed. Bolt cutters had been used to open the gate and the garage door. The person or persons involved must have managed to remove the steering wheel lock. It was later discovered

that the ignition system had been ripped from the car. This forcible seizure of the motorcar was not observed by the plaintiff and was presumably done when she was asleep. The seizure involved breaking and entering the premises by cutting the padlock on the gate and opening the gate and breaking and entering the garage and it also involved entering and interfering with the car without the plaintiff's consent.

The plaintiff did not know where the car could be found. Investigations were made by an insurance assessor. The car was found to be in the possession of the defendant.

An interlocutory application was made to the Court for an order for the preservation and the custody of the car. That application was served on the defendant on 29 June 1989. She immediately sold the car to a firm known as Elite Cars. There is some hearsay evidence from the plaintiff concerning the particular transaction, so I put that to one side. The car was in a damaged condition when purchased by Elite Cars because of the interference with the wiring. In her statement of defence the defendant asserted that on 1 July 1989 she sold the vehicle to Elite Cars for \$15,500.

In August 1989 the plaintiff read an advertisement in the New Zealand Herald of 12 August. I have already referred to that advertisement. The car was

offered by Elgin Motors for \$24,500. Mr Wilkinson, who had sold the car to the plaintiff's husband, went with the plaintiff to view it at Elgin Motors. The tow bar which had been fitted by Mr Wilkinson when he owned the car had been removed. Although the car was in a good condition its interior had not been kept polished and cleaned as he had done when he owned the car. He expressed the view in evidence that the car would not be worth as much on the market then because there may have been one or more other registered owners and the car was not then as unique as when he sold it to the plaintiff's husband because further models had come into New Zealand. However, he did see the car shortly before it was taken from the plaintiff's garage. He said that at that time it was in the same excellent condition as when he delivered it to the plaintiff's husband and he considered that its market value would not have diminished between 31 October 1988 and 31 May 1989.

I have already decided that the plaintiff's husband gifted the car to her. That gift was made immediately after the purchase from Mr Wilkinson. At all times thereafter, including 31 May 1989, the car was owned by the plaintiff. Nobody had any right to remove it on 31 May 1989. In fact the car was stolen from the plaintiff.

With regard to its value as at the date of conversion, in the absence of any counterveiling evidence, I accept the evidence of Mr Wilkinson that its market

value then was \$26,000. That is the price the plaintiff would have had to pay then to acquire the same vehicle in its excellent condition had she immediately endeavoured to purchase a replacement. The plaintiff is accordingly entitled to damages for conversion in the sum of \$26,000.

So far as aggravated damages are concerned, it is claimed that the defendant acted in an offensive outrageous and high handed manner in her taking of the car on 31 May 1989. That phrase in my judgment correctly portrays the circumstances of the theft and in the context of the fact that the proceeding in this Court was commenced on 24 April 1989. The defendant unlawfully exercised self help to the vehicle while the matter of its title was the subject of litigation. The pleading does not refer to her conduct in selling the vehicle immediately upon receipt of the interlocutory application for an order for preservation and custody of the car and before that application could effectively be dealt with by the Court. The assessment of damages could take into account the latter matter because, in paragraphs 10 and 11, the circumstances of the sale to which I have referred have been pleaded.

In relation to exemplary damages the plaintiff asserts that the car had a value to her beyond its monetary value by virtue of her sentimental attachment to it and the defendant intentionally by outrageous means deprived the plaintiff of the benefit of the car. In my

judgment, for the reasons already outlined, I find that the defendant did intentionally and by outrageous means so deprive the plaintiff. Clearly the car had sentimental value to the plaintiff because it was her wedding present given in part in lieu of a honeymoon.

The amounts claimed for aggravated and exemplary damages are \$6,000 and \$5,000 respectively. I notice that in the prayer for relief each item is claimed for aggravated and/or exemplary damages. Therefore the question of aggravated and exemplary damages is to be considered in the context of the total way in which these assertions have been pleaded. No difficulty arises in relation to the Accident Compensation Act 1982 because the pleadings do not raise in any way any personal injury to the plaintiff. The facts I have outlined raise a clear case for an award of aggravated damages. Exemplary damages are awarded by way of punishment for contumelious conduct. From the authorities it is hard to draw the line between aggravated and exemplary damages. I consider the appropriate award, for aggravated damages is \$5,000 and, in the light of that award, I consider the extra punitive element justifies a further sum of \$2,500 for exemplary damages.

For the foregoing reasons the judgment of the Court is that the plaintiff is entitled to a declaration against the defendant that on 31 May 1989 the plaintiff was the owner of the motor vehicle registration number NF

2964. The plaintiff is entitled to judgment for \$26,000 damages for conversion of the vehicle and to interest thereon at 11% per annum from 31 May 1989 to today. The plaintiff is further entitled to judgment against the defendant for \$5,000 aggravated damages and to \$2,500 exemplary damages. The plaintiff is entitled to costs against the defendant according to scale on the total amount of the judgments in her favour.

*A. Whitwell J*

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Solicitors for Plaintiff:

Wynyard Wood  
AUCKLAND

Solicitors for Defendant:

Samuel Ellis & Co  
AUCKLAND



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