832/09

Den 18. november 2009 blev i sag nr. 76.158:

xxxx xx xxxx
xxxxxxxxxx x
xxxx xxxxx x

mod

TrygVesta Forsikring A/S
Klausdalsbrovej 601
2750 Ballerup

afsagt sålydende

k e n d e l s e :

_____

Forsikringstageren, der har motorkøretøjsforsikring i TrygVesta Forsikring A/S, klager over, at selskabet har anerkendt en skade anmeldt af en modpart.

Selskabet henviser til, at et uvildigt vidne har angivet at have set, at klageren ramte modpartens bil i forbindelse med en parallelparkering.

Af en vidneforklaring af 23/10 2008 fremgår:

> "Sølvfarvet Ford Focus (så vidt jeg husker, seddel sat i sort bil med oplysninger) rammer den sorte parkerede bil under baglæns parallel parkering.
>
> Den sølvfarvede bil rammer den sorte med venstre forende, den sorte rammes på højre bag/side. Der er synlige skader på den sølvfarvede bil efter påkørslen, skader ved venstre for blinklys/lygte.
>
> Din placering da uheldet skete:
> Står inde på …torvet (ca. 1½-2 mtr. fra de parkerede biler, og kikker ud på trafikken da uheldet sker."

Selskabet anførte herefter i skrivelse af 27/2 2009 til klageren:

> "Modpartens forsikringsselskab har et uvildigt vidne, der beskriver din bil med farve og mærke, der stemmer overens med dit registreringsnummer. Samtidig har du været på stedet det pågældende tidspunkt. Ifølge domspraksis er dette desværre nok til, at vi må anerkende over for modparten.
>
> Når vi har betalt modpartens krav, vil du blive opkrævet selvrisiko."

Klageren anførte i senere skrivelse af 20/3 2009 til selskabet:

"(1) There has never been any question that my car was indeed parked in the place that the witness said it was parked, at the time stated. I have never denied this, so the elaborated '4 oplysninger' outlined by H.V. in her most recent letter (copy included) is not to the point. My car, correctly identified, was indeed there on that day. I have never denied it.

(2) The relevant question is only whether the alleged incident took place or not. A witness states that she saw it happen. Why, you ask, should she invent such a thing? I agree. But mistakes of perception happen. If she was indeed standing where she said she was (incidentally, as drawn in the diagram, the supposed 'contact point' of the two cars is not in her line of sight), why did she not step forward when I and my wife and passenger got out of the car in order to address me about what she thought had happened? Apparently, she left a note on the other car's windscreen giving details of my car: but if she took the trouble to do this, why did she not speak to me directly? She must also have seen that we got out of the car perfectly calmly, and that we made no inspection of the car parked in front of us - as any honest person would have done if such an incident had in fact taken place?

(3) I repeat what I said in my first letter (November 13th, copy included); if and when such an incident takes place, the driver of the vehicle concerned invariably knows that something, no matter how small, has taken place. He hears a sound; he feels a contact. And this was not the case here. I have no recollection whatever of any bump or graze taking place.

(4) We now come to the question of physical damage. The witness states that my car was damaged, as well as the other car. In my original letter to H.V. I denied this. 'Damage: what damage?' I now see, on close inspection, that there is indeed a small, almost imperceptible scratch just above the left front indicator light that is congruent with the idea that at some time in the past my car has brushed or grazed either an object or the fender of another car.

The question is: when? Did it happen on that day, and in the way that the witness said it did? Nothing is impossible. I might have been mistaken. She might have been mistaken. The problem is that the fact the witness failed to engage with me on the spot means that it is merely her word against mine. (The driver of the already parked vehicle was apparently not present at the time.) And I have to ask: Why should she be believed and not me?

The whole problem, in short, lies in the fact that I was not given any opportunity at the time to verify or disprove the allegation.

I am afraid that the obscurity and uncertainty of the circumstances, and the length of time that has unfolded since last October, combine to mean that it is unwarrantable that I should be held responsible for this damage.

The plaintiff's car obviously was damaged, by some one or some thing. I sincerely believe that I had nothing to do with the matter."

Selskabet anførte herefter i skrivelse af 23/4 2009 til klageren:

"Jeg skal hermed vende tilbage under henvisning til dit brev af 20. marts 2009, hvori du har klaget over skadeafdelingens afgørelse i ovenstående sag. Jeg skal indledningsvis beklage det sene svar.

På baggrund af din henvendelse har jeg rekvireret sagen i skadeafdelingen. Jeg må desværre meddele dig, at jeg ved min gennemgang af de foreliggende oplysninger ikke har fundet grundlag for at ændre den trufne afgørelse.

Efter fast praksis tillægges udsagn fra uvildige vidner betydelig vægt i sager som disse, hvorfor det er min vurdering, at vi som ansvarsforsikringsselskab er forpligtet til at anerkende erstatningsansvaret i relation til modpartens skade i medfør af færdselslovens §§ 101-108. Der foreligger ingen objektive oplysninger, som kan rejse tvivl om rigtigheden af vidnets udtalelse i denne sag. Jeg har herunder noteret, at vidnets forklaring stemmer overens med skadezonen på modpartens bil, at du erkender, at have været på skadestedet på det omtalte tidspunkt, ligesom jeg har noteret, at du i dit brev af 20. marts 2009 oplyser, at du faktisk har konstateret en mindre ridse på venstre side af din bils forende, uden at det dog med sikkerhed kan afgøres, hvorfra denne skade stammer."

Klageren har ved skrivelse af 9/5 2009 over for nævnet nedlagt påstand om, at selskabet skal anerkende, at han var uden skyld i skaden på modpartens bil. Klageren har til støtte herfor anført:

"I will not spend time describing the case again in detail; the papers and correspondence relating to the case are enclosed within or else are available from Tryg and I am sure you will have a chance to look at them. A witness in … in Å. on the 11th of October last year claims she saw my car hit or graze another car while I was parking my vehicle; I (and my wife and passenger) deny that this incident happened. I am convinced that the witness was mistaken. Several very specific features of the case need to be brought to your attention. I will try to do so in the paragraphs that follow.

(1) The person who made a complaint against me, J.J., does not know me and I am sure had no reason to make a malicious complaint. I am sure she thought she was reporting an accident that really happened. But that does not make her *ipso facto* reliable or correct. Several other issues are at stake here; issues of justice and fairness.

(2) The heart of my complaint indeed rests on an elementary point of fairness. Why didn't the witness, who says she was standing on the pavement at the time I parked my car, step forward and address my wife and me, as she had every opportunity to do? The 'accident' (if it indeed happened) could then have been discussed or disputed on the spot. Other witnesses could have been called (it was a crowded market, a Saturday), different points of view heard, addresses and phone numbers exchanged, and so on. But this didn't happen. *The elementary right to defend myself at the time was denied me*. And this is contrary to natural justice.

(3) A crucial aspect in determining what happened or did not happen in incidents like this concerns the behaviour of the person who is accused of committing the offence. How does he bear himself? Does he act in a guilty way? Does he (for example) deny that he was where the incident is said to have taken place? Does he prevaricate when asked questions by the insurance company? Let us examine my behaviour at the time of the incident and afterwards.

(4) After parking, I calmly got out of the car with my wife and our companion. We did NOT look at the car to see if there was any damage (as would have happened if there had really been a collision). We simply walked into the market to make our purchases and returned 20 minutes later. Why did the witness not step forward at either of these two points and say: 'Excuse me, I *think* you have hit the car parked in front of you.' In my opinion, if she thought an accident had happened, she had a responsibility to do this on the spot. Her NOT doing this is the reason why the case is unconscionable.

Please note: Tryg was kind enough to send me copies of two previous cases that failed to be upheld by your committee. I have read them both carefully. Both of them differ in crucial aspects from my own case. In the case of Nr. 73021 (April 23 last year) a fundamental point of difference is that the man got out of the car *and inspected the damage to the other car* before driving off. ('Føreren af den grå bil stiger ud, besigtiger 'skaden' og kører væk uden at efterlade seddel eller tlf.nr.') (We notice also that, when contacted by the insurance company, the man denied he had been where the witness said he was.) The second case (case nr. 63759, November 2004) seems to have nothing at all to do with what we are talking about here. The witness in this instance did behave in a correct manner and contact the man accused of the collision 'on the spot'. He (the accused man) was an elderly and confused person who seems to have made no attempt to defend himself or to deny his culpability. What the witness saw with his own eyes is convincingly described. There seems to be no doubt about 'what happened'. The case could not be more 'cut and dry' - and different from my own.

(5) My behaviour subsequent to the incident has always been co-operative and honest. I have answered telephone calls and letters promptly and have at all times attempted to explain myself in an open way. When I was first contacted about the incident, and asked for information about the bill for repairing the damage to my car, I was incredulous: my car had not been damaged! Subsequently, on investigation I did indeed discover a very small scratch in the vicinity of the left front indicator light. I pointed out to Tryg - which is the simple truth - that my car is 10 years old and could have picked up the scratch anywhere and at any time in its history. If the witness claims to have seen 'my' scratch, then it is only fair that I should have been allowed at the time of the incident to see 'his' scratch (I mean the scratch on the car I was supposed to have grazed). We could then have decided whether they truly 'matched up'. The fact that I was denied the opportunity to do this there and then is at the heart of my complaint about unfairness.

Now I believe it is far too late to establish what 'really' happened. It is the witness's word against mine. But why should she be believed and not me? Her behaviour on the spot, as I have tried to point out, was flawed and unjust to my fundamental rights. Because of her behaviour, there is a serious and un-resolvable doubt about what really happened (or did not happen) on that day. I do not see why I should pay any penalty under such circumstances."

Selskabet har ved skrivelse af 16/6 2009 fastholdt sin afgørelse over for nævnet. Selskabet har til støtte herfor anført:

"Vores kunde har tegnet ansvar- og kaskoforsikring hos os på sin Ford Focus 1,6 med reg. nr. … Forsikringen er tegnet med en selvrisiko på 6.585 kr.

Det fremgår af oplysninger i sagen, at vores kunde den 11. oktober 2007 foretog en baglæns parallelparkering ved …

Under denne manøvre skulle vores kundes bils venstre forende have ramt den foranholdende bils højre bagende.

Et vidne til uheldet har umiddelbart i forbindelse med manøvren anbragt en seddel på modpartens bil med oplysning om vores kundes bil, herunder registreringsnummer, bilmærke, model samt farve. Vidnet oplyser i en skriftlig erklæring til brug for modpartens forsikringsselskab at have stået 1,5 - 2 meter fra de involverede køretøjer. Vidner oplyser endvidere, at der tillige kunne konstateres skade ved venstre blinklys/lygte på vores kundes sølvgrå Ford Focus. Vidneerklæring af 23. oktober 2008 er vedlagt som bilag.

På grundlag af de foreliggende oplysninger har vi anerkendt erstatningsansvaret over for modpartens forsikringsselskab, idet vi ikke har fundet holdepunkter for at betvivle vidnets uvildighed eller anfægte indholdet af vidnets udsagn, som findes at være i overensstemmelse med skadezonerne på de involverede køretøjer.

Vores kunde har erkendt at have foretaget en parkering på den af vidnet angivne måde og på det angivne sted, jf. vedlagte brev af 20. marts 2009, ligesom vores kunde ved samme skrivelse (punkt 4) erkender, at der faktisk kan konstateres en mindre ridse på hans bil - netop på det sted, hvor vidnet har oplyst, at bilen var i berøring med modpartens bil. Vores kunde bemærker i denne forbindelse, at han ikke med sikkerhed kan afvise, at bilerne har været i berøring med hinanden.

Vores kunde begrunder imidlertid sin afvisning af erstatningsansvaret med, at vidnet - ved ikke straks at rette henvendelse til ham på skadestedet - har afskåret vores kundes mulighed for selv at søge et eventuelt ansvar for skaden be- eller afkræftet i umiddelbart tilknytning til hændelsen.

At vidnet ikke har rettet henvendelse til vores kunde på skadestedet, er naturligvis beklageligt, om end vi ikke mener, at dette forhold i sig selv svækker modpartens bevis for, at skaden er sket som oplyst af vidnet. Vidnets erklæring er som nævnt forenelig med alle øvrige oplyste forhold i sagen, hvorfor vi ikke har fundet grundlag for at afvise erstatningsansvaret for skaden.

Vi er ved vores anerkendelse af erstatningsansvaret opmærksomme på, at en påkørsel af den aktuelle type kan være sket, uden at vores kunde selv har været opmærksom på påkørselen, idet der efter omstændighederne har været tale om en ganske let berøring mellem bilerne. Vores kunde ses heller ikke at være afvisende overfor, at påkørselen kan være sket, uden at han selv har opdaget det, jf. vores kundes mail af 13. november 2008.

På denne baggrund fastholder vi således vores opkrævning på selvrisiko svarende til skadeudgiften på 4.188,99 kr., som vi har udbetalt til modpartens forsikringsselskab."

Nævnet udtaler:

Efter sin gennemgang af sagen, herunder oplysningerne fra vidnet, finder nævnet ikke anledning til at kritisere selskabets afgørelse, der findes at være i overensstemmelse med retspraksis i den konkrete situation.

Som følge heraf

b e s t e m m e s :

Klagen kan ikke tages til følge.

Marianne Højgaard Pedersen

udskriften bekræftes

Henning Jønsson