[2021] VSCA 133
Victorian Court of Appeal

Simmonds-Thatcher v Kamari

S EAPCI 2020 0074
Hearing: 23 March 2021
Decision: 14 May 2021
Kyrou JA, Emerton JA, Osborn JA

Digest (1)

[1] **Torts** Reasonable care

Party Names
Brandon James Simmonds-Thatcher, Sudabh Kamari

Legal Representatives
For the Applicant *Mr J Ruskin* QC with *Ms G Cooper*; For the Applicant *Transport Accident Commission*; For the Respondent *Mr A D B Ingram* QC with *Ms M Pilipasidis*; For the Respondent *Kenyon Legal*

Court Supplied Summary
Torts — Negligence — Motor vehicle accident — Respondent struck by applicant's vehicle when crossing road after alighting from taxi — Respondent alighted from taxi onto nature strip — Respondent then stepped onto roadway from behind taxi without looking in direction of applicant's approaching vehicle — Respondent took a number of steps onto roadway before being hit by applicant's vehicle — Whether trial judge erred in finding applicant negligent by reason of not slowing down, having seen respondent alight from taxi onto nature strip — Whether open to find that applicant not keeping proper lookout — Whether causal relationship established — Leave to appeal granted — Appeal allowed

Judgment

Kyrou, Emerton and Osborn JJA

Introduction
1 The applicant seeks leave to appeal the decision of a County Court judge in an action for damages for personal injuries suffered by the respondent as a result of a road traffic accident.

2 In reasons for judgment given on 6 July 2020,[1] the trial judge held that the respondent had suffered injury as the result both of her own negligence as a pedestrian and the negligence of the applicant in driving his car at the time of the collision.

3 The applicant seeks leave to appeal on the grounds that:

> "1. The learned trial judge erred in his findings as to duty and breach by imposing on the Applicant a duty of care which was beyond a duty to take reasonable care and by holding that the duty was breached.
> 2. The learned trial judge's finding that the Applicant failed to exercise reasonable care in the circumstances was not reasonably open and was against the evidence and the weight of the evidence.

3. The learned trial judge erred in finding in relation to causation, at [31] of the Judgment, that 'At a walking pace for the plaintiff (Respondent), the defendant (Applicant), if travelling at an appropriate speed, would have had ample time to avoid the collision.'"

4 For the reasons which follow, proposed grounds 1 and 3 must succeed. It is unnecessary to deal with ground 2.

Background facts

5 On 14 November 2015, the respondent attended a lunchtime social gathering in the Glenroy area with her two children and a group of friends.

6 At the conclusion of the gathering the respondent and three of her friends engaged a maxi taxi [2] to take them, together with their children, back to their respective homes.

7 The first drop-off was at 60 Hartington Street, Glenroy, the home of one of the respondent's friends. The taxi pulled up adjacent to the western kerb in Hartington Street facing north. The front wheels of the taxi were positioned on a speed hump running across Hartington Street. The respondent opened the sliding door on the passenger's side of the vehicle and stepped out into the gutter and onto the nature strip. She took a blanket in a plastic bag from her friend in order to help her friend disembark from the vehicle and cross the road, because her friend needed to place an infant in a pram before crossing the road.

8 The respondent's friend's home was on the eastern side of Hartington Street. The respondent walked around the rear of the taxi before crossing Hartington Street. She looked to her right but did not look to her left and stepped out from behind the taxi. She said in evidence she was not rushing as there was no need. It was necessary for the taxi driver to take the pram out of the taxi and for her friend to put her child in the pram before the unloading exercise could be completed.

9 Shortly after stepping out into the roadway, the respondent was struck by the applicant's vehicle and fell to the ground, suffering injury to her left wrist and face when she fell. The respondent's evidence was that after being struck she does not remember what happened until she found herself on the roadway adjacent to the eastern kerb of Hartington Street.

10 At the time of the collision, the applicant was driving a white 2005 Holden Commodore sedan south on Hartington Street. As he approached the taxi he had observed the respondent alight from it, but she then went out of view behind the taxi as the applicant's car moved forward.

11 When the front of the applicant's vehicle was approximately 10 metres north of the point at which the respondent was found after the impact, the applicant's vehicle commenced to traverse the speed hump which extended over a distance of five metres in length as he travelled along Hartington Street. The speed hump carried a sign with an advisory speed limit of 20 kilometres per hour.

12 The applicant did not give evidence at the trial. His counsel made a no case submission and was put to his election.

13 A police officer who attended the scene of the collision shortly after it occurred gave evidence of statements made by the applicant shortly after the accident:

"I was travelling south along Hartington Street Glenroy. I slowed at the speed hump and saw the taxi stop. I saw a lady get out of the taxi. As I drove over the speed hump all of a sudden, this lady ran out from behind

> the taxi and ran across the road in front of me. I braked but hit her on the passenger side of my vehicle. After I hit her, she fell to my left onto the road. [3] ”

14 Consistently with the applicant's statement that he hit the respondent “on the passenger side of my vehicle” and that after he hit the respondent “she fell to my left onto the road”, the police officer observed damage to the front of the vehicle on the passenger side and further recorded that the respondent's position on the roadway after the accident was on the eastern side of the roadway.

15 The front wheels of the maxi taxi were positioned on the speed hump, approximately in the centre of the speed hump. There was no evidence as to the length of the taxi, but the police officer stated it was parked approximately 300 millimetres out from the kerb and was approximately 2.5 to 2.7 metres wide.

16 The police officer also made the following measurements. Hartington Street was seven metres wide. The speed hump commenced eight metres south of an intersection with Mitchell Street. After the collision the respondent was positioned approximately 10 metres south of the northern edge of the speed hump and five metres south of the southern edge of the speed hump.

17 The police officer further estimated that given the position in which the taxi was parked, the applicant's vehicle could travel south with approximately one metre between his vehicle and the taxi on one side and one metre between his vehicle and the kerb to his left.

18 The police officer also stated the Holden Commodore was approximately 2 to 2.2 metres wide and in his opinion the respondent may have travelled approximately three metres out from behind the taxi before being struck.

The trial judge's Reasons

19 The trial judge had the advantage of a view of the scene of the accident and the benefit of observing the respondent give her evidence before him. No other witness was called to give direct evidence of the happening of the collision.

20 His Honour recorded:

> “There is no direct evidence in this case about what speed the defendant's vehicle was travelling at any time, up until the point of collision. I accept, on the evidence before the Court, that the advisory speed sign of 20 kilometres was on the pole north of the speed hump on Hartington Street on the day of the collision. The only evidence of the defendant's driving and observations prior to the collision is from the statement made by him to Mr Hull, the attending police officer. The defendant stated to Mr Hull that he first observed the plaintiff getting out of the taxi as he approached the speed hump. For that observation to be made by the defendant, he would need to be some considerable distance north of the northern edge of the speed hump so as to see the plaintiff on the other side of the maxi taxi. The plaintiff has had time to walk to the rear of the taxi and then across the rear of the taxi and stop. I accept that the plaintiff did stop prior to walking out onto Hartington Street in front of the approaching vehicle driven by the defendant. The plaintiff has then looked to her right in a southerly direction on Hartington Street and seen it was clear for her. She has then started to cross the road in an attempt to get an opportunity to look to her left for traffic coming from the north along Hartington Street. I accept the plaintiff's evidence that she has taken one, perhaps two, steps prior to being struck by the defendant's vehicle. I find that the plaintiff was walking, and not running, as stated by the defendant to the police officer, Mr Hull.

> The plaintiff stated that she did not have an opportunity to see what was coming from her left. The inference is that once the plaintiff had stepped out onto the roadway past the rear right side of the taxi, she did not look in a northerly direction to see the defendant's vehicle. That finding means that the plaintiff is predominantly responsible for the collision occurring. [4] "

21 Having read the transcript of the evidence, we interpolate that his Honour was entirely justified in rejecting the proposition advanced on behalf of the applicant that the respondent was running at the time of the collision.

22 His Honour then postulated that, having observed the respondent get out of the taxi, the applicant was negligent in that either he failed to keep a proper lookout [5] and/or was travelling too fast. [6]

23 More particularly, his Honour held that, having observed the respondent get out of the taxi, it was incumbent on the applicant to travel at a speed at which he could stop as he passed the taxi. Thus, while his Honour could not find the precise speed at which the applicant's vehicle was travelling, he was satisfied it was excessive. [7]

24 His Honour further found:

> "I find that the point of collision between the plaintiff and the defendant's vehicle was to the left front area of the defendant's vehicle. The approximate point of collision on the roadway was south of the southern edge of the speed hump in Hartington Street. The plaintiff had crossed over Hartington Street and was near the eastern side of Hartington Street when struck by the defendant's vehicle. [8] "

25 The trial judge found that insofar as the applicant saw the respondent getting out of the taxi, this could only have occurred if he was some considerable distance north of the taxi and the speed hump, at the time of making that observation. [9]

26 His Honour then went on to reject a series of factual submissions made on behalf of the applicant, including the following:

> "Mr Blanden submitted that the defendant braked before the collision. As I have previously noted, Mr Hull's evidence was that there was no evidence of any braking on the roadway. There is also no precise evidence in the statements made by the defendant to Mr Hull as to where he actually applied his brakes and when. Mr Blanden stated that the situation presented to the defendant was that he had no chance of avoiding a collision with the plaintiff. That statement depends on a number of factors, including the speed with which the defendant approached the speed hump, the braking, if any, that took place, and, more particularly, what observation the defendant maintained as he approached the speed hump and travelled in a southerly direction along Hartington Street.
>
> If I do not accept Mr Blanden's submission that because the defendant saw the plaintiff getting out of the taxi, he was keeping a proper lookout, that part of the observation by the defendant if, indeed, he made it, was only the first part of his responsibility to keep a proper lookout as he was approaching the speed hump, and travelling between the taxi and the road on his left, travelling in a southerly direction on Hartington Street. [10] "

27 In finding the applicant negligent, the judge explained:

> "The basis of the defendant's negligence is that he failed to keep a proper lookout as he was proceeding in a southerly direction along Hartington Street. The defendant's evidence is that he observed a woman getting out of the taxi on his right as he approached the speed hump. He has continued at an unknown speed to cross the speed hump, when he next sees the plaintiff running across the front of his vehicle. I find that if the defendant did see the plaintiff alight from the taxi, that he must have been at a considerable distance from the speed hump when he first observed her. His failure to continue to observe or satisfy himself that the plaintiff was not in his pathway as he travelled along the roadway, is a basis for him failing to keep a proper lookout. I accept that the plaintiff would have temporarily been out of his sight due to the bulk of the taxi.
>
> As you travel along this road, if the taxi was parked on the western side of the roadway, there is only room for the defendant's vehicle and, at the most, a metre either side of it, as he travelled down the road. Given the nature of the roadway and the defendant's observation of the plaintiff alighting from the taxi, it was incumbent upon him to travel at a speed where he could stop. While I am unable to find a precise speed of the defendant's vehicle on approach to the speed hump and crossing the speed hump, I find that in the circumstances of this case, as outlined by the plaintiff, the defendant was travelling at an excessive speed. I do not accept the defendant's statement to Mr Hull that the plaintiff was running from the back of the taxi across the road in front of him.
>
> It is clear on the evidence that the plaintiff did move out onto Hartington Street from behind the taxi. This is the second time the defendant would have seen the plaintiff. It is the defendant's failure to observe or watch for where the plaintiff was moving that gives rise to negligence on his part. [11] "

28 The trial judge found that the negligence of the applicant was a cause of the collision between his vehicle and the respondent. [12] He found that at a walking pace for the respondent, the applicant, if travelling at an appropriate speed, would have had ample time to avoid the collision. [13]

Did the trial judge err in relation to duty of care and breach?

29 The applicant contends that the trial judge erred in imposing upon him a duty of care which went beyond a duty to take reasonable care and by holding that the duty, so formulated, was breached (proposed ground 1).

30 The relevant findings and reasoning of the trial judge in finding breach of the applicant's duty of care were: first, that the applicant initially observed the respondent as she was alighting from the taxi and that he was at that time some considerable distance north of the northern edge of the speed hump; secondly, that when the respondent walked across the rear of the taxi she was temporarily out of the applicant's sight due to the bulk of the taxi; and, thirdly, that the respondent took one or perhaps two steps past the rear driver's side corner of the stationary taxi prior to being struck by the applicant's vehicle. The trial judge found that in those circumstances it was incumbent upon the applicant to travel at a speed where he could stop, and to continue to satisfy himself that the respondent was not in his pathway as he travelled along the roadway. [14]

31 The applicant takes issue with the proposition that, having seen the respondent alight from the taxi, it was incumbent on him to travel at a speed enabling him to stop before colliding with the respondent and submits, correctly, that the only basis for this proposition was that, having seen the respondent alight from the taxi at some earlier point, he ought to have driven at some unspecified speed in order to avoid the accident. The applicant submits that there

was no feature of the respondent's earlier conduct which could be said to have reasonably required him to exercise a heightened degree of caution around the taxi. There was no evidence that, upon alighting from the taxi, the respondent gave any sign or indication that she was about to cross the road and the applicant was not alerted by any conduct of the respondent that she might be about to act in a way that would put her in danger from his vehicle. He submits that he was entitled to reasonably conclude that an adult such as the respondent would exercise common sense and that she would look first before stepping out onto the roadway.

32 The applicant submits that in the circumstances of this case, it would be unreasonable to expect him to drive as if expecting an accident to occur at any moment. The present situation might be contrasted with that in which a driver sees a young child alighting from a vehicle or playing on the side of the road. In such circumstances, the standard of reasonable care might require the driver to reduce their speed to take into account the possibility of the child not exercising prudence in deciding when to cross the road. That is not this situation.

33 The applicant's submission is well supported by authority.

34 In Mobbs v Kain, [15] the New South Wales Court of Appeal considered an appeal by a driver against a finding of negligence in circumstances where a 10 year old school boy had alighted from a stationary bus, crossed the road in front of the bus and been struck by the driver's motor vehicle and injured. The primary judge found that the defendant driver had been driving at approximately 40 kilometres per hour in accordance with the statutory requirements concerning the overtaking of a bus, and that this was an excessive speed in the circumstances. The primary judge, like the trial judge in this matter, did not make a finding as to what speed the defendant driver could (or should) have driven in order to have time to avoid striking the school boy. He found that the school boy was aware that he should not cross the road in front of a bus and should wait until it had left, that the school boy emerged at a rapid pace, somewhere between a fast walk and a jog, and that he was obscured from the defendant driver's view almost until the collision took place.

35 In granting leave to appeal and allowing the appeal in Mobbs, the New South Wales Court of Appeal confirmed that the driver of a motor vehicle on a public road is under a duty to other persons on and in the vicinity of the road to exercise reasonable skill and care with a view to avoiding causing injury to those persons. The defendant driver was complying with the designated speed limit and was keeping a proper lookout and the evidence did not disclose any additional factor which should have caused the defendant driver to reduce his speed below the applicable speed limit. This was not a case in which the possibility that a child might emerge from the front of the bus meant that the driver had to slow down to a speed where he could either stop in any conceivable circumstances.

36 Giles JA said as follows:

> "The trial judge did not find a particular speed at which, in the exercise of reasonable care, the [driver] should have been travelling when passing the bus. He found at [69] that the [driver] drove at a speed which was excessive in the circumstances. By this I understand him to have meant the speed to which he had referred earlier in that paragraph as 'a speed which would have permitted the [driver] to stop if the [school boy] had emerged from behind the bus in the way he did'.
>
> There is a problem with a finding so expressed. It is self-fulfilling as to breach of duty — because there was an accident, the speed was too great. More important, it does not fit the facts as found. The [school boy] collided with the side of the [driver's] motor vehicle, and this occurred although the [driver] was keeping a proper lookout. A speed which would have permitted the [driver] to stop if the [school boy] had emerged had no causal relationship with the occurrence of the accident. [16] "

37 For her part, McColl JA said:

> "In my view this was not a case in which the possibility that a child might emerge from the front of the bus, meant that the [driver] had to slow down to a speed where he could either stop in any conceivable circumstances. Such a finding would impose absolute or strict liability on drivers. It would supplant the obligation to take reasonable care with the impermissible obligation of ensuring the respondent's safety …
>
> It is not reasonable, in my view, to require the [driver] to slow down to whatever speed would have avoided the accident. Leaving aside the high level of abstraction at which such a conclusion is expressed and its failure to address the particular risk, it is, in my view, the product of impermissible hindsight reasoning. [17] "

38 Her Honour went on to say that the court was required to look forward to identify what a reasonable person would have done in the circumstances, not backward to identify what would have avoided the injury. [18]

39 In Dungan v Chan, [19] the Supreme Court of New South Wales again considered driver liability in circumstances where the driver hit a pedestrian who broke rules by commencing to cross an intersection when the pedestrian light was flashing red.

40 Before the primary judge, the pedestrian contended that the driver had no reasonable regard for pedestrians who, given the busy nature of the intersection, might be likely to be on the pedestrian crossing. She contended that the driver was not vigilant and did not keep a proper lookout in the circumstances. She further contended that by not stopping at the stop line, the driver gave himself no opportunity to check for the presence of pedestrians on the crossing and to check that driving across the pedestrian crossing was safe. She argued that a reasonably vigilant person in the position of the driver, who had seen that cars ahead of his vehicle had stopped at an intersection known to be busy, could reasonably foresee that there may be pedestrians on the crossing and that a reasonable driver in the circumstances would have checked that there was no pedestrian at risk and would have stopped at the line and looked for pedestrians on the pedestrian crossing before moving onto the crossing. The primary judge did not accept the submissions.

41 The Court dismissed the appeal. In concluding that no duty of care was breached, Emmett JA (with whom Ward and Gleeson JJA agreed) set out a number of principles concerning the duties owed by drivers to pedestrians:

> "A driver is entitled to assume that others will observe the rules of the road. However, that does not mean that a driver may proceed at any pace he or she chooses or with complete indifference as to the possibility of a pedestrian emerging from somewhere as the result of accident, miscalculation, ignorance or recklessness. As a general rule, a person is entitled to assume that others will act in a non-negligent manner. However, where negligence is the issue, the real is [[sic]] question is whether, in all the circumstances, the person charged with negligence exercised the degree of care that those circumstances required. The standard of care expected of the reasonable person requires him or her to take account of the possibility of inadvertent and negligent conduct on the part of others.
>
> The reasonable person would accept that it is not the duty of a driver to drive such that there is no foreseeable risk of injury to others. However, it does not follow that risks may be ignored. One must bear in mind the extent of the damage that may be done by a driver to a pedestrian, the degree of likelihood that a pedestrian will suddenly come into the path of an oncoming vehicle, the consequent extent of the precaution that a driver must take against that eventuality and the extent of what a driver is able to do when confronted with such a

> danger. The damage that a driver may do to a pedestrian is great and that is an important matter when deciding what a driver must do. The inconvenience of driving more slowly is to be measured against what may be done to a pedestrian if the driver's estimate of the risk is wrong. Pedestrians act carelessly with sufficient frequency that a prudent person would take account of the possibility. Careless behaviour by pedestrians occurs often enough for a prudent driver to foresee it and to take it into account.
>
> Drivers of motor vehicles, being in charge of frequently lethal machines, are under a duty to drive reasonably in the circumstances in which they find themselves. Such circumstances include the fact that a driver is driving lawfully by obeying green lights and travelling within the limit proscribed by the law. On the other hand, other circumstances may need to be taken into account as well. Thus, a motorist may have some reason, because of the surrounding circumstances, to be aware that pedestrians are likely to behave carelessly. A driver may be guilty of breach of duty if it is established that, although driving at a pace, and in a place, that is lawful, the driver has nevertheless been put on notice, by conduct that the motorist saw or should have seen, that a pedestrian might act in such a way as to put that pedestrian in danger from the motorist. A motorist must always be conscious of the fact that a pedestrian may do something silly and must adjust his or her driving to account for that possibility. On the other hand, a motorist can hardly drive in such a way that he or she expects such accidents to occur every minute. Otherwise, no traffic would ever move. Unless there is some reason for a motorist to look to the right or the left, it is not surprising that he or she may be looking straight ahead when driving his or her motor vehicle. [20] "

42 Emmett JA concluded:

> "Before there should be a finding of breach of duty, the evidence must disclose some factor that would cause a motorist to reduce his or her speed below the applicable speed limit, particularly if he or she is keeping a proper lookout. … The mere fact that there was a possibility of a pedestrian being on the road would not of itself require a driver to slow down to a speed where he or she could stop in any conceivable circumstances. Such a finding would impose absolute or strict liability on drivers. [21] "

43 In Ilievski v Zhou, [22] J Forrest J considered the liability of a motorist who hit a person running across a road in the face of oncoming traffic. It was alleged that the driver was liable because of her failure to react to the presence of the pedestrian on the side of the road and reduce her speed. It was submitted that the driver was required to reduce speed upon sighting the pedestrian "in his jogging motion" at the side of the road. The substantive question was, therefore, whether a prudent, but not overly cautious driver, in a line of traffic and travelling within the speed limit, would reduce speed given the presence of an adult male apparently intent on crossing the road at some point in time.

44 J Forrest J concluded that a reasonable driver would not reduce speed from 50 kilometres per hour merely by reason of the presence of an adult on the kerb who seemed intent on crossing the road. His Honour rejected the submission by counsel for the pedestrian that the driver's concession that she thought that the pedestrian "might" cross the road meant that she should have reduced her speed significantly, holding that a reasonable driver would be entitled to conclude that an adult jogger, possessed of a modicum of common sense, would not endeavour to cross in front of a line of traffic that had just come through a set of traffic lights further up the road. [23] His Honour contrasted this situation with that of a young child on the side of the road looking to cross. In that case, a driver, acting reasonably, would contemplate reducing his or her speed because of the risk that the child was not capable of exercising the appropriate judgment in terms of determining when to cross the road. The same could not be said for a 30 year old male with no apparent mental disability. [24]

45 J Forrest J went on to say that in the event that he was wrong and that it was negligent of the driver not to slow down from a speed of 50 kilometres per hour to, say, 35-40 kilometres per hour as a result of observing a pedestrian, then he was unconvinced that such a step would have made any appreciable difference to the happening of the accident. [25]

46 The position was to be contrasted with that in Roche v Kigetzis. [26] There, Osborn JA (with whom Kyrou JA and Garde AJA agreed) considered the question of driver liability following a collision between a car and a pedestrian at traffic lights in circumstances where the pedestrian was walking against a "red man" pedestrian traffic signal. The driver was approaching a red light at the intersection and slowed down preparing to stop at the red light. He observed a bus in the right-hand lane which was stationary at the red light. As he approached the intersection, the lights turned from red to green but the bus remained stationary at the intersection. As the light was green, he accelerated into the intersection, increasing his speed to 30-40 kilometres per hour. He hit the pedestrian who had been obscured by the bus.

47 Osborn JA held that it was open on the evidence and in accordance with the weight of evidence to conclude that the continuing presence of the bus in a stationary position facing a green light raised a real possibility that it concealed something or somebody which might move into the path of the applicant's vehicle. [27] His Honour held that the stationary vehicle on the roadway (the bus) should have put the applicant on notice of a potential incident at the intersection, including the unpredictable behaviour of a pedestrian at the intersection. This was a case in which there were factors which could cause a reasonable motorist to reduce his or her speed below the speed which would ordinarily be appropriate when entering the intersection with a green light. There was a particular perceivable risk which the driver should have taken into account but did not. [28]

48 In the case we are considering, the only circumstance relied upon to put the applicant on notice of any kind of risk as he was driving along Hartington Street was the sight of the respondent alighting from the taxi onto the adjacent nature strip and then disappearing from view. The respondent is an adult woman who, it should be assumed, would behave rationally and not put herself at risk by entering onto the roadway without looking.

49 In our view, it was not open to the trial judge to find that the respondent alighting from the taxi onto the nature strip was a factor that should cause a motorist, acting reasonably, to reduce his or her speed below the applicable speed limit. It was not open to hold that it was incumbent on the applicant "to travel at a speed where he could stop", especially as it was entirely unclear where that point would be. The judge's analysis suffers from the flaw identified by Giles and McColl JJA in Mobbs: it is self-fulfilling as to breach of duty — because there was an accident, the speed was too great. It is the product of impermissible hindsight reasoning.

50 We note that in Clarke v Freund, [29] an earlier decision of the New South Wales Court of Appeal, Beazley JA (with whom Handley and Sheller JJA agreed) held that a driver who hit a pedestrian was negligent in failing to slow down when he realised that there was a line of stationary cars in the lane next to him because he should have been aware of the possibility that a pedestrian might cross the road by passing through the line of stationary cars and then onto the part of the road with moving traffic. Her Honour stated that the standard of care for drivers of motor vehicles was a high one and that "it must take into account the fact that there is a likelihood, for example, that pedestrians will suddenly come into the path of an oncoming vehicle". [30]

51 With respect, we do not consider this formulation of the duty to be of assistance, as it is simply too broad. If drivers were required to anticipate in any and all circumstances that a pedestrian might suddenly stray onto the road, traffic would come to a standstill. Furthermore, in the circumstances that we are considering, there was no line of stationary cars from which a pedestrian might unexpectedly emerge.

52 It follows that in the present case the trial judge erred in finding that it was incumbent on the applicant to travel at a speed at which he could stop so as to avoid a collision of the type which occurred.

53 Moreover, the trial judge identified the applicant's failure to travel at an "appropriate" speed not only as an important ingredient in the breach of duty, but as having a central role in establishing the causal nexus.

54 The question of causation was resolved by the trial judge (in a finding which is the subject of specific challenge by way of proposed ground 3) as follows:

> "At a walking pace for the [respondent], the [applicant], if travelling at an appropriate speed, would have had ample time to avoid the collision. [31] "

55 As we have held, the applicant was not required to slow down just because he saw the respondent alight from the taxi from further up Hartington Street. The trial judge's finding on causation is therefore infected by the error identified above concerning the extent of the applicant's duty of care.

Did the trial judge's error with respect to breach of duty and causation vitiate his decision?

56 Our conclusion with respect to error in the trial judge's approach to duty of care and breach of that duty is not dispositive of the appeal in itself. The facts may permit an inference that the applicant breached his duty of care to the respondent by failing to keep a proper lookout and that this breach was a cause of the injury to the respondent. It remains for us to consider the facts as found by the trial judge and the inferences which may be drawn from those facts.

57 In Warren v Coombes, [32] the High Court considered whether an inference of negligence could be drawn with respect to the conduct of the driver of a motor vehicle on the basis of facts found by the trial judge. The majority (Gibbs ACJ, Jacobs and Murphy JJ) described the proper approach as follows:

> "Shortly expressed, the established principles are, we think, that in general an appellate court is in as good a position as the trial judge to decide on the proper inference to be drawn from facts which are undisputed or which, having been disputed, are established by the findings of the trial judge. In deciding what is the proper inference to be drawn, the appellate court will give respect and weight to the conclusion of the trial judge, but, once having reached its own conclusion, will not shrink from giving effect to it. These principles, we venture to think, are not only sound in law, but beneficial in their operation. [33] "

58 Their Honours went on to say:

> "The duty of the appellate court is to decide the case—the facts as well as the law—for itself. In so doing it must recognize the advantages enjoyed by the judge who conducted the trial. But if the judges of appeal consider that in the circumstances the trial judge was in no better position to decide the particular question than they are themselves, or if, after giving full weight to his decision, they consider that it was wrong, they must discharge their duty and give effect to their own judgment. Further there is, in our opinion, no reason in logic or policy to regard the question whether the facts found do or do not give rise to the inference that a party was negligent as one which should be treated as peculiarly within the province of the trial judge. On the contrary we should have thought that the trial judge can enjoy no significant advantage in deciding such a

> question. The only arguments that can be advanced in favour of the view that an appellate court should defer to the decision of the trial judge on such a question are that opinions on these matters very frequently differ, and that it is in the public interest that there should be finality in litigation. The fact that judges differ often and markedly as to what would in particular circumstances be expected of a reasonable man seems to us in itself to be a reason why no narrow view should be taken of the appellate function. The resolution of these questions by courts of appeal should lead ultimately not to uncertainty but to consistency and predictability, besides being more likely to result in the attainment of justice in individual cases. … [34] "

59 In the present case, the fact that that the applicant failed to observe the respondent walking on the roadway but believed her to be running, coupled with the fact that the respondent was struck with the passenger side front of the applicant's vehicle after she had substantially walked across its path, tends to suggest that the applicant was not keeping a proper lookout immediately prior to the happening of the accident. That is, he was not keeping a proper lookout when the respondent emerged from behind the taxi and moved across his path of travel.

60 This point was made by counsel for the respondent in closing submissions to the trial judge, but it was effectively subsumed into the submission (ultimately accepted by the trial judge) that there was a broader duty to slow down and pay special attention to the respondent which arose when the applicant saw her alight from the taxi. According to counsel for the respondent, once the applicant had seen the respondent alighting from the taxi, "he should have anticipated that [the respondent] was near the roadway and not entered the roadway further until he knew [the respondent's] whereabouts."

61 In our view, it was open to find on the evidence that the applicant breached his duty of care to the respondent by failing to keep a proper lookout at the point *when the respondent emerged onto the roadway from behind the taxi* and proceeded to cross a substantial part of the roadway in front of him.

62 Both the applicant's admission to the police officer and the evidence concerning damage to the applicant's vehicle support the conclusion that the point of collision between the respondent and the applicant's vehicle was at the front of the applicant's vehicle on the passenger side. This means that the respondent had crossed over most of Hartington Street and was near the eastern side of the street when struck by the applicant's vehicle.

63 As we have observed, there is no direct evidence of the applicant's speed as he traversed the speed hump. If, however, his vehicle was travelling at 20 kilometres per hour in accordance with his statement that he slowed at the speed hump (and as is inherently probable given the advisory speed limit), this is equivalent to a speed of 5.5 metres per second. Given the point of impact with the applicant's vehicle (as admitted by the applicant and confirmed by the police officer's observations), it may be inferred that the respondent walked approximately 2.5 to 3 metres out from behind the taxi and across the applicant's path. The applicant, if he were keeping a proper lookout, would in turn have had the time that it took the respondent to walk the 2.5 to 3 metres across the roadway to perceive the respondent, react to her presence and attempt to stop his vehicle to avoid hitting her.

64 Assuming for the purposes of analysis, without deciding, that the respondent walked at an ordinary walking pace from a stationary position of approximately 1.3 to 1.45 metres per second, she would have been potentially visible to the applicant (and he to her) for no more than two seconds before the impact. If travelling at the recommended speed of 20 kilometres per hour, the applicant could have travelled no more than 10 metres in this time, placing him on or just before the speed hump when the respondent moved into his path.

65 There was no evidence as to how quickly the Holden Commodore could have been brought to a stop if travelling at the advisory speed of 20 kilometres per hour. The respondent told the police officer that he braked, but did not bring his vehicle to a stop. The evidence does not demonstrate what period of time was required for him to brake effectively.

66 The trial judge, who had the benefit of a view and of seeing the witnesses give their evidence, found that the respondent had only taken one or two steps before being hit by the applicant's vehicle, a finding that sits somewhat uneasily with the probable position of the respondent on the road at the point of impact. Nonetheless, that finding was based on the respondent's evidence, which the judge, having observed her give her evidence, found to be reliable. It may also be thought to be circumstantially supported by the respondent's failure to look to her left. If the respondent's evidence as to how many steps she took before being hit by the applicant's car is accepted (which may require a more complex hypothesis as to how, precisely, the damage to the applicant's car was caused), then the time available for the applicant to stop and the distance travelled between seeing the applicant and hitting her may have been significantly shorter.

67 Whilst we are of the view that the trial judge erred in relation to both duty and causation, we would, for the reasons we have explained, be prepared to infer that the applicant was not keeping a proper lookout when the respondent emerged from behind the taxi. However, the evidence does not permit us to be satisfied that had the applicant been keeping a proper lookout, he could have stopped his car so as to avoid hitting the respondent.

68 On any view, the applicant's opportunity to react to the presence of the respondent on the roadway was very brief. If the collision was to be avoided, it was necessary first for the respondent to step out into the applicant's view (say half a metre), then for the applicant to perceive the presence of the respondent on the roadway and react to such presence, and then for the applicant to apply the brakes to his motor vehicle sufficiently to bring the vehicle to a stop.

69 In the course of cross-examination at trial, the respondent said (through an interpreter):

> "It was just a split of a second that this happened."

70 This encapsulates the fundamental difficulty she now faces in establishing that the collision was caused by the applicant's negligence.

71 The extent and adequacy of the applicant's opportunity to react to the presence of the respondent on the roadway is attended by material uncertainty. Whilst this Court is entitled to use its common sense and to some extent its practical experience, it cannot speculate. Whilst it may be inferred that it is possible the collision may have been avoided if the applicant had kept a better lookout, it cannot be inferred that it is more probable than not that the collision would have been avoided or that the plaintiff would have not have fallen into the road and been injured if the applicant had kept a better lookout.

72 In Masters Home Improvement Australia Pty Ltd v North East Solution Pty Ltd,[35] Santamaria, Ferguson and Kaye JJA stated the relevant principle as follows:

> "Thirdly, and importantly, where the inference is drawn in favour of the party which bears the burden of proof in the case, the conclusion must be 'the more probable inference' from those facts. In other words, the inference drawn by the judge must be reasonably considered to have a greater degree of likelihood than any competing inference.[36]"

73 In the circumstances, we consider that causation could not be established on the evidence before the trial judge.

Disposition

74 Leave to appeal will be granted and the appeal allowed on grounds 1 and 3. The judgment entered in favour of the respondent by the trial judge will be set aside and the proceeding dismissed.

All Citations

[2021] VSCA 133, (2021) 96 MVR 117, 2021 WL 1945112

Footnotes

1 [2020] VCC 961 ("Reasons").
2 A taxi comprising a small van with the capacity to accommodate four adult and six child passengers together with luggage in addition to the driver.
3 Ibid [14].
4 Ibid [27]-[28].
5 Ibid [29], [35].
6 Ibid [30] (which, along with [29], is set out in full at [27] below).
7 Ibid [30].
8 Ibid [31].
9 Ibid [34].
10 Ibid [36]-[37].
11 Ibid [29]-[30], [35].
12 Ibid [39].
13 Ibid [31].
14 Ibid [29]-[30].
15 Mobbs v Kain [2009] NSWCA 301 (Mobbs).
16 Ibid [2]-[3].
17 Ibid [101], [103] (citations omitted).
18 Ibid [103].
19 Dungan v Chan [2013] NSWCA 182.
20 Ibid [15]-[17] (citations omitted).
21 Ibid [18], applying Mobbs [2009] NSWCA 301, [100]-[101].
22 Ilievski v Zhou [2015] VSC 158.
23 Ibid [129].
24 Ibid [130].
25 Ibid [133]. Consistently with this line of cases, having seen the respondent alight from the taxi onto the nature strip, the applicant was entitled to assume that the respondent would not step out onto the roadway without first looking.
26 Roche v Kigetzis [2015] VSCA 207.
27 Ibid [28].
28 Ibid [29].
29 Clarke v Freund [1999] NSWCA 197.
30 Ibid [14].
31 Reasons [31].
32 Warren v Coombes (1979) 142 CLR 531.

33 Ibid 551.

34 Ibid 552.

35 Masters Home Improvement Australia Pty Ltd v North East Solution Pty Ltd (2017) VSCA 88, [101].

36 Citing Luxton v Vines (1952) 85 CLR 352, 358 (Dixon, Fullagar and Kitto JJ); Holloway v McFeeters (1956) 94 CLR 470, 480-81 (Williams, Webb and Taylor JJ); Naxakis v Western General Hospital & Anor (1998) 197 CLR 269, 284-5 [45] (McHugh J); Transport Industries Insurance Co Limited v Longmuir [1997] 1 VR 125, 129-30 (Winneke P), 141 (Tadgell JA); Chapman v Cole (2006) 15 VR 150, 154 [14] (Callaway JA).

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