10/93

SUPREME COURT OF VICTORIA

STEVENSON v KINALI

Hayne J

14 December 1992

NEGLIGENCE – MOTOR VEHICLE COLLISION – STATIONARY VEHICLE ON FREEWAY AT NIGHT – HAZARD LIGHTS NOT OPERATING – DRIVER UNAWARE OF LOCATION OF SWITCH TO ACTIVATE HAZARD LIGHTS – COLLISION WITH ANOTHER VEHICLE – DAMAGE CAUSED – WHETHER FAILURE TO ACTIVATE HAZARD LIGHTS CAUSED ACCIDENT – WHETHER DRIVER NEGLIGENT IN NOT KNOWING LOCATION OF SWITCH.

Where, on a wet night, a motorist left a stationary vehicle on a freeway so as to cause an obstruction and failed to operate the vehicle's hazard lights being unaware of the location of the operating switch, and a collision occurred causing damage, it was open to a magistrate to find that the driver of the stationary vehicle was negligent in not knowing where to activate the hazard lights and that the failure to activate the hazard lights caused the accident.

HAYNE J: **[1]** On 8 August 1989, John Dennis Stevenson was driving his motor car towards the city, along the Tullamarine freeway. It was about 7.30 p.m. and it was not only dark, it was a wet and busy night on the freeway. He was travelling in the right hand lane of the freeway when his car began to lose power. He could not move to the emergency lane on the left hand side of the carriageway, and he came to a stop in the right hand lane very close to the metal barrier which divides the two carriageways of the freeway. He could not find the switch that would activate the hazard warning lights on the car, so he left the parking lights on, with no other indication that the car was stopped. He went to an emergency telephone and, eventually finding one that worked, summoned help. He returned to his car and looked under the bonnet to see if he could do anything to fix it. The car was stopped for an appreciable time, estimated variously between 5 and 15 minutes.

Barham Kinali was driving his cab towards the city along the freeway. He too was travelling in the right hand lane in a stream of traffic flowing at about 70 or 80 kilometres per hour. The vehicle in front of his suddenly pulled into the left hand lane and Kinali saw Stevenson's car stopped, partly in the right hand lane. There were cars travelling on his left and he tried to pass between those cars and the left hand side of the stationary vehicle. However, the right hand front corner of the cab clipped the left hand rear corner of Stevenson's car. Kinali pulled up about 100 metres past the stopped car. **[2]** After the collision, the drivers had a conversation, the exact details of which are disputed, but it concerned, among other things, why Stevenson had not had his hazard lights on. Each driver began separate proceedings in the Magistrates' Court, seeking to recover damages from the other. On the hearing of what was effectively a claim and crossclaim, the Magistrate ordered that Stevenson's claim be dismissed with no order as to costs, and on Kinali's claim, ordered that Stevenson pay Kinali $4,700.98 with $1,018.93 damages by way of interest and costs fixed at $1,867.40.

Stevenson now appeals against both orders. The questions of law stated in the rule 58.09 orders are identical and it is convenient to treat the two proceedings as if they were in fact one. The questions of law that are said to arise are whether the magistrate erred in not finding Kinali negligent, (a) in failing so to control his vehicle as to be able to avoid the collision, (b) in travelling too close to the vehicle in front so as to prevent him seeing Stevenson's vehicle in time to avoid the collision, (c) in travelling at a speed that was excessive, having regard to the weather conditions, and (d) in failing to steer his vehicle so as to avoid the collision. As always in proceedings such as these, the account of the evidence given below, and of the findings of the Magistrate is imperfect, and it way well be incomplete.

The material filed on behalf of the appellant records the findings of the Magistrate in the following terms:

[3] "He found that the appellant was guilty of negligence in failing to know where the hazard warning light switches were located. He found that the appellant did attempt to operate those lights but had failed to do so because he had not reached far enough up the console. Failure to operate those lights when he knew that his vehicle was equipped with such lights amounted to a breach of his duty of care towards other motorists."

The Magistrate then said that there was no evidence which would enable him to conclude that the respondent had been guilty of negligence and that he found that the respondent had taken every step to avoid a stationary obstruction on the roadway in front of him. The appellant seeks to challenge these findings on the basis that no reasonable magistrate could have made them on the evidence that was led, see *Young v Paddle Bros Pty Ltd* [1956] VicLawRp 6; [1956] VLR 38; [1956] ALR 301, *Hardy v Gillette* [1976] VicRp 36; [1976] VR 392, *Transport Accident Commission v Hoffman* [1989] VicRp 18; [1989] VR 197; (1988) 7 MVR 193. In argument, the appellant did not seek to challenge the finding that Stevenson was negligent in not knowing where to activate the hazard lights. In any event, that finding was clearly open on the evidence. There was no dispute that Stevenson's first reaction to having to stop in the right hand lane of a busy freeway, at night, was to try to turn on his hazard lights. That reaction was the reaction of a reasonable man and it was open to the Magistrate to say that the reasonable driver would know where on the vehicle he was driving the hazard light switch was to be found.

The real burden of the appellant's attack on the findings below, was that any failure to activate the hazard lights did not cause the accident. In my view it is clear following *March v E & M H Stramare Pty Limited* [1991] HCA 12; (1990-91) 171 CLR 506; (1991) 99 ALR 423; (1991) 65 ALJR 334; (1991) 12 MVR 353; [1991] Aust Torts Reports 81-095, that where negligence is in issue, **[4]** causation is essentially a question of fact, to be answered by reference to commonsense and experience. It is also, of course, a question to be answered on the whole of the evidence. Here, it was open to the Magistrate to conclude that had Stevenson's hazard lights been operating, the car ahead of Kinali could have and would have moved lanes earlier, giving Kinali a longer opportunity to avoid the difficulty created by Stevenson's car.

In my view, it was open to the Magistrate to conclude, as a matter of commonsense and experience, that the failure of Stevenson to activate his hazard lights caused the accident. The finding of the Magistrate that there was no negligence on the part of Kinali also, of course, required consideration of all of the evidence. There was evidence called from not only the drivers, but also two other witnesses. One, who had been a passenger in Kinali's cab, gave some evidence of what he saw immediately before the collision, in particular, evidence of how far the cab then was from Stevenson's car, but it seems that he was unable to say whether there were other vehicles to the left of the cab.

The question confronting the Magistrate, when considering whether Kinali was negligent, was whether Kinali had acted in breach of duty, or whether he had, as the Magistrate was to put it, "Taken every step to avoid a stationary obstruction on the roadway in front of him". That, of course, required consideration of whether the Magistrate accepted the evidence of Kinali, that the car in front had diverged suddenly, leaving the obstruction **[5]** ahead of him, with him having nowhere to go because of the traffic on his left. It required consideration of the speed at which Kinali was travelling, and required consideration of the conditions that then obtained. It required consideration of the distance that Kinali was travelling behind the car in front of him. In the end it required consideration of what steps could have been taken to avoid what was a sudden and unexpected hazard.

The appellant submitted that the only conclusion open to the Magistrate was that Kinali must have been travelling too fast or too close to the car ahead. Now, it may be, as the respondent submitted, that this argument of the appellant proceeds from the premise that there was no negligence on the part of Stevenson in failing to have his hazard lights on, and thus that there was no basis for the conclusion that the car ahead might have diverted earlier. It is significant, as the respondent points out, that there is no suggestion recorded in the material relating to the cross-examination of Kinali, that a case was put to Kinali that he was travelling either too fast or too close to the car ahead of him. It may then be that the case now put on appeal is one that was never put below.

However that may be, the question confronting the Magistrate was essentially a question

of fact, dependent for its outcome upon consideration of all of the evidence that was before the Magistrate, evidence which I have not heard, and of which I have necessarily only an imperfect record. **[6]** In my view, it is not demonstrated that no reasonable Magistrate could have reached the conclusion he did. It was a conclusion that was open on the evidence below.

It follows that the appeal should be dismissed.

APPEARANCES: For the appellant Stevenson: Mr DI Thomas, counsel. Rogers & Gaylard, solicitors. For the respondent Kinali: Mr PD Burchardt, counsel. Papasavas, solicitors.
