25/02; [2002] VSC 361

SUPREME COURT OF VICTORIA

COOK v VELKRAY PTY LTD

Nettle J

23 August 2002

CIVIL PROCEEDINGS – MOTOR VEHICLE COLLISION – VEHICLE STRUCK FROM BEHIND – VEHICLE ACCELERATED FORWARD STRIKING ANOTHER VEHICLE – VEHICLE THEN STRUCK ANOTHER FOUR VEHICLES – CAUSATION – WHETHER VEHICLE'S DRIVER'S ACTIONS WERE A REASONABLE RESPONSE IN THE CIRCUMSTANCES – WHETHER DRIVER ACTED NEGLIGENTLY AFTER COLLIDING WITH THE VEHICLE IN FRONT – 'AGONY OF THE MOMENT' DECISION – CONTRIBUTORY NEGLIGENCE – WHETHER MAGISTRATE IN ERROR IN FINDING FIRST DRIVER LIABLE – WHETHER MAGISTRATE IN ERROR IN ADOPTING THE 'ALL OR NOTHING' APPROACH.

C., the driver of a motor vehicle collided with the rear of a taxi. Immediately following the impact, the taxi accelerated forward some distance colliding with another vehicle and then went further and collided with another four vehicles. At the hearing, counsel for C. indicated that the question of contributory negligence was not open and that it was an 'all or nothing' situation. The magistrate found that C. was wholly liable for the damage to the taxi. Upon appeal—

HELD: Appeal dismissed.

1. The magistrate was not in error in finding that the actions of the taxi driver in accelerating into the car in front were a reasonable response in all the circumstances, and in particular, in the context of the emergency, dilemma or stress created by the initial impact. Once the magistrate found that the taxi driver's actions were caused by C.'s negligence and they were a reasonable response to the situation created by that negligence, there was no room for the suggestion that there was a break in the chain of causation. The magistrate was conscious of the subsequent events which occurred and it could not be said that the approach adopted by the magistrate was not open.

2. In relation to the question of contributory negligence, although this was pleaded, it was expressly disavowed in favour of an 'all or nothing' approach to be based on the 'agony of the moment' authorities. In view of the fact that contributory negligence may be dealt with by apportionment and the court is now free to lay blame where properly it should fall, because of the express abandonment of contributory negligence, the magistrate was not in error in failing to deal with the issue of contributory negligence.

NETTLE J:

1. This is an appeal from a final order of the Magistrates' Court at Melbourne made on 19 December 2001, by which the appellant, Peter Cook, was ordered to pay damages of $7,030 consequent upon a motor accident, plus interest and costs.

2. On 30 April 2002 a Master of the Court made an order under Rule 58.09 of Chapter 1 of the Rules of Court which set out the following two questions for decision:

> (a) was there evidence open to find that the cause of damage to the front of the vehicle was the negligence of the respondent;
>
> (b) was there any evidence upon which it could have been found that it was reasonable for the driver of the respondent's vehicle to accelerate into the rear of the vehicle in front?

3. The facts surrounding the motor accident and the detail of what occurred were the subject of considerable evidence during the course of a two day hearing before the Magistrate. A number of witnesses gave evidence and each was subjected to a detailed cross-examination, all of which is recorded in the transcript of evidence made available to me for the purposes of this appeal.

4. Without attempting a complete summary of the evidence, I record that the accident occurred on 20 April 2001 when the appellant's vehicle, travelling south in Church Street, Richmond, struck the rear of the respondent's vehicle, a taxi and also travelling south in Church Street, due to the admitted negligence of the appellant. The impact was sufficient to damage the rear of

the taxi and to push it forward for some distance. But instead of the taxi then coming to rest, in which event the damage would have been confined to the rear of the taxi, the taxi driver almost immediately accelerated the taxi forward into the vehicle in front of the taxi, a Daewoo motor car, thereby causing significant damage to the front end of the taxi.

5. Then, after colliding with the Daewoo, the taxi driver again accelerated the taxi forward causing it to strike several more vehicles, some stationary and some on the move, until finally coming to rest more or less in the middle of the road; from which point it was later moved to the kerb.

6. I should say that the taxi driver gave evidence of a sequence of events which was significantly different to that which I have just recorded. But it is apparent that his evidence was in fundamental respects at odds with the evidence of other witnesses and that it was not accepted by the Magistrate. Having regard to the transcript of evidence to which I have referred, I have no difficulty in seeing why his Worship rejected it.

7. I should also say something about the pleadings and the submissions which were made to the Magistrate. In his Defence the appellant admitted the collision but he denied that his negligence caused the collision. He also pleaded that any damage caused to the respondent's vehicle was caused or contributed to by the taxi driver's management and control of the taxi and he gave as particulars of that allegation that the taxi driver had recklessly and deliberately accelerated the taxi into and around the path of five other vehicles and that the ensuing collisions between the taxi and other vehicles occurred over a distance of approximately 100 metres, occasioned by the reckless actions of the taxi driver.

8. In the course of final submissions to the Magistrate, counsel for the appellant again conceded that the appellant had been negligent in allowing his vehicle to collide with the taxi. But when asked by the Magistrate whether contributory negligence was open or whether it was an all or nothing situation, counsel for the appellant responded that it was all or nothing. In his submission the actions of the taxi driver in accelerating away from the point of first impact and in otherwise behaving as he had were an unreasonable response to the impact to the rear of the taxi and in effect broke the chain of causation between first impact and subsequent collisions.

9. The Magistrate did not deliver any reasons for judgment as such. He did, however, expose his reasoning during a number of exchanges between counsel and the bench in the course of argument. Thus, at page 161 his Worship said:

> "I think I can be fairly satisfied that the plaintiff accelerated away when he was hit. It is consistent with the evidence of Ms Dale, it is consistent with the evidence of the last witness, Mr Dolphin, and it's also consistent really with the whole chain of events after the initial impact, but the question really is whether if you are suddenly being hit heavily from behind and you do perceive that there is a tram coming, if the person did take inappropriate action, either he accelerated rather than coming to a stop and remaining stationary, you have to have regard for the fact that not everyone responds in a perfectly logical and lucid manner, correct? So it's a really a question of whether his conduct was so, if you like, out of line with the situation created by your client as to constitute a whole new cause of action, a whole new cause of damage."

I interpolate that the reference to "your client" is a reference to the appellant. At page 163 the Magistrate observed:

> "Now he did that, he hit the car in front of him which I think I can safely conclude was closer than 50 metres, right, but undoubtedly I don't have much doubt that he did in fact accelerate away rather than just stay where he was, but the question was (whether) that (was) altogether unreasonable or do you take it out of the line of emergency cases?"

At page 168, to somewhat similar effect, his Worship continued:

> "I said he (the taxi driver) appears to have panicked. I didn't think there was any doubt about that in terms of what happened after he bounced off the third car."

And then a little later at the same page, his Worship posed the question:

> "Is it reasonable for me to infer on all the evidence that he (the taxi driver) accelerated from the point of the impact in circumstances which fall within the dilemma or emergency cases? If so, he is entitled to succeed, if not, he is not; is that right?"

At page 171 his Worship reiterated the question, thus:

> "In this case it is a question of whether the actions of the cab driver were so unreasonable in the circumstances as to break the direction of causation. I mean, if he had done something totally out of order, like he had suddenly stopped, swung across to the wrong side of the road totally ... behaved like a complete lunatic, different matter, surely. All he's has done, he's been hit and instead of planting his foot on the brake, he's put it on the accelerator. He's careered off, he's hit into the car in front. That's what happened, that's what establishes what's happened."

At page 172 his Worship began to answer the question:

> "I agree with you, there is no doubt about that. I don't think there is any doubt about that and it is not conduct that perhaps nine out of 10 drivers would do but it is what he did in the circumstances and there is no doubt he did it after getting hit either. He got a fairly substantial hit from behind by your driver."

I interpolate that "your driver" is a reference to the appellant. At page 174, the Magistrate continued:

> "You don't push the accelerator and intend to stop, Mr Hardy; they are inconsistent. You push the accelerator because you intend to go. The question is was the forming of that intention in the circumstances reasonable or not given what had just happened to him?"

Finally, at page 183 his Worship expressed his conclusion as follows:

> "Well, it's line ball. It's close, Mr Hardy, but I'm afraid I'm against you. I'm going to accept that his conduct in accelerating away after the initial impact was reasonable in all the circumstances. Whether you call that an emergency or dilemma or situation of stress, I think that his conduct could be said to be both reasonable and a consequence of your client's initial act of impacting him in the rear. In those circumstances I think he is entitled to recover the full amount of the claim, given that there was no evidence or cross-examination directed to the division of the front damage between the Daewoo and any vehicles he may have hit subsequent to the Daewoo."

10. This morning counsel for the appellant advanced four propositions in support of his contention that the Magistrate had committed one or more errors of law in reaching that conclusion. The first was that the Magistrate had posed the wrong legal test of whether the defendant's negligence caused the frontal damage. It was said that the Magistrate had posed a test of whether the action of the taxi driver in accelerating forward was a possible response, whereas the Magistrate should have asked whether it was a reasonable response to the situation created by the defendant's negligence.

11. Secondly, it was said that the Magistrate had failed to take into account relevant considerations, by confining his attention to events between the point of first impact and the collision between the taxi and the Daewoo, and excluding from consideration both the significance of the taxi driver's subsequent aberrant behaviour (in ploughing on into another four vehicles until physically he could go no further) and the speed with which the taxi had hit the rear of the Daewoo.

12. Thirdly, it was said that there was no direct evidence that the action of the taxi driver in accelerating was a response to the stress of first impact and no evidence of primary facts sufficient from which to draw an inference to that effect.

13. Fourthly, it was said that the Magistrate had erred in refusing to accept that the taxi driver's acceleration constituted a *novus actus interveniens* when, on any reasonable view of the evidence, no other conclusion was open.

14. It will be convenient to deal with each of those propositions in turn. I reject the first proposition, because as will have been seen from the passages of the Magistrate's reasoning which I have set out, his Worship repeatedly posed the question for decision and ultimately answered it in

terms of whether the conduct of the taxi driver (in accelerating into the Daewoo) was a reasonable response in all the circumstances and, in particular, in the context of the emergency, dilemma or stress created by the initial impact. I regard his Worship's formulation of the test as according with authority[1] and with the principle that causation is, in the end, to be resolved as a common sense question of fact[2].

15. I reject the second proposition because I think it plain that the Magistrate did take into account the events which followed the impact with the Daewoo. It is true that his Worship eschewed an assessment of whether the taxi driver acted negligently in what he did after hitting the Daewoo[3]. And it is arguable that if his Worship had undertaken such an assessment, it may have influenced the view which he took of the events which occurred before the taxi hit the Daewoo. But because the question for the Magistrate was one of fact, it was open to the Magistrate to give the subsequent events such weight as he considered fit, even if others might take a different view of their significance, unless the weighting which he gave them is to be regarded as wholly unreasonable. I do not think that it is.

16. To put it another way, the Magistrate was conscious of the events following the impact with the Daewoo. He adopted the approach that they did not help him to reach a view about what caused the events up to the point of impact with the Daewoo. And, as the finder of fact, he was entitled to adopt that approach.

17. I also reject the appellant's third proposition, because I consider that there was evidence of primary facts from which it was open to infer that the act of acceleration was the result of reaction under stress to the initial impact.

18. That is not to say that I would have reached the same conclusion. But that is not the point. The question on this appeal is not whether I regard the actions of the taxi driver as a reasonable reaction to the situation created by the appellant's negligence. The question is whether it was open to the Magistrate as a matter of law to reach the view that they were[4]. I consider that it was. It accords with everyday experience that people react instinctively to an episode of extreme stress in ways which would be regarded as irrational in other circumstances. That does not mean that their conduct is unreasonable. In the cool detachment of hindsight it may seem an irrational reaction to a rear end impact to apply the accelerator rather than the brake. But that does not mean that it is necessarily an unreasonable response to press the wrong pedal in the state of excitement and fear which is capable of being engendered by a car accident. To suggest that it must be otherwise, which after all is what the appellant's argument amounts to, is to depart from the realities of ordinary human behaviour.

19. The fourth proposition necessarily falls with the third. Once it was found that the taxi driver's action was caused by the appellant's negligence, and was a reasonable response to the situation created by that negligence, there was no room for the suggested break in causation[5].

20. That is enough to dispose of this appeal. In case it matters, however, I should say that in the course of the hearing before the Magistrate and again before me this morning, considerable reference was made to the so-called agony of the moment doctrine[6] and to the degree of latitude which it affords.

21. The Magistrate more than once articulated the concept in terms that a plaintiff in a case of this kind (*scil.* an agony of the moment case) is to be afforded a degree or even a considerable degree of latitude before his or her reaction to the agony will be adjudged unreasonable. It was suggested that the use of those expressions bespoke a misconception on the part of the Magistrate that a plaintiff was entitled to recover even if his or her reaction to first impact were something less than reasonable.

22. I do not consider that the Magistrate made any error of the kind suggested. It appears plain to me that his invocation of the concepts of "latitude" and "considerable latitude" did no more than recognise, as a common sense matter of fact, that in some circumstances a defendant's negligence may be regarded as being responsible for the production of what would otherwise be regarded as an aberrant response. In the view of the Magistrate it was responsible, and in my view it was open to his Worship so to conclude.

23. The final aspect of the matter which warrants attention is the question of contributory negligence. It will be remembered that although contributory negligence was pleaded, in the course of final submissions before the Magistrate it was expressly disavowed in favour of an all or nothing approach to be based on the agony of the moment authorities. It may be thought that if the Magistrate had been invited to consider the question of contributory negligence he could have found that there was some negligence on the part of the taxi driver. The agony of the moment doctrine, somewhat like the last opportunity rule, originated as a mechanism to ameliorate the excesses of rules relating to contributory negligence before the enactment of apportionment legislation. So long as contributory negligence was a complete defence to a claim, it was understandable that courts would attempt to excuse contributory negligence as the results of the agony of the moment or of a failure of another to exploit the last opportunity to avoid calamity. Now that contributory negligence may be dealt with by apportionment, there is not the same need to go to those lengths; for the court is now free to lay blame where properly it should fall[7].

24. No doubt it was with that in mind that counsel for the appellant sought to have me amend the questions of law for appeal, to include contributory negligence. I refused to do so, for three reasons.

25. First, because of the express abandonment of contributory negligence below, I do not consider that it is open to contend that the Magistrate made an error of law in failing to deal in his reasons for judgment with the issue of contributory negligence. I take the view that the final submissions, as much if not more than the pleadings, defined the issues for decision and that his Worship decided accordingly.

26. Secondly, although contributory negligence was not abandoned as an issue until final submissions, and so it may be thought that the respondent called evidence and conducted cross-examination on the basis that contributory negligence remained an issue, the whole course of evidence appears to have been directed to an all or nothing approach.

27. Counsel for the appellant submitted that the cross-examination which appears at page 36 of the transcript is properly to be characterised as directed to the issue of whether or not the taxi driver was guilty of contributory negligence in failing to stop or to slow after first accelerating. But I must say that I do not read it in that sense. It appears to be part of a continuum of suggestions going to the proposition (rejected by the Magistrate) that the taxi driver was forced from his original position to the tram lines and then from there, in an attempt to escape an approaching tram, back into the path of other stationary and moving vehicles.

28. Thirdly, and although in times past it was not uncommon to allow an applicant for order to review to raise points of law not argued below, recent authority[8] suggests that s109 of the *Magistrates' Court Act* (under which this appeal is brought) is sufficiently different to the old order to review regime to mean that it is no longer the case or, at least, that it should not ordinarily be regarded as appropriate to allow new points to be raised.

29. The decision in *Mond v Lipshut* is based upon a number of considerations, including the principles laid down in *Suttor v Gundowda Pty Ltd*[9] and *Coulton v Holcombe*[10], as well as the general disinclination of appellate courts to allow issues to be expanded by addition on appeal of issues not raised below. In this case the sorts of considerations which informed *Suttor v Gundowda* and *Coulton v Holcombe* do not have the same role to play. As has already been observed, it may be supposed that the respondent adduced evidence and conducted cross-examination upon the premise that contributory negligence was in issue. It is therefore more difficult than in *Mond v Lipshut* to say that the case below would have been conducted differently if the issue had been raised. Nevertheless, it remains that once the issue was abandoned there was no need for the Magistrate to consider it and, having regard to the tenor of his Worship's observations on other issues, it cannot be gainsaid that if the issue of contributory negligence had been raised his Worship may well have assessed it at zero.

30. Perhaps the problem could be overcome by remitting the matter for further hearing before the Magistrate. But I did not consider that such a course would necessarily produce a conclusion for the respondent as satisfactory as that which might have been obtained if the issue had been addressed in the first place whilst the facts were still fresh in the Magistrate's mind. In my view,

it is not open to add the question of contributory negligence without causing prejudice to the respondent.

31. The appeal will be dismissed.

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[1] See, for example, Fleming, *The Law of Torts*, 9th edition at pages 318-320, *Jones v Boyce* [1816] EWHC KB J75; (1816) 1 Stark. 493, 171 ER 540, *Hicks v Roberts* (1977) 16 ALR 466, 469.
[2] *March v Stramare* [1991] HCA 12; (1990-91) 171 CLR 506, 515; (1991) 99 ALR 423; (1991) 65 ALJR 334; (1991) 12 MVR 353; [1991] Aust Torts Reports 81-095, 515.
[3] See his Worship's observation at 172.9 of the transcript.
[4] See *Young v Paddle Bros Pty Ltd* [1956] VicLawRp 6; [1956] VLR 38 at 41; [1956] ALR 301, *Spurling v Development Underwriting (Vic) Pty Ltd* [1973] VicRp 1; [1973] VR 1 at 11; (1972) 30 LGRA 19 and *S v Crimes Compensation Tribunal* [1998] 1 VR 83, especially in the judgment of Phillips JA at pages 88-93.
[5] See and compare *March v Stramare, supra* at 517; *Bennett v Minister of Community Welfare* [1992] HCA 27; (1992) 176 CLR 408, 428; (1992) 107 ALR 617; (1992) 66 ALJR 550; [1992] Aust Torts Reports 81-163; *Medlin v State Government Insurance Office* [1995] HCA 5; (1995) 182 CLR 1 at 6; (1995) 127 ALR 180; [1995] Aust Torts Reports 81-322; (1995) 69 ALJR 118.
[6] See Hart and Honore, *Causation in the Law*, 5th edition at pages 142, 143 and 184; Fleming, *The Law of Torts*, ibid; *Jones v Boyce*, *supra*; *Ansell v Arnold* (1963) SASR 355; *United Uranium No Liability v Fisher* (1955) ALR 99 at 133; *The Bywell Castle* (1879) 4 PD 219; 41 LT 747; and *British School of Motoring Ltd v Simms* [1970] 1 All ER 317.
[7] See Fleming, *The Law of Torts*, *ibid*; *March v Stramare*, *supra* at 511-513.
[8] *Mond v Lipshut* [1999] VSC 103; [1999] 2 VR 342.
[9] [1950] HCA 35; (1950) 81 CLR 418; [1950] ALR 820.
[10] [1986] HCA 33; (1986) 162 CLR 1; 65 ALR 656; (1986) 60 ALJR 470.

APPEARANCES: For the appellant Cook: Mr SP Hardy, counsel. Glenys Dolphin, solicitor. For the respondent Velkray Pty Ltd: Mr IR McEachern, counsel. Adams Maguire Sier, solicitors.
