10/94

SUPREME COURT OF VICTORIA

CITY OF RICHMOND v DELMO

Smith J

9, 13 November 1992

NEGLIGENCE – DUTY OF CARE – GOLF COURSE NEAR BUSY ROAD – BALL STRUCK BY GOLFER – PASSED THROUGH WIRE MESH FENCE – HIT PASSING MOTOR CAR – DAMAGE CAUSED – WHETHER DUTY OF CARE OWED BY GOLF COURSE OWNER – WHETHER DUTY BREACHED.

Where a golf ball, after being struck, passed through a cyclone wire mesh fence and hit a passing motor vehicle thereby causing damage, it was open to a magistrate to conclude that the owner of the golf course owed a duty of care to the motor vehicle owner and that it breached the duty by failing to provide adequate fencing.

SMITH J: [1] In 1991 Mr Delmo sued the Mayor, Councillors and Citizens of the City of Richmond ("City of Richmond") and Mr Smith for damage done to Mr Delmo's Porsche motor car by a golf ball struck by Mr Smith while playing on the Richmond Municipal Golf Course. Mr Smith apparently sliced his drive from the first tee. The ball found its way on to Madden Grove where it struck Mr Delmo's Porsche, causing damage to it. The City of Richmond had the responsibility of managing the Golf Course. Mr Delmo's claim against the City of Richmond was brought in negligence.

On 16th December, 1991, the Magistrates' Court at Melbourne ordered that the City of Richmond pay Mr Delmo, the sum of $2,002.13 together with interest of $120.42 and $1,100.70 for costs. Mr Delmo was unsuccessful against the other defendant, Brendan Smith and was ordered to pay his costs.

The City of Richmond has appealed to this Court from the Magistrate's decision. The order referring the questions of law for the determination of this Court was made on the 13th February, 1992. It stated the following:-

> "The questions of law that the Appellant shows to be raised by the appeal are whether:-
> (a) the Magistrate was in error in holding that the Appellant owed a duty of care to the Respondent;
>
> (b) if the Appellant did owe a duty of care to the Respondent the Magistrate was in error in holding that the Appellant was in breach of that duty;
>
> (c) the Magistrate was in error in holding that the damage to the Respondent was the damage which the Appellant ought reasonably to have foreseen; **[2]**
>
> (d) the Magistrate was in error in holding that the Appellant had not taken reasonable precautions to prevent the damage to the Respondent;
>
> (e) the Magistrate was in error in holding that it was more than a mere possibility that a golf ball could pass through the golf course fence;
>
> (f) the Magistrate was in error in holding that the Appellant was liable in negligence to the Respondent when he had held that the Defendant Brendan Smith was not so liable;
>
> (g) the Magistrate was in error in finding that the golf ball passed through the golf course fence, as there was no evidence to support the finding;
>
> (h) the Magistrate was in error in admitting the Evidence of the witness Robert Payne."

Before me, the appellant, the City of Richmond indicated that it was abandoning question (a) and question (f). In abandoning question (a), counsel for the appellant conceded that the City of Richmond owed a duty to exercise reasonable care to avoid damage to passing motor vehicles in

Madden Grove from golf balls which were struck by golfers on the golf course and escaped from it on to Madden Grove. The appellant's argument in essence was that the learned magistrate should not have held that that duty of care had been breached. The City of Richmond had caused fencing to be constructed along the northern boundary between the first hole and Madden Grove with a view to preventing the escape of golf balls into Madden Grove. Counsel argued that the learned magistrate should have held that the City of Richmond had discharged its duty of care by reason of its construction and maintenance of the fencing. It comprised a section of fence 5 feet high, a section 12 or 15 feet high and another section 22 feet high.

As to the remaining questions, questions (b) to (e) challenge the learned magistrate's finding that there was a **[3]** breach of the duty of care. The questions raised in questions (c), (d) and (e) indicate the specific matters where it is alleged the learned magistrate erred – that he found, that:

- the damage ought reasonably to have been foreseen;
- reasonable precautions were not taken to prevent it; and
- there was more than a possibility that a golf ball could pass through the fence.

Question (g) raises the issue of whether there was evidence to support the learned magistrate's finding that the ball passed through the fence and question (h) concerns the correctness of admitting certain evidence. I will deal first with these two questions and then return to the main issue of the appeal – whether it was open to the learned magistrate to find that the City of Richmond was in breach of its duty of care. Before going to any of the questions, however, I propose to first set out the substance of the learned magistrate's reasons. These are set out in affidavits filed by both parties. The learned magistrate found that the City of Richmond had a duty to protect road users. He found that there was sufficient proximity between the plaintiff and the City of Richmond. He held that it was foreseeable that a golf ball could enter the fence and cause damage to road users. He held that this risk was more than a mere possibility and steps could be taken to protect road users from that risk. He held that there was sufficient height in all the circumstances to protect people by preventing golf balls going over the fence. However, **[4]** they could still pass through it. He said that he was satisfied on the balance of probabilities that the golf ball had travelled at waist height through the fence and that the fence could have had further protection to prevent a golf ball going between the wires. He held that further protection was needed to make a more sufficient fence. He also held that the golf ball had struck the plaintiff's car in the region of what he described as "the medium section of the fence".

As to question (g), I am not persuaded that the Magistrate erred in finding that the golf ball passed through the fence. It was plainly open to him to make that finding. It is sufficient to refer to the evidence of the golfer, Mr Smith, that he hit the ball towards the 22 foot section of the fence, that it did not go over the 5 foot section, that the ball travelled no higher than waist height for some 150 metres, that he was a left-hander and that he had hit the ball with a severe slice. There was also, of course, the evidence that a golf ball struck the plaintiff's car in Madden Grove and the evidence linking that golf ball with the one struck by Mr Smith. The City of Richmond cannot demonstrate that there was no evidence to support the finding.

I turn to question (h), which raises the alleged error of permitting Robert Payne to be called as a witness. Mr Payne gave evidence of his car being struck by a golf ball on the 24th February, 1991, to the west of the situation where the plaintiff's car was struck in Madden Grove. I indicated in the course of argument that it was relevant, in my view, to establish the frequency and circumstances in which golf balls escaped from the golf course and in those circumstances the **[5]** evidence of that witness appeared to me to be relevant and admissible, albeit marginally so. I return then to the major issue raised by the appeal. It is well-established that the question of whether a defendant has breached a duty of care is a question of fact and very much a jury question. (cf. Lord Normand in *Bolton v Stone* [1951] UKHL 2; [1951] AC 850 at 862; [1951] 1 All ER 1078; [1951] 1 TLR 977.) The test to be applied in determining whether there has been a breach of the duty of care is—

> "To determine what a reasonable man would do by way of response to the risk. The perception of the reasonable man's response calls for consideration of the magnitude of the risk and the degree of the probability of its occurrence, along with the expense, difficulty and inconvenience of taking alleviating action and any other conflicting responsibilities which the defendant may have. It is only when these matters are balanced out that the Tribunal of fact can confidently assert what is

> the standard of response to be ascribed to the reasonable man placed in the defendant's position." (per Mason J *Wyong Shire Council v Shirt* [1980] HCA 12; (1980) 146 CLR 40 at 47; (1980) 29 ALR 217; (1980) 54 ALJR 283; (1980) 60 LGRA 106; 47 Aust Torts Reports 80-278).

The City of Richmond relied heavily on the famous House of Lords decision of *Bolton v Stone* [1951] UKHL 2; [1951] AC 850 at 862; [1951] 1 All ER 1078; [1951] 1 TLR 977. The effect of that decision, however, was commented on in *"The Wagon Mound" (No.2)* [1966] UKPC 1; [1967] 1 AC 617; [1966] 2 All ER 709 in the following terms:

> "What that decision did was to recognise and give effect to the qualification that it is justifiable not to take steps to eliminate a real risk if it is small and if the circumstances are such that a reasonable man careful of the safety of his neighbour would think it right to neglect it".

In approaching the questions relating to the learned magistrate's decision about the alleged breach of duty, I proceed on the basis that the learned magistrate found that the ball had passed through the fence and had declined to find that **[6]** it had passed through any holes resulting from deterioration of the fence or other unusual openings. This view, it appears to me, is the preferred view; for there was a conflict of evidence as to whether any such holes existed yet the findings to which I have referred speak of the need for further protection to prevent a golf ball going between the wires and say nothing of the possibility of the ball passing through holes in the fence. Other interpretations may be open but I proceed for the present with the interpretation I have suggested, as it appears to me to be the more likely. In relation to each of the remaining questions, the argument for the Appellant was based on the proposition that the fence having been constructed and the Magistrate having found the ball had passed through the fence, the risk of such an event happening with attendant damage was so slight that

- the damage suffered was not something that ought reasonably to have been foreseen,
- the precautions taken to prevent damage were reasonable, and
- it was no more than a mere possibility that a golf ball could pass through the fence and cause damage.

It was argued that the magistrate erred in making contrary findings and erred in his ultimate finding that there was a breach of the duty of care. The appellant relied upon a number of matters relating to the possible infrequency of a ball escaping into Madden Grove in the way found by the learned magistrate. There was evidence, for example, that since the section of the fence had been raised from about 12 to 22 feet there had been a 90% **[7]** reduction in the problem of golf balls escaping into Madden Grove. Further, there was evidence that only once every six months was a ball reported by members of the public to have gone over the fence since that section of the fence had been raised. There was evidence from Mr Aitken, the golf course manager, that he had never known of any golf balls going through the 5 or 15 foot sections. His evidence also was that a golf ball could not pass through the fencing unless the ball was deliberately hit at the fence because if a ball hit the fence otherwise, it would do so on an angle and bounce off the fence.

The learned magistrate did not indicate whether he accepted this evidence of Mr Aitken. If he did, the evidence of a 90% reduction in the problem left open to him to find that there was still a significant problem. The fact that complaints had come in at the rate of one every six months is only a very limited indication of the extent of the problem. It merely told the learned magistrate, if he accepted the evidence, of formal complaints known to Mr Aitken. It would be open to the learned magistrate to assume that more balls had escaped from the golf course and that more golf balls had done so in a manner which caused danger than was reflected by the frequency of formal complaints. If it be necessary for a golf ball to strike the fence at right angles, it was open to the learned magistrate to find that a ball hit with a significant slice or hook might well be travelling at right-angles to the fence when it struck the fence and that the problem of slicing and hooking golf balls is not uncommon amongst golfers. It was also open to the learned magistrate to take the view that an **[8]** escaping golf ball has the potential to result in serious motor accidents, if it strikes a car and, for example, breaks the windscreen of a car. It was also open to him to take judicial notice that Madden Grove is a busy street taking all types of traffic.

A matter which requires special consideration is whether remedial measures could have

been taken to address the risk. The learned magistrate held that steps could have been taken to prevent a golf ball going through the fence. No evidence however was led about the possibility of remedial measures. I am satisfied, however, that this case is one that comes within that class of case where technical and therefore expert evidence is not required and that it was open to the learned magistrate to act on "the common knowledge of mankind". *Carlyle v Commissioner for Railways* (1954) 54 SR (NSW) 238 at 243; 71 WN (NSW) 202. In addition, there was evidence before the learned magistrate of the nature of the fencing. It was typical cyclone wire mesh which had been manufactured in such a way that strands of wire were around each other in an interlocking pattern. It was open to the learned magistrate to infer that if the mesh could be manufactured in that pattern, it could be manufactured in other patterns, including a pattern with smaller openings. No evidence was led by the City of Richmond to suggest that this was not possible. Applying the principles of *Jones v Dunkel* [1959] HCA 8; (1959) 101 CLR 298; [1959] ALR 367; 32 ALJR 395, the failure to produce such evidence was something that the learned magistrate was entitled to use as strengthening the inference I have mentioned. Thus I am satisfied that it was open to the learned magistrate to proceed on the basis that there were reasonable **[9]** alternatives available to the City of Richmond to prevent the escape of golf balls through the fence.

Views might differ about the seriousness of the risk or the frequency of its occurrence but it was plainly open to the learned magistrate to find that they were such as to warrant the provision of more adequate fencing and to find that the City of Richmond was in breach of its duty of care in failing to provide adequate fencing. I am not persuaded that error has been shown in the manner raised in the above questions. Accordingly, the appellant having failed in this appeal in respect of all questions pursued before me, the appeal should be dismissed.

APPEARANCES: For the appellant City of Richmond: Mr P Page, counsel. Peter Eggleston & Associates, solicitors. For the respondent Delmo: Mr R Lancy, counsel. Carey Van Rompaey, solicitor.
