04/71

SUPREME COURT OF VICTORIA

FORD v BRENT

Newton J

25 February 1971

CIVIL PROCEEDINGS – MOTOR VEHICLE COLLISION – DAMAGE CAUSED TO BOTH VEHICLES – WINDSCREEN OF THE DEFENDANT'S MOTOR VEHICLE STRUCK WITH A ROCK CAUSING THE WINDSCREEN TO GO OPAQUE – DEFENDANT LOST CONTROL OF HIS MOTOR VEHICLE – DEFENDANT MISTAKENLY ACCELERATED THEREBY COLLIDING WITH THE COMPLAINANT'S VEHICLE – FINDING BY MAGISTRATE THAT DEFENDANT NOT LIABLE FOR DAMAGE CAUSED – WHETHER MAGISTRATE IN ERROR.

HELD: Order nisi discharged.
1. It was reasonably open to the Stipendiary Magistrate to take the view that the defendant's action in mistakenly placing his foot on the accelerator was the cause of the collision, and was itself the result of the defendant's shock and loss of control of his car arising from the large rock striking his windscreen and injuring his passenger, and rendering his windscreen opaque, and that this mistake on the part of the defendant was not inconsistent in all the circumstances with the exercise of reasonable care in the management of his car.

2. The exercise by a motorist of reasonable care does not imperatively require that he shall drive his car on the assumption that his windscreen is liable to be struck at any moment by a large rock flung by some unruly bystander, nor does it imperatively require that if his windscreen is hit by a large rock he must nevertheless make no mistake in the operation and control of his brakes and accelerator, notwithstanding his own shock and the general agony of the moment. The law does not require a motorist to be perfect. The appropriate defendant should have been the hurler of the rock.

NEWTON J: In my opinion this Order Nisi ought to be discharged.

The burden lay upon the complainant to satisfy the Stipendiary Magistrate on the balance of probabilities that the damage to the complainant's motor car had been caused by negligence on the part of the defendant, that is by a failure on the part of the defendant to exercise reasonable care in the management and control of his motor car in all the circumstances.

Evidence, which the Stipendiary Magistrate accepted, established that when the defendant's car was travelling in a westerly direction along Little LaTrobe Street at about 15 or 20 miles per hour and was about 55 to 60 feet to the east of the complainant's car (which was stationary) a person threw a large rock through the windscreen of the defendant' car and injured his passenger; this evidence further established that the defendant was dazed by this incident, and could not see properly since his windscreen had gone white, and that the defendant lost control of his car and in attempting to apply the foot brake mistakenly put his foot on the accelerator, with the result that his car increased speed and struck the complainant's car about one second later.

It is common ground that the decision of the Stipendiary Magistrate dismissing the complaint cannot be set aside, unless it was a decision which no reasonable tribunal could have reached on the evidence which it accepted: see *Taylor v Armour Co Pty Ltd* [1962] VicRp 48; [1962] VR 346 at pp351-2; (1961) 19 LGRA 232; compare *Middleton v Melbourne Tramway & Omnibus Co Ltd* [1913] HCA 45; (1913) 16 CLR 572 at pp579-80 and 582; and *Williams v Smith* [1960] HCA 22; (1960) 103 CLR 539 at pp544-5; [1960] ALR 425; 34 ALJR 7.

In my opinion, it was reasonably open to the Stipendiary Magistrate to take the view that the defendant's action in mistakenly placing his foot on the accelerator was the cause of the collision, and was itself the result of the defendant's shock and loss of control of his car arising from the large rock striking his windscreen and injuring his passenger, and rendering

his windscreen opaque, and that this mistake on the part of the defendant was not inconsistent in all the circumstances with the exercise of reasonable care in the management of his car. The exercise by a motorist of reasonable care does not imperatively require that he shall drive his car in Little LaTrobe Street on the assumption that his windscreen is liable to be struck at any moment by a large rock flung by some unruly bystander, nor does it imperatively require that if his windscreen is hit by a large rock he must nevertheless make no mistake in the operation and control of his brakes and accelerator, notwithstanding his own shock and the general agony of the moment. The law does not require a motorist to be perfect.

As at present advised, I would venture to say that the appropriate defendant in this case would have been the hurler of the large rock. But perhaps his identity is unknown, or he is bereft of financial resources. The order nisi will be discharged with costs fixed at $120.

APPEARANCES: For the applicant/defendant Ford: Mr D Graham, counsel. James Gamble, solicitor. For the respondent/complainant Brent: Mr JV Kaufman, counsel. Keith Hercules & Sons, solicitors.
