08/93

SUPREME COURT OF VICTORIA

IRELAND and ANOR v SANCHEZ

Hayne J

10 December 1992

CIVIL PROCEEDING – MOTOR VEHICLE COLLISION – LARGE TRUCK BLOCKING ROADWAY – TRUCK NOT WELL LIT – DARK AND RAINING – TRUCK STRUCK BY VEHICLE TRAVELLING ALONG ROADWAY – QUESTION OF NEGLIGENCE – WHETHER APPORTIONMENT APPROPRIATE.

S. was driving his motor car at the speed limit in the middle lane of the Maroondah Highway. I. was the driver of a large truck which entered the highway and stopped in a gap in the median strip with its rear wheels about halfway across the lane occupied by S.'s vehicle. It was dark and raining at the time and the truck was not well lit.

HELD: It was open to the magistrate to find that the:
(a) truck driver was negligent and 90% to blame for not waiting until the road was clear and in taking up a position in the middle of the road thereby creating a considerable hazard;

(b) motor car driver was negligent and 10% to blame for not looking sufficiently far ahead given the prevailing conditions and the speed at which he was travelling.

HAYNE J: [1] At about 5 to 7 on the morning of 18 July, 1990, a motor vehicle collision occurred at the intersection of Cook Road and the Maroondah Highway, Mitcham. It was still dark and raining. The collision was between a Toyota Seca motor car driven by Tomas Sanchez and an 8-wheeler Volvo truck, 30 to 35 feet long and 11 and a half feet high, which with its then load weighed about 25 tonnes. The truck was owned by Brambles Australia Limited and driven by Raymond Ireland. Ireland had just collected a load of rubbish in Cook Road and had driven south down Cook Road to the Maroondah Highway, intending to turn right and travel west along the highway towards the city. At that point, the highway had service lanes on each side of it and had three principal lanes on each carriageway, divided by a central median strip or plantation. The plantation was indented at the intersection of Cook Road in order to provide right-hand turning lanes in both directions. Ireland said in evidence he gave before the Magistrates' Court that the service road –

> "was all clear, and I moved to the gap in the plantation between the service road and the highway and stopped again. My indicators were on for a right-hand turn ... There was nothing at all on my right and I moved across to the central gap at an angle. Unfortunately, a city bound car moved into the rightmost of the lanes to my left, so I was obliged to stop with the front of my truck almost at the further edge of the plantation and the body of the truck extending back across the Right Hand Turn Only lane, the rightmost through lane and approximately half of the centre lane. I sat there for some time. Two waves of traffic came from the Mitcham Road area. There were a good 20 to 30 cars in each wave ... After the second wave of traffic, there was a bit of a gap ... A few seconds after the last wave, I heard a loud crash and felt the truck's rear pushed to the side."

[2] Sanchez had struck the back of the truck. Sanchez brought proceedings in the Magistrates' Court against Ireland and against Brambles. The Magistrate held that each party was negligent and apportioned liability between them finding that the defendants were 90 per cent to blame and the plaintiff 10 per cent to blame for the accident that had happened. Ireland and Brambles now appeal pursuant to s109 of the *Magistrates' Court Act* 1989. That appeal, of course, is limited to an appeal on questions of law and it is said that the errors made below consisted here in the Magistrate reaching conclusions that on the evidence could not reasonably have been reached. As counsel for the appellants acknowledged, the burden undertaken by the appellants on such an appeal is onerous, for the question that is raised must be judged according to whether the court below could reasonably have reached the conclusion which it did. (See *Young v Paddle Bros Pty Limited* [1956] VicLawRp 6; [1956] VLR 38; [1956] ALR 301; *Hardy v Gillette* [1976] VicRp 36; (1976) VR 392; *Transport Accident Commission v Hoffmann* [1989] VicRp 18; [1989] VR 197; (1988) 7 MVR 193).

The attacks made on the Magistrate's findings were made in three ways. It was submitted, first, that it was not open on the evidence to the Magistrate to find that Ireland or Brambles had been negligent. Second, it was submitted that although Sanchez had been found by the Magistrate to have been negligent, the Magistrate ought to have found him negligent in ways different from the ways in fact found. Thirdly, it was submitted that if contrary to the primary submissions of the appellants, the Magistrate could have found Ireland or Brambles negligent, then responsibility for the accident should have been **[3]** apportioned otherwise than the way in which the Magistrate in fact did so.

As always on appeals such as this where no transcript has been taken of the proceedings below, the Court must consider the matter on the basis of what is necessarily an imperfect account of the evidence below and the reasons for the Magistrate's findings In saying that, I am not in any way to be taken as being critical of the appellants or their advisers; it is simply the inevitable consequence of the way in which these proceedings must be conducted.

As recorded in the affidavit of the appellant Ireland, the principal findings made by the Magistrate that are relevant to the present matter were these.

> The Magistrate found that Sanchez had been travelling at the speed limit along Maroondah Highway going east and that he had been travelling downhill in the middle of the three lanes on that part of the carriageway.
>
> The Magistrate found that Ireland's truck had stopped, straddling the eastbound carriageway such that the rearmost wheel of the truck was very probably midway across the middle of the three lanes.
>
> The Magistrate found that the truck was not well lit.

He found that the plaintiff did not see the truck until very shortly before the collision. Although Sanchez braked and skidded, this had only a marginal impact on his speed. The Magistrate held that the truck, stopped where it was, **[4]** "was a substantial hazard". He said that it was not necessary for the truck driver to have made his turn where he did and that he had created a risk to other road users He went on to say that there was a real risk that the truck would have, as he put it, "to prop" in the gap where he did, that it was a slow-moving truck and that the truck had stopped where it had on a wet, dark road for 2 minutes blocking two lanes of the eastbound carriageway. The Magistrate held that there was "substantial negligence" on the part of the truck driver. He referred to three matters in this respect; namely, taking the route that the driver had taken, "not waiting until it was all clear" and "he did not give way to on-coming traffic 2 minutes down the road, as he knew or ought to have known it would cause and could be blocked in those conditions". He found that the plaintiff, Sanchez, "was driving down the road doing his best" but that he "in part contributed by not looking ahead". He described Sanchez' contribution to the accident as "minimal". He therefore found Ireland and Brambles 90 per cent responsible for the accident and Sanchez 10 per cent. In my view, each of these findings was open on the evidence.

Counsel for the appellants submitted that on the evidence, Ireland was not negligent because when Ireland decided to move from where he had stopped at the division between the service road and the eastbound lanes, he thought it was clear to do so. However, in my view, the evidence below was such that it was open to the Magistrate to conclude that Ireland moved from the position near the service road median strip at a time when he could not safely have completed the right-hand turn that he intended **[5]** to make even if the city bound car mentioned by Ireland in his evidence had not moved, as it did, from the centre lane to the lane closest to the central plantation.

Thus it was, in my view, open to the Magistrate to conclude that Ireland moved into the position that he did at a time when there was a significant risk that in doing so, he would thereby create the very considerable hazard presented by a stationary truck of the dimensions that I have mentioned. Thus, it was open to the Magistrate to find that there was negligence on the part of Ireland "in not waiting until it was all clear". In those circumstances, it is not necessary for me to say whether it was open to the Magistrate to find, as he did, that given the difficulties likely to be encountered in coming out of Cook Road and turning right onto the Maroondah Highway the driver should have taken, or the company could have prescribed, a route different from that which was in fact adopted. The evidence below of the extent to which the route was prescribed by the

company is, in my view, not altogether clear. If it were necessary for me to form some conclusion on this aspect of the matter, it would not seem to me to be demonstrated that the Magistrate could not have concluded that there was negligence in taking the route that Ireland in fact took.

As I have noted earlier, the Magistrate spoke in his findings in terms of Ireland not giving way "to on-coming traffic 2 minutes down the road". At first sight, that comment suggests an unusually high standard of care being required of Ireland. However, the significance of the comment is to be understood in the light of the immediately succeeding words recorded concerning the **[6]** Magistrate's findings – that Ireland "knew or ought to have known it would cause and could be blocked in those conditions". (By this I understand the Magistrate to be referring to the significant risk that Ireland would have to stop his truck in the position that in fact he did.) It follows that I am of the view that the Magistrate could find on the evidence below that Ireland was negligent. As I have already noted, the Magistrate found that Sanchez did not keep a proper lookout; that finding was inevitable given the evidence of Sanchez that he did not see the truck until the last moment.

The appellant directed criticism towards the Magistrate's finding recorded as being that the plaintiff's (that is, Sanchez') contribution to the accident was minimal – "It was caused by some human factor and was not due to the way of his driving". There may be some doubt about exactly what the Magistrate had in mind in this comment. The doubt, however, may be attributable to the difficulty inherent in the nature of the record that exists of his findings or it may be attributable to taking a single statement out of the context in which it ought properly to be understood. It is, in my view, enough to say that the statement "it was caused by some human factor and was not due to the way of his driving" is not such as to cause me to conclude that the Magistrate failed to direct himself on the question of negligence on the part of Sanchez otherwise than according to law.

The appellants submitted that the Magistrate should have found (but did not find) that Sanchez was travelling at an excessive speed. The Magistrate found that before the accident Sanchez was travelling at the speed limit, **[7]** 75 kph. Of course, the finding that the driver was travelling at the maximum speed allowed by law is by no means conclusive of the question whether that speed was in all the circumstances excessive. But the question of the speed at which Sanchez was travelling on this occasion does not, in my view, in the circumstances of this case raise any separate question for consideration from Sanchez' failure to keep a proper lookout – failure adverted to by the Magistrate. Even if it were appropriate to have regard to notions of last clear chance or opportunity to avoid the accident, something which I gravely doubt, Sanchez' negligence in this matter lay in the fact that he was not looking sufficiently far ahead given the conditions and the speed at which he was travelling. I do not consider that the appellant demonstrates any error on the part of the Magistrate in this respect.

It has long been held that a finding on a question of apportionment is a finding upon a -

> "question not of principle or of positive findings of fact or law but of proportion, of balance and relative emphasis and of weighing different considerations. It involves an individual choice or discretion as to which there may well be differences of opinion by different minds". (*British Fame v Macgregor* (1943) AC 197 at 201.)

As was said by the High Court in *Podrebersek v Australian Iron & Steel Pty Limited* [1985] HCA 34; (1985) 59 ALR 529; (1985) 59 ALJR 492 at 494; [1985] Aust Torts Reports 80-321, "such a finding if made by a judge is not lightly reviewed". Their Honours go on to say,

> "The making of an apportionment as between a plaintiff and a defendant on their respective shares in the responsibility for the damage involves a comparison both of culpability, that is of the degree of departure from the standard of care of the reasonable man ... and of the relative importance of the acts of the parties in causing the damage ... It is the whole conduct of each **[8]** negligent party in relation to the circumstances of the accident which must be subjected to comparative examination. The significance of the various elements involved in such an examination will vary from case to case. For example, the circumstances of some cases may be such that a comparison of the relative importance of the acts of the parties in causing the damage will be of little, if any, importance.

Thus, the question presented to the Magistrate of what apportionment should be made between the plaintiff and the defendant of their respective shares in the responsibility for the

damage was a question pre-eminently for the Magistrate to make on the basis of all of the evidence before him. The fact that the impression created in my mind by a necessarily imperfect and incomplete record of the evidence may well have led me to reach some other, different comparison and apportionment is, I think, nothing to the point. For the appellants to succeed on this aspect of their appeal they must show that the Magistrate made an error of law as, for example, by applying a wrong principle. I do not consider that here the appellant has shown any such error.

It follows that for these reasons, I consider that the appeal should be dismissed.

APPEARANCES: For the appellants Ireland and Brambles Australia: Mr JR Dixon, counsel. Battley & Co, solicitors. For the respondent Sanchez: Mr D McDonald, counsel. Wainwright Ryan, solicitors.
