29/79

HIGH COURT OF AUSTRALIA

TNT MANAGEMENT PTY LTD v BROOKS

Gibbs, Stephen, Mason, Murphy and Aickin JJ

28 February 1979

(1979) 23 ALR 345; (1979) 53 ALJR 267 (Noted 53 ALJ 294; [1979] NZLJ 502; 3 UNSWLJ 415)

NEGLIGENCE – PROOF OF – INFERENCES FROM CIRCUMSTANTIAL EVIDENCE – HEAD ON COLLISION OF TWO VEHICLES – WHETHER PROPER INFERENCE THAT ONE VEHICLE ON INCORRECT SIDE – WHETHER PROPER INFERENCE OF NEGLIGENCE – STANDARD OF PROOF IN CIVIL CASES – EVIDENCE – LOGICALLY MORE PROBABLE THAT DEFENDANT NEGLIGENT – WHETHER RELEVANT: *COMPENSATION TO RELATIVES ACT* 1897 (NSW) – *LAW REFORM (MISCELLANEOUS PROVISIONS) ACT* 1965 (NSW), S10(4).

A collision between an unladen pantechnicon travelling south on the New England highway and a loaded semi-trailer travelling north caused the death of both drivers. There were no witnesses. After the accident the cabins of both vehicles were torn from their bodies and forced together on the western side of the road, the semi-trailer was to the south on the western side of the road, pointing north, and the pantechnicon body was further north on the eastern side and pointing east. Other debris was scattered about, and there was a gouge mark on the roadway. The wife of the driver of the semi-trailer sued the employer of the driver of the pantechnicon in the NSW Supreme Court and recovered damages under the *Compensation to Relatives Act* 1897 (NSW). An appeal from the judgment was dismissed by the Court of Appeal, and the employer then brought this appeal to the High Court of Australia. It argued that it was not impossible to infer from the evidence that the driver of the pantechnicon had caused or contributed to the accident by negligent driving. Section 10(4) of the *Law Reform (Miscellaneous Provisions) Act* 1965 (NSW) provided that a claim under the *Compensation to Relatives Act* would not be defeated, nor the damages reduced, by reason of the fault or breach of statutory duty of the deceased person.

This was an appeal to the High Court of Australia from the decision of the Supreme Court of New South Wales Court of Appeal, which upheld a judgment for a widow in her claim under the *Compensation to Relatives Act* 1897 (NSW). The circumstances are set out in the reasons for judgment of Gibbs J.

HELD: (i) Per Gibbs J (Stephen, Mason and Aickin JJ agreeing): The position and state of the vehicles after the collision provided a basis from which a reasonable inference could be drawn as to the position of the vehicles before the collision, and it was reasonable to find on the balance of probabilities that the pantechnicon was, to some extent at least, on its incorrect side of the roadway at the time when the collision occurred. If that was so, it should further be concluded that its driver was guilty of negligence which caused or contributed to cause the collision.

***Bradshaw v McEwans Pty Ltd* ([1951] HCA 480; High Court, 27 April 1951, unreported);**
***Luxton v Vines* [1952] HCA 19; (1952) 85 CLR 352; [1952] ALR 308; and**
***Jones v Dunkel* [1959] HCA 8; (1959) 101 CLR 298; [1959] ALR 367; 32 ALJR 395, applied.**

(ii) Per Murphy J: Assuming that the accident was caused by the trailer driver or the van driver or both, and that the chances of it being caused by one driver were no different to those of it being caused by the other, then it followed that the one circumstance in which the defendant was not liable was if the trailer driver was solely to blame. However, the probability of that was less than the probability that the van driver was to blame (solely or together with the trailer driver) was higher than the probability that he was not, which satisfied the civil standard of proof. The assumptions argued by the appellant therefore required a verdict for the plaintiff.

***Briginshaw v Briginshaw* [1938] HCA 34; (1938) 60 CLR 336; [1938] ALR 334; 12 ALJR 100;**
***Nesterczuk v Mortimore* (1965) SASR 81; (1965) 115 CLR 140; [1966] ALR 163; (1965) 39 ALJR 288, not followed.**
***Reifek v McElroy* [1965] HCA 46; (1965) 112 CLR 517; [1966] ALR 270; (1965-1966) 39 ALJR 177;**
***Andrijich v D'Ascanio* (1971) WAR 140;**
***Maher-Smith v Gaw* [1969] VicRp 47; (1969) VR 371;**
***Baker v Market Harborough Industrial Co-operative Society Ltd* (1953) 1 WLR 1472; 97 Sol Jo 861, referred to.**

(iii) Per curiam: The appeal should be dismissed.

GIBBS J: This appeal is brought from a decision of the Court of Appeal of New South Wales which by a majority dismissed an appeal from a judgment given by Maxwell J in favour of the present respondent, who sued to recover damages under the *Compensation to Relatives Act* 1897 as amended (NSW) in respect of the death of her husband.

On the night of 4 November 1975 the respondent husband (the deceased) was driving a semi-trailer heavily laden with timber in a northerly direction along the New England Highway. At a place just north of Brown's Creek, about five miles north of Tenterfield, the deceased's vehicle came into collision with a pantechnicon driven by a servant or agent of the appellant. The pantechnicon was unladen. The deceased was killed in the collision. The driver of the pantechnicon was also killed, and there were accordingly no eye-witnesses of the collision. The respondent can only succeed in the action if it can reasonably be inferred from the evidence as to the nature of the road and the position and condition of the vehicles after the collision that the death of the deceased resulted from the negligent driving or management of the pantechnicon.

It is obvious from the nature of the damage that the cabins of the two vehicles met in the impact. There is no evidence that the pantechnicon was then moving, and it is possible that it was stationary. Although it seems more probable than not that the pantechnicon was moving at the time of the collision, it is immaterial whether or not that was the case. The crucial question is on what part of the road it was either travelling or standing at that time. If it was on its incorrect side of the roadway, whether or not it was moving, it can be inferred, for reasons which I shall later state, that its driver had been guilty of some negligence in driving or controlling it.

After the collision the body of the semi-trailer was standing well to the left on its correct side of the road, and facing in the direction in which it had been proceeding, although at a slight angle to the highway. When one of two colliding vehicles is much heavier than the other, the heavier vehicle is less likely to be displaced from its position at the time of impact than is the lighter vehicle. In fact the pantechnicon was turned by the force of the collision through an angle of about 90 degrees, so that in its final position it was facing east rather than south. It seems reasonable to infer that the semi-trailer was not pushed by force of the impact from the eastern to the western side of the roadway. Moreover it is unlikely that after the cabins had been torn from the two vehicles they would have been up on to the embankment, 6 or 8 feet away from the western edge of the roadway, if the collision had occurred on the eastern or southbound, side of the roadway. From these matters it can reasonably be inferred that the semi-trailer was, at the time of the collision, either entirely or substantially on its correct side of the roadway.

If it were necessary for the respondent to prove, as a matter of scientific certainty that the semi-trailer had been travelling on its correct side of the roadway she would have failed in her endeavour. Such may be the complex interaction of forces in a collision that deductions of the kind which I have made cannot attain scientific certainty. But that is not necessary. The principle to be applied was stated by this court in *Bradshaw v McEwans Pty Ltd* ([1951] HCA 480; 1951; unreported) in a passage cited in *Luxton v Vines* [1952] HCA 19; (1952) 85 CLR 352 at 358; [1952] ALR 308;

> 'Of course, as far as logical consistency goes, many hypotheses may be put which the evidence does not exclude positively. But this is a civil and not a criminal case. We are concerned with probabilities, not with possibilities. The difference between the criminal standard of proof in its application to circumstantial evidence and the civil is that in the former the facts must be such as to exclude reasonable hypotheses consistent with innocence, while in the latter you need only circumstances raising a more probable inference in favour of what is alleged. In questions of this sort, where direct proof is not available, it is enough if the circumstances appearing in evidence give rise to a reasonable and definite inference; they must do more than give rise to conflicting inferences of equal degrees of probability so that the choice between them is mere matter of conjecture ... But if circumstances are proved in which it is reasonable to find a balance of probabilities in favour of the conclusion sought then, though the conclusion may fall short of certainty, it is not to be regarded as a mere conjecture or surmise.'

This statement does not justify the drawing of inferences based only on general considerations, as to the likelihood of negligent conduct occurring in the conditions which existed at the time and place of the collision': *Jones v Dunkel* [1959] HCA 8; (1959) 101 CLR 298 at 305; [1959] ALR 367; 32 ALJR 395. For that reason I disregard such suggestions as that the nature of

the roadway was such that a south bound driver might have been expected to swing out too wide when rounding the curve or that a northbound driver might naturally pull partly to his incorrect side to cross the bridge.

Such considerations are purely conjectural. However, the position and state of the vehicles after the collision do provide a basis from which a reasonable inference can be drawn as to the position of the vehicles before the collision. In my opinion it is reasonable to find on the balance of probabilities that the pantechnicon was, to some extent at least, on its incorrect side of the roadway at the time when the collision occurred. If that was so it should further be concluded that its driver was guilty of negligence. It is of course true that it is possible to envisage circumstances in which the pantechnicon could have got on to its incorrect side of the roadway without any negligence on the part of its driver.

For example some inevitable accident or hazard quite unconnected with the semi-trailer, might have caused the pantechnicon to have swerved to its incorrect side of the roadway. However there is nothing at all in the evidence that would support an inference of that kind, and a finding to that effect would be merely conjectural. If therefore the pantechnicon was proceeding (or standing) entirely or partly on its incorrect side of the roadway, the reasonable inference to draw in the circumstances of the present case is that the driver of the pantechnicon had been guilty of some negligence which caused or contributed to cause the collision. I would dismiss the appeal.

APPEARANCES: For the appellant: JR Clarke QC and P Webb, counsel. For the respondent: JS Coombs QC and TJ Christie, counsel.
