64/89

SUPREME COURT OF VICTORIA

FRASER v STANLEY and VITKUS

Nathan J

24 October, 13 November 1989 — (1989) 10 MVR 103

NEGLIGENCE – MOTOR VEHICLE COLLISION – CONCERTINA-TYPE COLLISION – DRIVER OF FIRST CAR SUED DRIVERS OF SECOND AND THIRD CARS – NEGLIGENCE PROVED BY FIRST DRIVER – UNABLE TO PROVE CLAIM AGAINST OTHER DRIVERS – WHETHER FIRST DRIVER ENTITLED TO A DETERMINATION – WHETHER COURT REQUIRED TO DETERMINE LIABILITY OF CONTRIBUTION BY OTHER DRIVERS.

1. Where, in a tortious action by a complainant against two defendants a complainant is able to prove negligence generally but unable to prove negligence specifically on the part of one or other or both defendants, the complainant is entitled to a determination notwithstanding the court's difficulty in deciding the question of liability and the degree of contribution (if any) between the defendants.
Hummerstone v Leary **(1921) 2 KB 664, referred to.**

2. Accordingly, a Magistrate was in error in dismissing a claim on the ground that the complainant, whilst proving negligence in general, had not proved negligence against one or the other or both defendants.

NATHAN J: *[After setting out the grounds of the Order nisi and the facts, His Honour continued]* ... **[7]** I consider that the Magistrate has fallen into error and did in fact misdirect himself as to the ingredients of negligence in this case. It was undisputed that the damage to the complainant's vehicle arising out of the collision with Nichol arose because his car had been struck in the rear by Stanley. If Stanley was not forced into striking Fraser by Vitkus, then the damage must have been caused by Stanley alone. There were notices of contribution between the defendants and the resolution of the issue as to whether Vitkus had first struck Stanley was a matter the magistrate could have decided, once he had found negligence. I do not consider it was a necessary ingredient in Fraser's case that he prove Vitkus first struck Stanley because he found there was in fact negligence on either one, or other, or both, their parts.

The overwhelming weight of the evidence was that either Stanley or Vitkus caused Fraser's damage. There simply can be no other conclusion. To leave a complainant without remedy because of indecision as to whether the fourth car in the concertina struck the third car before it in turn struck the second car which struck the first car is to illustrate the difficulties of decision-making, but not the impossibility of it.

The standard of proof required of **[8]** a complainant in these circumstances, if the Magistrate's analysis were to stand, would be to require a complainant to go back in time and place and ascertain what may have occurred prior to the collision for which he is seeking damages and prove or disprove whether there was then a collision between other vehicles which resulted in damage to his own. Such a standard of proof, as opposed to the onus of proof, would be impossibly high and could seldom be discharged. It is an unreal requirement and illustrates the Magistrate's error in not making a decision given the weight of the evidence.

I continue with the first ground, that is the weight of evidence. There is absolutely no evidence that Stanley had stopped behind Fraser prior to the collision, and therefore it was either Stanley's own motion or that which was added to by the force of an impact from Vitkus which forced his car into the complainant's. Therefore on any view, there must have been some propulsion on Stanley's part which was a cause of the collision. To what extent that propulsion may have been added to, or in what proportion the Magistrate might ultimately have apportioned blame, was a matter which required his further consideration. It may be that the Magistrate created the climate which ultimately gave rise to error, that is by dismissing Vitkus prior to coming to an ultimate conclusion in respect of the entire concertina. In this way the Magistrate obliged himself

to consider the questions of the defendants' negligence in two parts. First Vitkus alone, and then Stanley alone. Fraser sued both, on or either one **[9]** or the other or both bases. The particulars admit of no other interpretation, despite contentions before me to the contrary. By isolating the cases against both defendants the Magistrate failed to deal with a legal issue before him. He found as a fact that it was either the negligence of Stanley or Vitkus which caused Fraser's damage; the fact of the tort being committed was therefore not in dispute. The only issue was the degree of contribution between them; and this was an issue to which, as a matter of law, the Magistrate had to address his mind. The difficulties of disposing of the claims as between defendants was used as a platform to deny a blameless complainant a civil remedy. Moreover, the difficulties do not appear to have been insurmountable. Every day of the week Magistrates must decide between competing stories, as was the case here between Stanley and Vitkus. Some extrinsic evidence was available.

Although there is undoubted authority to permit a Magistrate to decline to decide liability, on the ground that a plaintiff has not discharged the onus of proof, that authority does not extend to excusing apportioning the blame once the issue of negligence and the identity of those who committed it has been found.

I turn, for the sake of completeness, to some authorities bearing in mind their marginal utility considering the facts in this case. *Nesterczuk v Mortimore* [1965] HCA 60; (1965) 115 CLR 140; [1966] ALR 163; (1965) 39 ALJR 288 upheld a decision of a trial judge who had been unable to decide, between plaintiff and defendant, which of their stories was the more probably correct. In that case the **[10]** defendant was also a counter-claimant and his action was also dismissed. Hence it can be seen that both parties were invested with an onus of establishing negligence and both failed. The case before me is of a different character. The plaintiff has established the threshold issue of negligence. The issue was which one of two persons was responsible. Of facts similar to these and by reference to earlier English authority, viz *Hummerstone v Leary* (1921) 2 KB 664, Menzies J said, p151:

> "The argument proceed that in any case where the proper conclusion is that injury was caused by the negligence of one or other or both of two persons, each of them, having failed to disprove his own negligence, is to be regarded not only as having been guilty of negligence but, in the absence of any evidence upon which to apportion the blame between the two negligent persons, the conclusions must be drawn that they were equally responsible.
>
> This argument fails because of the distinction that must be drawn between an action by a plaintiff against two defendants when there is evidence that one or other or both were negligent, and an action by a plaintiff against a defendant when all that can be said at the end of the case is that there was negligence on the part of one or other or both the parties. In the former case, the plaintiff is entitled to a determination because he has made out a *prima facie* case against defendants sued not merely jointly but in the alternative; in the latter case, the whole of the evidence leaves open the question whether the injury was caused by the plaintiff's own negligence without any negligence on the part of the defendant".

That case considered, as I now do, *Bray v Palmer* (1953) 1 WLR 1455 a Court of Appeal decision which ordered a new trial in circumstances where a trial judge failed to decide between the competing stories of plaintiff and defendant, in the course thereof the Master of the Rolls said (p1459):

> "Having come to the conclusion that the accident happened either in the way asserted by the **[11]** plaintiff's side or in the way asserted by the defendant's side he said (referring to the trial judge) in effect that he was unable to decide which story was the right one. With the greatest respect to the judge that seems to me to be a denial of justice. It can only mean that the parties to the case on one side or the other are deprived of relief to which they are entitled. In my view it behoved the judge to form some conclusion one way or the other in the matter ... "

More recent authority in the New South Wales Court of Appeal *Kilgannon v Sharpe Bros Pty Ltd* (1986) 4 NSWLR 600; [1986] Aust Torts Reports 80-011 but dealing with the concept of *res ipsa loquitur* is also of some, albeit minor relevance. That case concerning product liability redolent of *Donoghue v Stevenson* involved an exploding bottle of pop drink in the hands of a minor. Of the concept in that case Kirby P (p617) said:

> "Instead it is to confine the application of the maxim and the reasoning process it describes to a case where the plaintiff has brought to the court all those who could be liable in negligence, has excluded his own conduct as a potential cause of his loss, has excluded the intervention of extraneous third parties and says that the evidence he has produced permits a logical inference that an unidentified act or omission of negligence on the part of one or more of the defendants produced the occurrence that caused the loss".

— there are reasons of policy to support this conclusion. And at p618:

> "The common law permits sensible inferences to be drawn by processes of logical reasoning from proved facts. If a plaintiff brings all relevant parties to the court and establishes to the satisfaction of the tribunal of fact that one or more of those parties is responsible even though the plaintiff cannot identify which, it would be unjust that those parties, who have the detailed knowledge of their own arrangements should be able to escape liability by declining to give evidence and by asserting that the plaintiff has failed to make out his case, because he has failed to specify who is liable".

[12] I cite the above conclusions of Kirby P to support the conclusion already stated, namely the magistrate fell into error by dismissing Vitkus, and then going on to consider Stanley's negligence and whether *res ipsa* applied. He found, partly because of the fact that Vitkus was no longer part of the action, that the maxim did not apply. He then concluded that Fraser had failed to discharge the onus as against Stanley. This is tantamount to the reasoning process condemned by Kirby P in the passage referred to.

Finally, I turn to an authority which would have bound me, had it been applicable, that is, *Maher-Smith v Gaw* [1969] VicRp 47; (1969) VR 371. The case concerned an intersection collision with both parties suing each other. The trial judge was unable to conclude on the balance of probabilities as to what the facts were and thus dismissed both claim and counter-claim. The Full Court upheld the decision of the trial judge and found he was not in error because the degree of actual persuasion which was required had not been met. However, that case must be distinguished from the present one before me, because, far from the facts being in dispute, here they are settled. That is, Fraser caused damage to Nichol because his vehicle was struck in the rear by Stanley whilst he (Fraser) was stationary. So much of the chain of causation was not in dispute. The magistrate declined to make a finding as to whether Stanley's car was first struck by Vitkus, and if so, whether that had any effect in propelling Stanley into Fraser or of increasing the severity of the collision Stanley had with Fraser. In the circumstances before the Court, the following observation was made (p374):

> "This was not a case where the occurrence of the collision at the time and at the place where it **[13]** happened necessarily imported negligence on the part of the respondent, nor was it a case where the acceptance of the respondent's accounts of the facts would have required the judge to find some negligence on his part".

As I have already observed, the case before me proceeded on the basis that negligence had been established. It is a rare and exceptional case in which the weight of the evidence will speak from the affidavit material so as to compel a conclusion that a magistrate's decision was wrong as being contrary to it. However, for the extensive reasons given above, I am satisfied that that part of the ground 1 is made out and the order absolute should be made on that basis. Further, I am satisfied that the magistrate was in error in directing himself that the despatch of the case required the complainant to prove the order of collisions (as between Stanley and Vitkus and Stanley and Fraser). I do so for the reasons already given and for this additional one, the collision between Vitkus and Stanley may have been immaterial, so far as Fraser's damage was concerned. It is unnecessary to pronounce upon ground 3.

These conclusions require that the case be remitted to a Magistrates' Court for adjudication according to law and the tenor of this judgment. Fraser, who was the complainant below and the plaintiff here is entitled to costs, and I order that the defendants pay the plaintiff's costs to be taxed and I shall grant a certificate to the defendants under the terms of the *Appeals Costs Fund Act*.

APPEARANCES: For the applicant Fraser: Mr DM Clarke, counsel. Secombs, solicitors. For the first-named respondent Vitkus: Mr P Fox, counsel. Papasavas Vadarlis, solicitors. For the second-named respondent Stanley: Mr A Blumsztein, counsel. Alan Faulkner & Co, solicitors.