20/96

SUPREME COURT OF VICTORIA

MURER v SCOTT

Harper J

2 April 1996

NEGLIGENCE – DUTY OF CARE – MOTOR VEHICLE COLLISION ON NARROW COUNTRY ROAD – DRIVER'S FORWARD VISION OBSCURED BY BEND IN ROAD – DRIVER TRAVELLING AT 80 - 90 KM/H – COLLISION WITH VEHICLE REVERSING WITH DRIVER'S SIDE WHEELS ON EDGE OF BITUMEN – WHETHER ONCOMING DRIVER NEGLIGENT – WHETHER ANY CONTRIBUTORY NEGLIGENCE ON THE PART OF REVERSING DRIVER.

M., who was driving his motor vehicle at 80-90km/h on a narrow country road and approaching a corner with limited visibility, collided with S's. vehicle which was reversing possibly with its driver's side wheels on the edge of the bitumen. At the hearing, the Magistrate found M. to be 100% negligent. Upon appeal—

HELD: Appeal dismissed.
It was open to the magistrate to conclude that it was negligent for M. to approach this corner of the road at a speed which did not enable him to stop before colliding with S's vehicle. It was also open to the magistrate to find that S. was not negligent in the circumstances.

HARPER J: **[1]** This is an appeal from a decision of Mr RG McIndoe, Magistrate, sitting in the Magistrates' Court at Castlemaine on 22 November 1995. The appeal is brought pursuant to s109 of the *Magistrates' Court Act* 1989 and arises out of a motor car collision which occurred in Back Glenlyon Road, Glenlyon, at about 3 pm on 7 December 1994. In the proceeding before His Worship, the plaintiff, who is the respondent to the appeal, claimed damages in the sum of $17,655. His Worship allowed the claim. Judgment was therefore entered in the amount shown in the summons, together with interest and costs.

Back Glenlyon Road is, in the vicinity of the collision, a typical rural secondary road. It has a narrow bitumen surface, some 3.5 metres in width. It has a broad verge of gravel, and then grass and other vegetation to the fence line. At the time of the collision, the respondent's car, according to the evidence of the respondent, was on the gravel shoulder, with possibly its driver's side wheels on the edge of the bitumen. It was reversing towards a driveway which joined the road about 30 metres from the point of collision. His Worship found that the reversing movement was not undertaken at excessive speed. The magistrate also rejected the appellant's evidence that the course taken by the respondent's car was "snake-like". No challenge is made to these findings. Nor is it suggested that it was not open to His Worship to **[2]** conclude that the respondent's car was at all material times in that position on the shoulder of the road for which the respondent contended. The evidence of the appellant was that he travelled at between 80 and 90 kilometres an hour towards the bend of the road at the furthest extreme of which the accident took place. He admitted under cross-examination that the corner is a blind corner when approached from the direction in which he was travelling. He also admitted that, given the physical configuration of the roadway, drivers would be forced to move into the path of oncoming traffic (if any), or move off the bitumen altogether, or stop, if confronted by an obstacle on the lefthand portion of the sealed surface. This, then, was the factual background against which the magistrate made his decision. In giving judgment, His Worship said that, this being a country road, obstacles such as a flock of sheep or a slow-moving tractor could be expected. According to the appellant, the magistrate also said:

> "It is the responsibility of all drivers to drive in a fashion that allows for the vehicle to stop when faced with any circumstance, for example a sheep or any other obstruction on the road. The defendant should have been able to stop no matter what circumstances confronted him on the road ....."

(See the affidavit of Michael William O'Donnell, sworn 21 December 1995 and filed in this appeal). The appellant submits that by these remarks His Worship demonstrated that he had

made a mistake of law. The magistrate (so the appellant argues) appears to have overlooked the fact that, as a matter of law, it is not **[3]** only the appellant upon whom a duty of care is imposed. The respondent was also a driver; and the respondent was also subject to the same duty as that which rested on the appellant. In these circumstances, so the appellant submits, the magistrate was wrong to speak of the appellant as being under a responsibility to stop immediately danger arose. It was and is not the law that drivers must be able to stop in time to avoid any accident, no matter how suddenly danger may appear. I agree that, had the magistrate based his decision upon this latter proposition, he would have fallen into error. Negligence is not demonstrated by the mere failure to stop in time to avoid an accident. But I cannot accept that this is what His Worship found.

According to an affidavit sworn by the respondent on 12 February 1996 and filed in this appeal, His Worship's remarks about the appellant's ability to stop his car were made not as part of a ruling of law but against the background presented by the particular facts of this case: A narrow country road, a corner with limited visibility, and the need to anticipate hazards ahead. I must, I think, accept the respondent's version of that context. Where there is a material conflict between appellant and respondent about what happened in the court below, the version which supports the decision from which the appeal is taken will, in the absence of any other fair, practicable and appropriate method of resolving the dispute, be accepted. This, it seems to me, points to my acceptance of the respondent's account. It was conceded by counsel for the appellant that it was open to His Worship to find that the respondent **[4]** was not negligent. It was, in my opinion, also open to His Worship to conclude that, as a matter of law, it was negligent to approach this corner of Back Glenlyon Road at a speed which did not enable the oncoming vehicle, on its driver first becoming aware of the respondent's car, to stop the oncoming vehicle before colliding with that car. A driver who is confronted by a bend in a narrow country road which obscures his or her forward vision, and who is therefore also confronted by the possibility of an unseen obstacle ahead, may only be able to avoid colliding either with that obstacle or with oncoming traffic by stopping before the obstacle is reached. It was open to the magistrate to find that this was the position faced by the appellant shortly before his collision with the respondent's car. It is a short and (given appropriate findings of fact as to such things as speed and distance) legitimate step to hold that the appellant was negligent in not stopping before that collision. His Worship may not, in the words which I have quoted, have expressed the applicable law with the utmost felicity; but I am satisfied that any lack of felicity does not evidence an appellable mistake. Until the appellant had been found in breach of a duty of care to the respondent, the question of the respondent's duty is in my opinion irrelevant. Of course, the respondent's behaviour – and in particular his execution of the reversing manoeuvre in which he was engaged at the time of the collision - is of immediate and direct relevance in determining whether or not the appellant acted negligently. Once that decision has **[5]** been properly made, the issue of the respondent's contributory negligence, or the issue of any breach by the respondent of his duty to the appellant, may fall for determination. I can find no fault with His Worship's approach to the law in this regard.

Motor vehicle collisions give rise to issues of fact which the courts often find very difficult to resolve. Not least among the problems is the very human tendency to filter the facts through one's subconscious to the extent that when they relodge themselves in the conscious memory they become very different to the reality. It is not necessarily the case that this phenomenon occurred with the recollection of either the respondent or the appellant here. My point is only that, because the memory is a very fallible instrument with which to reconstruct the truth, the task which confronts the courts in discovering the truth is often immensely difficult. The result, regrettably but understandably, is that litigants sometimes feel very disappointed about the results of the litigation. Doubtless this applies to the appellant in this case. That is not to say that I think that the magistrate was wrong in his findings of fact. This is an appeal on a question of law only; it is therefore not in my power to inquire for myself into the other aspect of the case. I merely acknowledge the importance which litigants commonly attach to the outcome of motor vehicle cases, as indeed to litigation in general. For the reasons which I have endeavoured to state, it is my opinion that this appeal must fail.

APPEARANCES: For the Appellant: Mr M Campbell, counsel. Solicitors for the Appellant: Gurry and Associates. For the Respondent: Mr M Hebblewhite, counsel. Solicitors for the Respondent: John Guthrie.