31/91

SUPREME COURT OF VICTORIA

MILIONIS v TIFRAN PTY LTD

Brooking J

13 September 1991 — (1991) 14 MVR 573

CIVIL PROCEEDINGS – MOTOR VEHICLE COLLISION – PROPERTY DAMAGED – ONE VEHICLE FLED SCENE – TWO OCCUPANTS SEEN IN FLEEING VEHICLE – OWNER SUED FOR COST OF REPAIRS – NO ADMISSION THAT OWNER DRIVING AT TIME OF COLLISION – WHETHER OWNER INFERRED TO BE DRIVING.

Where the owner of a motor car is shown to have been in it together with some other person when it was being driven, in the absence of evidence to the contrary it is open to draw the inference that the motor car was being driven by the owner.

BROOKING J: [1] In February 1989, Stephen Allen went fishing at Sorrento from the vicinity of the aquarium, leaving his car parked near the boat ramp. On his return he found that someone had damaged his car by running into the front of it. Allen obtained the number of the other vehicle on his return to the shore, finding the number written on a piece of paper under the windscreen of his car.

That note had been put under the windscreen, I am afraid, not by the delinquent driver but by an observant and public-spirited bystander, who had seen the incident and taken the number of the offending vehicle, a car registered number DOB932, which had been towing a trailer with a boat on it and had backed into the parked car, damaging it with the rear of the trailer.

I have spoken of Allen's return to his car but in fact the car was the property of his employer, Tifran Pty Ltd, which sued the person who was registered as the owner of the other car, Basil Milionis, for the cost of repairs. An order was made for payment of the cost of repairs by the Magistrates' Court sitting at Frankston, the process having been issued, it would seem, out of the court at Sandringham. The learned Magistrate was Mr Hodgens.

Against the order for payment of the cost of repairs the defendant has appealed on the ground, in substance, that being the only ground argued, that it was not open to the learned Magistrate to infer that the defendant was the driver of the car at the time of the collision.

Allen gave evidence, which was admitted without objection, that he went from the scene to the Sorrento Police Station, where a search was conducted for the name **[2]** and the address of the owner of vehicle registered number DOB-932 and where he was given the name and address of Milionis as that of the owner. Allen also gave evidence that when, on the day of the accident, he telephoned the number shown in the telephone directory as the number of that person and spoke to a man describing himself as Milionis he was told by that man that he was the owner of the vehicle concerned. The case below was conducted on the basis that ownership on the part of Milionis had been sufficiently proved and this concession has been implicitly persisted in by the appellant defendant.

The question is whether it was open to the learned Magistrate to infer that at the time of the collision the appellant was driving his car. The passer-by who had the presence of mind and public spirit to take the offending car's number said that she saw that at the time of the accident it contained two men. I think that her evidence should be viewed as evidence not that there were at least two men in the car but that the only persons in it were two men, although it would, in my view, make no difference to the result if the case had to be considered on the basis that the car contained two men and may or may not have contained another occupant or occupants.

The bystander gave evidence which showed by inference that the two men were aware of the accident and also showed by inference that after the accident the boat was removed from the trailer and the car and vacant trailer were left parked near the boat ramp. Allen also testified that in his telephone conversation with the person who identified himself as the defendant he **[3]** asked the defendant if he had gone fishing at Sorrento that day and the defendant replied that he had. In view of this admission, it is unnecessary to consider whether the evidence, the reception of which was not objected to, that a little earlier a woman who answered the telephone at the number in question had said that the owner of the car was out fishing afforded any evidence on that point.

The appellant, in the course of the telephone conversation, was asked whether his car had struck the respondent's car at the Sorrento boat ramp that day and answered that this had not happened. I find it unnecessary to consider whether that last piece of evidence was capable of being viewed as evidence that the appellant was present on the day in question at the Sorrento boat ramp or as evidence of a false denial, tending to show that the appellant was the driver of his car at the time of this accident.

The appellant elected to call no evidence and neither Allen nor the bystander was cross-examined. The result is that the respondent had called evidence to show that the appellant owned a certain car and had gone fishing at Sorrento on the day of the incident and that on that day the appellant's car, while towing a boat on a trailer at the Sorrento boat ramp, had collided with the respondent's car at a time when one man was driving the appellant's car and another man was a passenger in it and that after the collision, the appellant's car had been left parked near the boat ramp, the boat no longer being on the trailer.

[4] The question is whether it was open to the learned Magistrate to infer that the defendant was the driver of his car. This question can be sub-divided into two questions by asking whether it was open to the Magistrate to infer that the defendant was one of the two men in the car and whether it was open to him to infer that of those two men it was the defendant who was the driver. I have no doubt that it was, to say the least, open to the learned Magistrate to infer that the appellant was one of the two men in his car at the time of the accident and that of those two men it was he who was the driver, having regard to his ownership of the car and to the absence of any evidence to suggest that he had permitted his companion to drive, with the result that it was the companion who was driving at the time of the accident. If a person who owns a car is shown to have been in it together with some other person or persons at a time when it was being driven, then, in the absence of anything in the evidence tending against the view that the owner was driving, the likelihood is, as a matter of common sense and common experience, that the owner was driving the car, exercising his right to drive his own car rather than surrendering that right to a companion.

This is not a matter of considering what the chances are mathematically. It is uncommon, having regard to ordinary human behaviour, for a person to allow himself or herself to be driven as a passenger in his or her own car. For obvious reasons, we usually prefer to drive ourselves. Of course we may hand over the wheel to a companion for any one of many possible reasons, for example, to share the **[5]** burden of driving on a very long journey or because of old age or illness or a laudable desire to be driven home by one's spouse after drinking a little too much claret. But these situations are out of the ordinary and there is nothing to suggest any extraordinary situation here. All we know of the appellant is that he was going fishing at Sorrento and there is nothing in the evidence to suggest that he would not be doing what the owners of cars normally prefer to do, that is, drive rather than be driven by their companions.

Authorities too well known to require citation show the use that might be made by the learned Magistrate of the appellant's failure to give evidence in deciding whether in fact to draw the inference that was open to him, first that the appellant was one of the two men in his car and secondly that of those two men he was the driver.

On the question whether it was open to the Magistrate to infer that the appellant was the driver, I refer to a decision cited by *Wigmore on Evidence*, Chadbourn revision, vol.IX, section 2510a, namely *McIlroy v Force* 220 NE2d 761; 75 Ill App2d 441; 232 NE2d 708; 38 Ill2d 528; (200 North Eastern reporter, second series, 761; affirmed 232 North Eastern Reporter, second

series, 708). There the action was brought against the personal representative of a deceased for damages for personal injuries arising out of an accident in which a car had run off the road at a time when it contained two persons, the plaintiff and the deceased. There was a rule which prevented the injured plaintiff from giving evidence and the question was whether, it being shown that the car was owned by the deceased, it was open to the jury to conclude that it had **[6]** been shown by circumstantial evidence that he and not the plaintiff was the person who was driving it at the time of the accident.

The Supreme Court of Illinois, following an earlier decision of its own and the decision of the Supreme Court of Minnesota in *Sprader v Mueller*, 265 Minnesota 111, held that when the owner of a vehicle was an occupant of it at the time of a collision there was, from those bare facts, *prima facie* evidence that the owner was the driver at the time of the collision. Other examples of American decisions will be found in *Rodney v Staman* 32 ALR 2d 976; 89 A2d 313; (1952) 371 PA 1 and the annotations to it in 32 ALR 2d 988.

Strangely, there is not, so are as I am aware, any decision in Australia or England on the question whether, it being shown that the owner of a car was present in it together with another person or persons at a time when it was being driven, the inference may be drawn, in the absence of any circumstance pointing the other way, that the owner was driving his own car. The decision of the High Court in *Paterson v Martin* [1966] HCA 68; 116 CLR 506; [1967] ALR 323; 40 ALJR 313, was cited to the learned Magistrate and to me. It is enough for me to say that there is nothing whatever in that decision pointing against the conclusion which I have reached, namely, that it was, to say the least, open to His Worship to draw the inference which he drew.

So far as the material discloses, no alternative case was sought to be made by the respondent below by asserting that the appellant's car was driven either by the appellant or on his behalf and by relying on evidence of ownership as **[7]** itself warranting a finding that the car (if not driven by the appellant) was being driven on behalf of the appellant, whether or not he was present in the car, or to rely on evidence of ownership coupled with the fact, itself established by inference, that the owner was present in the car, as making it proper to conclude that the appellant was legally responsible for the driving of the driver, on the assumption that it was a person other than himself.

As regards use of ownership of a car as *prima facie* evidence that a person driving it was driving in circumstances making the owner responsible for damage done by the car, I refer to the decision of the Court of Appeal of New South Wales in *Jennings v Hannan (No.2)*, (1969) 71 SR (NSW) 226; [1969] 1 NSWR 260 and to the decision of Marks J in *Mauro Taxi Services Pty Ltd v Israport (Sales) Pty Ltd*, (1990) 12 MVR 147, 8 October 1990. I refer also to the discussion of the cases to be found in Vickery, *Motor and Traffic Law, Victoria*, paras.17099-17103.

Had the respondent chosen, it might have impaled the appellant on the horns of a dilemma by relying on the modern authorities. But it tied itself to proof that the appellant himself was the driver. The appeal is dismissed with costs, including reserved costs. The order of the Magistrates' Court, which is recorded as an order made at Sandringham on 22 October 1990, is affirmed.

APPEARANCES: For the appellant Milionis: Mr J Ross (Solicitor). Shulkes, solicitors. For the respondent Tifran Pty Ltd: Mr R Taranto, counsel. Price Brent, solicitors.
