50/94

SUPREME COURT OF VICTORIA

TASANDY PTY LTD v FRANJIC

O'Bryan J

21, 24 June 1994

NEGLIGENCE – MOBILE CAR WASH – COLLISION BETWEEN PART OF CAR WASH AND CAR – CAR TO STOP WHEN RED LIGHTS ON – LIGHTS NOT EASILY SEEN – WHETHER CAR DRIVER FAILED TO KEEP PROPER LOOK-OUT – WHETHER RULE OF *RES IPSA LOQUITUR* APPLIED – WHETHER MAGISTRATE CORRECT IN DECLINING TO HAVE A VIEW OF THE SCENE.

Upon payment of a fee, F. drove her car into a mobile car wash owned by T. P/L. When a red light is displayed, a metal bar prevents a vehicle from moving past a certain point. F. gave evidence that she saw no red light before her car collided with the bar causing damage to the bar and the hydraulic system of the car wash. During the hearing, the magistrate declined to have a view of the car wash. At the end of the evidence, he dismissed the claim on the basis that T. P/L had not proved that F. had failed to keep a proper look-out for the red light. Upon appeal—

HELD: Appeal dismissed with costs.
1. *Res ipsa loquitur* is a rule of law which facilitates proof of negligence where there is a paucity of evidence about an event which ordinarily does not happen without negligence. As the facts were known in the present case, the rule had no application. The question was whether T. P/L proved negligence against F. on the known facts. On the evidence, the magistrate's conclusion was reasonably open.

2. A view of the scene may be held by a magistrate for the purpose of understanding the evidence but not for the purpose of deciding the case. A magistrate is not compelled to have a view. In the present case, a view of the car wash to look at the position of the red light may have produced a conclusion based on the view rather than the evidence given by the witnesses. Accordingly, the magistrate was correct in declining to have a view.

O'BRYAN J: [1] At the conclusion of the argument in this appeal I ordered that the appeal be dismissed with costs and indicated that I would publish my reasons at a later date. I do so now. The appellant brought a claim for damages due to negligence in the Magistrates' Court at Broadmeadows. The claim arose out of an accident which occurred between a motor vehicle driven by the respondent and a mobile car wash owned and operated by the appellant in Greenvale. The amount of damage, $3,257 was not in dispute. The respondent denied negligence in the Court below. On 9 March 1994 a Magistrate dismissed the claim on grounds to which I shall refer in due course.

> On 8 April 1994 Master Kings ordered that two questions of law were arguable on appeal.
> (a) The Magistrate was wrong in law in that on the evidence the Magistrate ought to have found that the respondent was guilty of negligence and accordingly made an order in favour of the appellant for the amount claimed in the complaint.
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> (b) The Magistrate was wrong in law in that all the circumstances disclosed by the evidence the learned Magistrate should have found that the doctrine of *res ipsa loquitur* applied and accordingly made an order in favour of the appellant for the amount claimed in the complaint.

At the commencement of the appeal counsel for the appellant submitted the appeal constitutes a hearing *de novo*. This is plainly wrong because s109 of the *Magistrates' Court Act* 1989 only creates a right of appeal to the Supreme Court **[2]** on a question of law from the final order of the Magistrates' Court (underlining for emphasis). The statutory procedure requires an appellant to formulate relevant questions of law for determination in the Court. In the present case the questions of law raise questions as to the reasonableness of the findings of fact and conclusions of law of the Magistrate. The first question asks whether it was reasonably open to the Magistrate to find as he did that the respondent was not guilty of negligence.In the Court below the burden of proof was upon the appellant and it failed to discharge the burden of proof. In this Court it will generally be a very difficult task to show that the evidence below was so strong

that a finding of negligence had to be made, particularly if the Magistrate has confined himself to relevant considerations. In *Warren v Coombes* [1979] HCA 9; (1979) 142 CLR 531; (1979) 23 ALR 405; (1979) 53 ALJR 293 the High Court held that, in a case of negligence where the primary facts are not in question, the decision of the trial Judge ought not to be treated as the equivalent of the verdict of a jury. By a majority, the Court held that the appellate court (Court of Appeal of New South Wales) was entitled to reach its own conclusion about inferences to be drawn from primary facts.

A point of distinction between the present appeal and the appeal in *Warren v Coombes* is that whereas there was an appeal by way of rehearing from a single Judge to the Court of Appeal, s109 limits this appeal to a question of law. Consequently, it is more apt to have regard to the principles applicable to the verdict of a jury. In *Pujick v Savic and others* [1971] VicRp 76; [1971] VR 632 the Full Court held: Where **[3]** the verdict of the jury is against the party upon whom the burden of proof lay, the appellant must show that the evidence was such that the jury were bound to find in his favour; this is a difficult onus to sustain and one which is only likely to be satisfied in rare instances. Unlike a jury decision, the Magistrate must give reasons for the decision and regard may be had to the reasons in order to determine whether the finding was reasonably open.

Before turning to the facts it is convenient to dispose of a point raised by counsel for the appellant which is outside the questions of law relied upon by the appellant. During the hearing, on two occasions, counsel for the appellant invited the Magistrate to view the mobile car wash "given that the major issue in contention appeared to be whether the lights could or could not be seen". The Magistrate declined to do so. Counsel faintly argued in this Court that the Magistrate should have had a view of the *locus in quo* presumably to help resolve conflicts in the evidence.

In my opinion the learned Magistrate very correctly declined to do so. A view of the *locus in quo* may be held for the purpose of understanding the evidence but not for the purpose of deciding the case. It would be unwise in most instances for the fact finder to treat a view as evidence. The High Court in *Scott v The Shire of Numurkah* [1954] HCA 14; 91 CLR 300; [1954] ALR 373 cautioned against the result of a view replacing the evidence. The learned Magistrate was entitled to have a view but was not compellable to do so. In my opinion, a view would have been most unwise for there was a real risk that **[4]** the Magistrate might have reached conclusions based upon what he saw or did not see and not upon what the witnesses said they were able to see or not see.

The facts were disputed in the Court below and required the learned Magistrate to make specific findings which he did generally in favour of the respondent. The appellant operated a mobile car wash machine which was available to customers upon payment of a fee. The respondent paid a fee and received a metal token which caused the machine to cycle when the token was inserted into a slot in a metal box. A witness for the appellant said in evidence that she gave oral instructions to the respondent as to the proper procedure for using the car wash. The respondent denied that such instructions were given to her.

The learned Magistrate said that he was not satisfied "one way or other from the evidence as to whether any (oral) instructions were given". Counsel for the appellant challenged this finding. In my opinion, it was reasonably open to the Magistrate not to be satisfied by the appellant's evidence on this disputed issue. The appellant also relied upon written instructions available to the respondent on the metal box into which the token is inserted. The written instructions, if important to the case, were not tendered in evidence in the Court below. The learned Magistrate had no evidence as to the terms or adequacy of the written instructions.

The principal witness for the appellant said that insertion of a token activates the car wash and that in the operation a metal bar is raised from ground level when a red light is displayed preventing a car in the car wash moving past a certain point. **[5]** The material before this Court did not disclose clearly or at all the location and operation of a red light. Mr O'Dwyer, a witness called for the respondent, inspected the car wash "and noted that there were two round lights on the car wash roof". No other description appears to have been given as to the red light. The lights are not visible in photographs tendered in evidence in the Court below.

Before counsel for the plaintiff closed his case in the Court below he submitted to the learned Magistrate: "the major issue in contention appeared to be whether the lights could or could

not be seen" – and invited the Court to view the car wash. The respondent said that she read the instructions on the token box twice and was confused. She was not asked to elaborate upon the written instructions. She said that after placing a token in the box the green light came on and she drove forward slowly, the light went out of view above her windscreen and she presumed she had to keep going. She did so until she felt a bump whereupon she saw that the red light had come on. She also said she had looked for a red light and was looking ahead but did not see the light until she felt the bump when she applied the brakes and stopped.

Mr O'Dwyer, a loss adjustor, said that he drove his car into the car wash and observed the green light pass out of view above the top of his windscreen. He also said that he had expected to see a red light but he did not see a red light before his car contacted the metal bar. Apparently, when the metal bar was struck by the respondent's car considerable damage was done to the bar and the hydraulic system of the car wash.

[6] The learned Magistrate agreed with counsel for the plaintiff in the Court below that the failure of the respondent to see the red light "was the critical point of the case". The learned Magistrate said that the failure to see the red light was either due to negligence or "the red light is hard to see and/or could not be seen". He said that he was satisfied on the evidence that the red light is not easily seen and the appellant's case failed. This finding was challenged in the first question of law as unreasonable. I am unable to accept the submission that it was not reasonably open to the Magistrate to find as he did that the red light is not easily seen. The appellant's evidence did not identify where the red light was positioned. Two witnesses said that it was hard to see or could not be seen. In my opinion, the learned Magistrate was entitled to regard the visibility of the red light "as the critical point of the case" and to conclude that the appellant had failed to establish that the respondent failed to keep a proper look out for the light. Had the respondent seen the red light in time or, if a reasonable person ought to have done so, and proceeded to drive forward, inevitably a finding of negligence would have been made by the Magistrate. The first question of law is not made out.

Counsel for the appellant argued that negligence ought to have been found upon another two bases. Firstly, in not seeking instructions when the respondent was unsure as to how the car wash operated. Secondly, in driving at an excessive speed. The short answer to this argument is that these particulars of negligence were not pleaded and not **[7]** raised in the Court below. They were, therefore, not the subject of any finding by the Magistrate. Counsel for the appellant did not press strongly the second question of law. *Res ipsa loquitur* is a rule of law which facilitates proof of negligence where there is a paucity of evidence about an event which ordinarily does not happen without negligence. The rule simply establishes a *prima facie* case of negligence and avoids an injustice because a plaintiff is unable to explain the event. Where the facts are known, as they were in the present case, the inquiry is whether negligence has been established on the known facts. The plaintiff carried the burden of proof at the end of the case, the burden did not shift to the defendant. The *res ipsa* rule had no application. The second question of law is misconceived, in my opinion, and is not made out.

The order of the Court is: appeal dismissed with costs.

APPEARANCES: For the appellant Tasandy Pty Ltd: Mr D Mattin, counsel. Battley & Co Pty Ltd, solicitors. For the respondent Franjic: Mr Blanden, counsel. Purves Clarke Richards, solicitors.
