**52/92**

**SUPREME COURT OF VICTORIA**

# *PANGALOS v ATC and BOURKE*

**Hayne J**

**7 October 1992**

**MOTOR TRAFFIC – MOTOR VEHICLE COLLISION – BETWEEN RIGHT TURNING AND ONCOMING VEHICLES – RIGHT TURNING VEHICLE STOPPED IN INTERSECTION FOR A FEW SECONDS – OPPORTUNITY FOR ONCOMING VEHICLE TO STOP – WHETHER SUCH DRIVER NEGLIGENT IN COLLIDING WITH OTHER VEHICLE.**

**Where the driver of a vehicle began to make a right-hand turn then stopped for an appreciable period of time and an oncoming vehicle came from a service road, proceeded into the intersection and collided with the other vehicle, it was open to a Magistrate to conclude that the driver of the oncoming vehicle was wholly negligent in failing to keep a proper lookout and drive at a reasonable speed in the circumstances.**

**HAYNE J: [1]** This is an appeal brought pursuant to s109 of the *Magistrates' Court Act* 1989 from a decision of the Magistrates' Court made on 18 February 1992. It is therefore an appeal on points of law, not a general re-hearing of the proceeding below.

The proceeding below arose out of a motor accident that happened on 13 September 1991, at the intersection of High Street and Kingsbury Drive, Lalor. This intersection is a T intersection.at which the eastern end of Kingsway Drive meets High Street, which travels generally north-south. It is controlled by traffic lights. As the photos tendered below show, provision is made for cars turning left into Kingsway Drive by a third left hand turning lane immediately before the traffic lights. The appellant, who was the plaintiff below, was travelling north. There are two northbound lanes in High Street which cross Kingsway Drive. There was some dispute about some aspects of the evidence said to have been given by the appellant below, but I do not find it necessary to resolve them, if only because an affidavit has been filed on behalf of the respondent by the Magistrate who heard the matter, to which he has exhibited the Magistrate's notes of evidence and his notes of the finding that he made. I rely on these notes. (See *Aherne v Freeman* [1974] VicRp 17; [1974] VR 121).

The appellant gave evidence below that at all times he was travelling in the right hand of the two northbound lanes. He said that there was one other vehicle close to him, but slightly behind him, and I infer, in the left hand lane. He said that he was approaching the intersection at about 40 or 45 kilometres an hour, and **[2]** when he was about 50 metres from the intersection the traffic lights facing him turned green. He then noticed two vehicles execute right hand turns from the southbound lane of High Street into Kingsway Drive. These vehicles completed their turns without incident. The appellant went on in evidence to say that he maintained his speed of about 40 to 45 kilometres an hour. As he approached the intersection he noticed that the vehicle driven by the second named respondent was stopped, waiting to do a right hand turn, but that it was stopped in a position that did not obstruct his passage through the intersection. He said that when he was about six car lengths from the point of impact, the respondent's vehicle began to move into his path, and he applied his brakes. The respondent's vehicle by then completely blocked the appellant's lane, and the vehicles collided. The appellant said that he "had nowhere else to go due to the vehicle travelling in close proximity to me in the left hand lane." The front of the appellant's vehicle hit the left front corner of the respondent's vehicle, which was, at the time of the impact, at about 45 degrees to the line of the appellant's intended travel. After the accident there was said to have been an exchange of words between the drivers, but nothing turns on this.

In cross-examination, the appellant said that the respondent had been stationary before the impact, but only momentarily. He acknowledged that he had braked forcefully, but was unable to agree or disagree with the suggestion put to him that his vehicle had left skid marks **[3]** on the road 27 paces long.

It is clear that the second respondent gave evidence that he was travelling south down High Street, and stopped at the lights at Kingsway Drive intending to turn right. He said that he saw about five cars facing him in the left hand turning lane northbound, intending to turn left into Kingsway Drive. Because there were so many waiting to turn left, the last car was, according to him, still in the left hand northbound lane in High Street. He went on to say in evidence that believing that the cars in the left hand turn lane were giving way to him, he began his right hand turn, but after he began the turn he saw another vehicle coming, either from the left hand turn lane or from the service road adjacent to High Street, intending to enter the intersection and travel straight through it. Accordingly, he stopped. He stopped across the right hand northbound lane, and at that time saw the appellant about 30 metres away coming towards him, he said, at speed.

The second respondent said in evidence that he was stopped in the position that I have described for an appreciable time. He put it at four to five seconds. After the collision he said that he measured skid marks left by the appellant, and measured them as being 27 paces long. The second respondent was cross-examined, and it is clear from the appellant's description of the cross-examination that at least in the eyes of the appellant, the cross-examiner made some headway. However this may be, the daughter of the second respondent gave evidence generally to the same effect as that given by her father. **[4]** In particular, she said that the car driven by her father had stopped "at least four to five seconds". The respondents also called the driver of the vehicle behind the respondent's vehicle. The account given by the appellant of that evidence included this. "He", that is the witness, "stated the oncoming lanes were clear as far as he could see. The respondent pulled out to do a turn, and that a car from the service lane pulled out, forcing the respondent to stop. He stated that the respondent was stopped a few seconds before he was hit by traffic coming up in the opposite direction." The Magistrate's notes record this evidence as being that the respondent was stopped "a few seconds – quite a bit of time before impact". Thus the evidence of this independent witness could be seen as corroborating the account of the second named respondent in some significant respects, most notably the question of the time for which the second named respondent's vehicle had been stopped.

The Magistrate's note of his findings is in the following terms.

> "I find defendant pulled out into the intersection to make a right hand turn and was stopped by a car coming out of the service road for oncoming traffic. When defendant started to move it was apparently safe to turn. When the defendant stopped the car from the service road proceeded in front of defendant. Defendant remained stationary, and the plaintiff, one of at least two cars oncoming, braked and could not stop before colliding with the defendant. I find no negligence on the part of the defendant. I find that the accident was caused by the plaintiff failing to stop in time after the defendant's car was forced to stop. I find that the plaintiff should have seen the defendant's car stopped in the intersection and should have stopped before hitting the defendant's vehicle. I find that the plaintiff had enough time to stop to prevent the impact had he been keeping a proper lookout and driving at a reasonable speed, and **[5]** therefore the plaintiff was negligent and caused the accident. I find that the defendant was not negligent in not noticing the car in the service road, and I find for the defendant 100 per cent"

The appeal is, as I say, an appeal on points of law. The points of law stated in the rule 58.9 order were whether:

> "(a) on the evidence the Magistrate ought to have found that the respondents were negligent;
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> (b) on the evidence the Magistrate ought to have found that the failure of the second named respondent to keep a proper lookout constituted negligence:
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> (c) the Magistrate took into account the provisions of regulations 601, 602, 603 and 802 of the *Road Safety Traffic Regulations* 1988 in determining that there was no negligence on the part of the respondents."

By consent leave was given to the appellant to amend the second of these questions of law to read whether:

> (b) on the evidence the Magistrate ought to have found that the second respondent failed to keep a proper lookout, and if so, whether that failure amounted to negligence which caused or contributed to the accident.

The appellant's complaint was, as I understood it, in essence that the Magistrate ought to have found the second named respondent negligent. It is of course clear that in proceedings such as these, the Court is not to interfere with the findings of fact made by the Magistrate unless it is shown that there was no evidence upon which the Magistrate, as a reasonable man, might have come to the conclusion to which he did come. (See for example *Taylor v Armour & Co Pty Ltd* [1962] VicRp 48; [1962] VR 346 at 351; (1961) 19 LGRA 232, *Young v Paddle Brothers Pty Ltd* [1956] VicLawRp 6; [1956] VLR 38; [1956] ALR 301, *Hardy v Gillette* [1976] VicRp 36; [1976] VR 392. It is equally clear that in general the Court should adopt a view of the evidence about the proceedings below **[6]** that will support the finding that was made. (See *Aherne v Freeman, supra*; *Foenander v Dabscheck* [1954] VicLawRp 6; [1954] VLR 38; [1954] ALR 168.

I therefore proceed on the basis that the Magistrate found that the second respondent began to make his right hand turn at a time when it was safe to do so, and that he was then forced to stop because a car came from the service road and proceeded into the intersection. There was some suggestion in the evidence that the Magistrate's findings were made in two parts, the second part being made in response to questions asked of the Magistrate by counsel. Whether this is so or not, it is, I think, clear that the Magistrate sought to explain the finding that he had made by finding in effect that the appellant was, at the time that the second respondent commenced his right hand turn, sufficient distance away from the intersection for it to be safe for the second respondent to commence the turn, and that the appellant was at that time in a position where he had time enough to stop to prevent the accident.

In my view it is implicit in the finding that when the defendant started to move it was apparently safe to turn, that the appellant was then far enough away to stop to avoid a collision There was, in my view, evidence on which the Magistrate could make that finding. There was evidence of the second respondent and his daughter, and perhaps more significantly there was the evidence of the independent witness, all of whom spoke of the second respondent's vehicle being stopped for an appreciable time before the collision.

The appellant seeks to make, in effect, two points. **[7]** First, that the evidence should have led the Magistrate to conclude that the second respondent had failed to keep a proper lookout, and second, that the Magistrate failed to take any sufficient account of the provisions of the *Road Safety (Traffic) Regulations* to which I have referred. It is convenient, perhaps, to deal with this latter point first.

The regulations upon which the appellant relied were those which provide, in effect, that a driver in the position of the second named respondent must give way to oncoming traffic. I do not think it necessary to embark on a consideration of whether the evidence revealed that in fact the second named defendant was in breach of the regulations. Even if he were, and I express no view on it, that was but one matter which bore upon the question of whether the second respondent was in fact negligent. There is, in my view, nothing to suggest that the Magistrate did not address the right question in reaching the conclusion that he did. In particular, there is in my view, nothing to suggest that the Magistrate did not have in mind the fact that a driver executing a right hand turn must give way to oncoming traffic. Really, in this respect, the complaint, I think, comes in the end to a complaint that the Magistrate ought to have made some other finding of fact.

As to the first of the two points made, namely that the Magistrate should have found that the second respondent failed to keep a proper lookout, I think it very important to recall what it was that the Magistrate did find. His finding was, in effect, that the accident was caused wholly by the negligence of the appellant **[8]** because the appellant had not kept a proper lookout. His finding was, in effect, that the respondent had been stopped sufficiently long in the position where he was for the appellant to have seen the vehicle and to have stopped before hitting the vehicle. Indeed his finding was that the appellant "had enough time to stop to prevent the impact had he been keeping a proper lookout and driving at a reasonable speed, and therefore the plaintiff was negligent and caused the accident."

The question of what caused this accident is a question of fact. We are told by the High Court in *March v E & MH Stramare Pty Ltd* [1991] HCA 12; (1990-91) 171 CLR 506; (1991) 99 ALR 423; (1991) 65 ALJR 334; (1991) 12 MVR 353; [1991] Aust Torts Reports 81-095 that where negligence is in issue, causation is essentially a question of fact to be answered by reference to

common sense and experience. Thus the question of what caused this accident was essentially a question of fact for the Magistrate to determine on the basis of the evidence before him.

There was, in my view, evidence upon which he could conclude that the plaintiff did have enough time to stop to prevent the impact, had he been keeping a proper lookout and driving at a reasonable speed, and there was therefore evidence upon which he could conclude that it was the plaintiff's negligence that caused the accident. If that is so, the question of whether the defendant ought to have seen the plaintiff's vehicle sooner than he did is, I think, nothing to the point.

In the end, the appellant's complaint stems from the not unnatural reaction of a party to the fact that a Magistrate has adopted a version of events which the appellant does not accept. **[9]** However the questions are, as I say, ultimately, in my view, questions of fact, and Parliament has made quite plain that appeals to this Court from the Magistrates' Court are not appeals on question of fact, they are appeals only on questions of law.

In my view, no error of law is shown in the decision below, and I consider that the appeal should be dismissed.

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