51/94

SUPREME COURT OF VICTORIA

KEEP v POZZEBON

McDonald J

29 August, 1 September 1994

NEGLIGENCE – MOTOR VEHICLE COLLISION – TRUCK TURNING LEFT – OVERTAKEN ON LEFT BY OTHER VEHICLE – OVERTAKING IN BREACH OF REGULATION – TRUCK DRIVER GAVE WAY TO TWO VEHICLES ON THE LEFT – DID NOT SEE THIRD VEHICLE – COLLISION – WHETHER TRUCK DRIVER NEGLIGENT – WHETHER ANY CONTRIBUTORY NEGLIGENCE ON THE PART OF OTHER DRIVER: *ROAD SAFETY (TRAFFIC) REGULATIONS,* R502(5)(b).

P.'s driver T., pulled up at traffic lights behind 2 other vehicles. To T.'s right was a prime mover with a large trailer attached driven by K. When T. reached the front of K.'s trailer, T noticed the left-hand indicators on K.'s truck were on. When the traffic lights turned to green, T. moved forward but stopped at the stop line because K.'s truck was turning left and a collision was imminent. T. sounded the horn for some time but the truck continued to turn left and the rear of the trailer struck the driver's door and front corner of T's vehicle causing damage. At the hearing the magistrate found K. 100% to blame. On appeal—

HELD: Appeal dismissed.
1. By T. moving her car forward and passing to the left of K.'s truck, T. was in breach of Reg. 502(5)(b) which provides that a driver of a vehicle must not overtake or pass to the left of a vehicle displaying the sign: DO NOT OVERTAKE TURNING VEHICLE.

2. However, a breach of a regulation is no more than a piece of evidence to be considered with all other evidence when a court determines the ultimate questions. It is to be weighed in the evidence and given such weight as is proper in all the circumstances of the case.
***Tucker v McCann* [1948] VicLawRp 40; (1948) VLR 222, applied.**

3. Given that 2 vehicles in front of T. had moved forward and cleared the intersection, T. reasonably expected that K. would also allow T. to move forward and clear the intersection. The failure by K. to see T.'s car and avoid colliding with it was a breach of the duty of care.

4. Contributory negligence is principally a failure to take care for the safety of one's own person or property, rather than being in breach of a duty owed to another.
***Nance v British Columbia Electric Ry. Co* [1951] AC 601; 1951 2 All ER 448; [1951] 2 TLR 137, applied.**

5. Whilst T. was in breach of the regulation in moving forward, it was not reasonably apparent that this would create a situation of danger. On all of the evidence it was open to the magistrate to conclude that there was no contributory negligence on the part of T.

McDONALD J: *[After setting out the facts, some preliminary matters as to practice, relevant Regulations, the Magistrate's findings and the questions of law raised on the appeal, His Honour continued]...* **[11]** If a party to a proceeding seeks to rely on a breach of a statutory regulation as evidence of negligence or contributory negligence, it is necessary for that party to tender the regulation in evidence. *Humphrey v Collier* [1946] VicLawRp 60; [1946] VLR 391; [1946] ALR 448, *Cromie v Francis* [1956] VicLawRp 57; [1956] VLR 352; [1956] ALR 1038. That was done in this case. The regulations then become part of the evidentiary material in the arbitration, in this case, being the court conducting the arbitration. If it is established by other evidence that a regulation relied on was breached, that is a fact which must be taken into account when determining whether in all the circumstances the party who breached the same was negligent or guilty of contributory negligence. A breach of a regulation is no more than a piece of evidence to be considered with all other evidence when a court determines the ultimate questions before it. It is to be weighed in the balance with all other evidence before the court and given such weight as is proper in all the circumstances of the case. *Tucker v McCann* [1948] VicLawRp 40; (1948) VLR 222 at 225. *[After considering the questions stated by the Master, His Honour continued]...*

[15] It was eventually not contested by counsel for the respondent that by moving her car forward and "passing to the left" of the appellant's truck, that Ms Trentin had breached the regulation. If the magistrate had found to the contrary, that is she had not breached the regulation, it would have been contrary to the evidence and a finding which would not have been open on the evidence before him. However, I do not read this part of the magistrate's reasons to mean that he had found that the respondent's agent had not breached the regulations. The magistrate accepted the evidence of Ms Trentin, as he was clearly entitled to do. He found she had stopped three cars back from the corner, level with the front of the trailer. At this time the lights to her and the appellant were red and the vehicles were stationary. She moved forward, following the cars in front of her, when the lights turned to green. On the evidence of the appellant, he had observed a vehicle to his left at the intersection. This was one of the vehicles in front of Ms Trentin. His evidence was that when the lights changed, he allowed this vehicle in the **[16]** left-hand lane to "clear the intersection before executing (his) left-hand turn". He said further that before executing the turn, he "again looked in (his) mirror and saw nothing and he then executed (his) turn". It was open to the magistrate to conclude on the evidence that the appellant's vehicle remained stationary while the first car on its left cleared the intersection and until the appellant looked again in his mirror observing nothing, including that which he had previously observed, a white car at the rear of his trailer.

On the facts as found by the magistrate, it was while the appellant's vehicle was stationary that, not only the leading car in the left-hand lane moved forward and cleared the intersection, but at least one other car in front of the respondent's car had moved forward and passed the left of the truck. On that evidence, I am of the opinion that it would have been open to the magistrate to conclude that Ms Trentin was entitled to move forward from the position which she was in, in the reasonable expectation that in the circumstances her car, along with those in front of her, would be able to be seen and had been seen by the appellant, and that he was remaining stationary and waiting for them to be clear of his left side before commencing to turn his large truck and trailer. It is likely that this is what the magistrate was seeking to convey by that previously referred to.

In *Foenander v Dabscheck* [1954] VicLawRp 6; [1954] VLR 38; [1954] ALR 168, it was held by Hudson AJ that when reviewing a decision of a magistrate every reasonable presumption must be made in favour of the decision of the magistrate, and it should be upheld if it can be supported on any reasonable view of **[17]** the evidence. I do not read the statement of the magistrate under consideration as a conclusion that, in the circumstances, the driver of the respondent's car had not breached regulation 502(5)(b), or that in any way he had misdirected himself with respect to the effect of that regulation.

I next address the question which was argued in this appeal, that is whether it was open on the evidence before the magistrate, to find that there was negligence on the part of the appellant which was a cause of the collision and the damages suffered by the respondent. I am satisfied that on the evidence it was open to the magistrate to find against the appellant on this question. The evidence was that the appellant was driving a large truck which was towing a large trailer. Because of the size and the combined length of these vehicles, they could not be turned left from Nicholson Street to travel west in Johnston Street from the left-hand turn lane of Nicholson Street. This was appreciated by the appellant, who positioned his vehicle in the centre of the northbound lanes, notwithstanding it was marked with a right-hand turn arrow. He was able to adopt such course for the purpose of turning his vehicle by virtue of regulation 507(4). On the evidence it would appear he was aware that in executing the turn that his vehicle would encroach on more than one lane. After the lights had turned in his favour, he remained stationary until the car that he had observed on his left in the left-hand lane had cleared the intersection and until, as was said by him, he had looked in his mirror and observed no other car. The fact is that at the time when he looked in his mirror, there was at **[18]** least the respondent's car in the left lane. This he did not see. He could give no explanation for that fact. Whether he did not look, or, if he looked, he did not look properly, or his mirror was set in such a position that a vehicle on the left of his truck could not be seen, on the evidence was really not to the point. In driving and turning such a large and long vehicle, particularly in a suburban street, there was cast on the appellant a heavy onus to take care not to permit his truck or trailer to come into collision with another vehicle on the road, or any other object. The fact that another vehicle may have been in the position in which the respondent's car was at the time that he moved forward, not only ought to have been reasonably in his contemplation, but in fact it was. On the timeframe in which the

turn was executed, on the evidence of Ms Trentin, which was accepted by the magistrate, the period between the appellant commencing to turn his vehicle and the happening of the collision was far from short. The failure to observe the respondent's motor car, either when the appellant's vehicle was stationary at the lights and before he commenced to execute his turn, or during it, and the failure to take steps to avoid the collision which would have been open to him had he observed the car, constituted a breach of the duty of care that the appellant owed to Ms Trentin, having regard to the position in which her car was on the road. At the relevant time, as found by the magistrate, Ms Trentin sounded her horn "loud and long". This warning was heard by another driver on the road who was called as a witness. It was open on the evidence to conclude that **[19]** this warning was either not heard when it ought to have been heard or not paid attention to by the appellant. It was open on the evidence for the magistrate to conclude that this negligence, when applying the test of common sense, experience and making a valued judgment, was a cause of the collision. See *March v 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.

As to the question of contributory negligence, it was submitted by counsel for the respondent that notwithstanding that on the evidence it appeared that by Ms Trentin moving the respondent's car forward from the stationary position where it was at or about the front of trailer when the lights had turned green, she had breached the regulation referred to, it was open to the Magistrate to conclude that it did not, on the evidence and in the circumstances, constitute an act of contributory negligence or fault which should have the effect of reducing the damage that the respondent may otherwise recover. As referred to, the appellant's counsel argued that, not only was such conclusion not open on the evidence, but the breach of the regulation by Ms Trentin ought to have been found the major cause of the collision. If it was to be found by me that the finding of no contributory negligence was not open on the evidence, it would not be for this court to assess the extent or proportion by which the respondent's damages should be reduced. It would be necessary to remit the proceeding to the magistrate for him to determine that matter.

Actionable negligence is the breach of a duty of care owed to another which is a cause of the other to suffer injury or damage. On the other hand, contributory **[20]** negligence is principally a failure to take care for the safety of one's own person or property, rather than being in breach of a duty owed to another. See *Nance v British Columbia Electric Railway Co* [1951] AC 601; 1951 2 All ER 448; [1951] 2 TLR 137; Trinidade and Cane *Law of Torts in Australia*, 2nd Ed. 534. A breach of a duty of care owed to another can, however, in circumstances amount to contributory negligence. See *Noall v Middleton* [1961] VicRp 43; [1961] LR 285. A finding of no contributory negligence negatives both matters.

In the circumstances of this case, if there was fault on the part of the respondent's agent which was a cause of or which contributed to the collision, such fault in reality would be by her moving the car forward from its stationary position when the lights had turned green to her and when other cars in front of her moved forward also. I have already described in this judgment the circumstances in which such actions were done. The fact that that movement was a breach of a statutory duty is not conclusive of the issue as to contributory negligence. That fact was one of the facts to be taken into account in conjunction with all other relevant facts and circumstances when determining this matter. See *Tucker v McCann* [1948] VicLawRp 40; (1948) VR 222. The fact that this movement must have commenced at a time when the appellant's vehicle was stationary and when there were other cars in the left-hand lane, and in such circumstances it would have been open to find that the driver of the respondent's vehicle had grounds to reasonably expect that the presence of her car would have been observed and that the driver of the heavy vehicle, **[21]** although signalling to turn left, was remaining stationary while the other cars moved forward. This was a relevant matter in assessing this issue. The magistrate found that Ms Trentin stopped her car when she realised there was a danger. It was open to the magistrate to infer that she realised that there was a danger and stopped when the appellant moved his vehicle forward and commenced to execute a left turn. As referred to, on the evidence she was then stationary for some time giving warning of her position and presence. It was open to the magistrate to conclude that when she was moved forward, it ought not to have been reasonably apparent to her that her action would create a situation of danger.

In the circumstances of this case, I am satisfied that notwithstanding that the action of Ms Trentin in moving the respondent's vehicle forward when the appellant's vehicle was stationary

constituted a breach of the regulation, that fact, when viewed with all the other relevant evidence, it was open to the magistrate to conclude that there was no negligence on her part in the relevant sense. Even assuming that the actions of Ms Trentin which constituted a breach of the regulation was a failure to take reasonable care for her own safety and the property of the respondent, the facts in this case provide a good example of why the "but for" test should not be a definitive test of contributory negligence in the circumstances of this case. *March v Stramare Pty Ltd.* I am satisfied that even had the magistrate on the facts found that there was contributory negligence on the part of Ms Trentin, it would have been open to him, when applying the test of common sense, experience and **[22]** making a valued judgment, to conclude that such actions were not a cause of or contributed to the happening of the collision in the circumstances in which and when it occurred as appeared from the evidence.

For those reasons, the appeal should be dismissed.

APPEARANCES: For the appellant Keep: Mr K Sparks, counsel. For the respondent Pozzebon. Mr M Randall, counsel. Wisewoulds, solicitors.
