32/89

SUPREME COURT OF VICTORIA — FULL COURT

KOVACEVIC v MUSKEE

Murphy, Marks and Vincent JJ

1 May 1989

NEGLIGENCE – DRIVING OF MOTOR CAR – CAUSING DAMAGE TO REAR OF VEHICLE IN FRONT – DRIVER OF REAR VEHICLE INVOLUNTARILY SNEEZED – FOOT SLIPPED OFF BRAKE – IMPACT ALMOST SIMULTANEOUS – WHETHER SNEEZING NEGLIGENT – WHETHER DRIVING NEGLIGENT.

K.'s vehicle was stationary at red traffic lights when it was struck in the rear by another vehicle which had been struck by a vehicle driven by M. At the trial, M. gave evidence that as he approached K.'s vehicle, he had been braking for some 2 or 3 seconds when suddenly he had a fit of sneezing thereby causing his foot to slip off the brake and allowing his vehicle to collide with another vehicle which then struck K.'s vehicle. The jury found no negligence on the part of M. On appeal—

HELD: Appeal dismissed.
If a driver sneezes whilst driving a motor car, that is not itself a breach of the driver's duty to take reasonable care. Accordingly, where the jury found that M. had involuntarily sneezed and the collision occurred almost simultaneously, it was open to conclude that M.'s driving was not negligent.

MURPHY J: [1] This is an appeal brought by the unsuccessful plaintiff who, in the County Court in June 1988, sued the defendant for damages for injuries allegedly received by him as the result of a motor car accident in which he had been involved. The accident happened after, according to the plaintiff's evidence, he had been stationary at an intersection waiting for the lights to change, the lights being red at the time, when his vehicle was struck in the rear by another vehicle approaching the intersection.

The plaintiff, in support of his claim for negligence, relied upon the fact that if one is stationary at an intersection and is struck in the rear by another vehicle, then *prima facie* the inference is that the vehicle which struck your vehicle or which caused your vehicle to be struck was driven by a person who was acting in a negligent manner.

Mr Galbally of Counsel, who appeared for the appellant before us, submitted that the position was stronger than that and that really the situation could be put that in those circumstances the onus then went upon the defendant to prove that the accident had not happened through any negligence on his part. In his submission to the Court he submitted that if the motorist who sneezes cannot sufficiently control his motor vehicle so as to avoid collision with another vehicle, then as a matter of law there has been a breach of the proper standard of care. His reference to sneezing arises because the defendant, who gave evidence in the court below before the jury, swore that as he approached the intersection he had his foot upon the brake of his motor **[2]** vehicle with the intention of pulling up at the red lights, and had been slowing down for some two to three seconds, when suddenly he had a fit of sneezing which caused his foot to slip off the brake and allow his vehicle, as he put it, to collide not very heavily with another vehicle which in turn struck the vehicle driven by the plaintiff. The proposition as put by Mr Galbally before this Court is, in my view, untenable. It is always a question of fact for the jury as to whether or not the plaintiff has made out its case and in my view to posit that a man who sneezes and performs some involuntary act which causes damage almost simultaneously is, as a matter of law, guilty of negligence cannot be sustained. Negligence is, of course, a breach of the duty to take reasonable care for one's neighbour, and when driving, to take reasonable care in the driving management and control of the motor vehicle so as not to cause the risk of injury to one's neighbour. In my view, to sneeze is not itself a breach of the duty to take reasonable care and if with the involuntary sneezing which, on the facts of this case, would appear to have been the defendant's case an accident happened almost simultaneously therewith, one cannot say, in those circumstances, that as a matter of law the driver who sneezed is negligent.

Mr Galbally was, of course, driven to make this submission by reason of the fact that the onus of proof of negligence rested upon the plaintiff in the court below, and the jury (when answering the questions put to it) as to the first question as to whether there was any negligence **[3]** on the part of the defendant proven as a cause of the happening of the accident, answered the question "No". In my view, it was open to the jury to arrive at this conclusion.

Mr Galbally has also drawn the attention of the Court to the fact that in the appeal book the actual form of question which was put to the jury might, on the fact of things, appear to have been uncertain, for in the settling of the appeal book and inclusion of documents in the appeal book question 1 as put to the jury is noted at page 69 of the appeal book to be: "Was there negligence by the defendant which was the cause of the accident and the plaintiff's injuries?"

In the substance of the appeal book at page 27, where the Judge's notes are used to set out the evidence that was given in the case, there being no transcript of the proceedings, and in the Judge's summary of the account of what happened after the hearing of the evidence, it appears that His Honour has made the following entries:

> "Counsel then addressed the jury; the jury was charged.
> No exceptions were taken to the charge by either counsel.
> Two questions were asked of the jury; the first question was, `Was there negligence by the defendant which was a cause of the accident and the plaintiff's injuries?'"

Mr Morrow, who appeared for the defendant in the Court below, is unable to say with precision whether or not the question for the jury was written out in the form in which the question appears at page 69 of the appeal book **[4]** or whether it was as is noted in His Honour's notes of the evidence in the summary. However, he properly pointed to the fact that no objection was taken by counsel to either the charge of His Honour or to the questions which were in fact asked of the jury. Mr Galbally has asked the Court for leave to amend the grounds of appeal to add a further ground to the grounds which appear in the notice of appeal, by way of ground (e). That ground, he submitted, should read:

> "That Question 1 of the questions submitted to the jury for its deliberation contained an error of law on a material issue".

The Court reserved the question as to whether leave should be granted to add that further ground of appeal to the grounds set out in the notice of appeal and in my view the Court should not grant leave in the circumstances of this case. In my view the appeal cannot be sustained and it should, in my view, be dismissed.

MARKS J: I would also refuse leave to amend the grounds of the notice of appeal. I agree in the reasons and conclusions of the learned presiding Judge as to why this appeal should be dismissed.

VINCENT J: I agree that leave to amend the grounds set out in the notice of appeal should be refused and I agree in the view expressed by the learned presiding Judge in the disposition of this application.

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

APPEARANCES: For the appellant Kovacevic: Mr P Galbally, counsel. Galbally & O'Bryan, solicitors. For the respondent Muskee: D Morrow, counsel. Rogers & Gaylard, solicitors.
