37/11; [2011] VSC 534

SUPREME COURT OF VICTORIA

SINGH v ALSTON POST PTY LTD

Osborn J

19 October 2011

CIVIL PROCEEDINGS – MOTOR CAR ACCIDENT – NEGLIGENCE – FINDING BY MAGISTRATE THAT ONE PARTY LIABLE FOR THE COLLISION – WHETHER MAGISTRATE BOUND TO CONCLUDE DRIVER GUILTY OF CONTRIBUTORY NEGLIGENCE – ONUS ON APPELLANT – MAGISTRATE'S CONCLUSION OPEN – APPEAL DISMISSED.

S. was driving a truck which collided with a motor car owned by APP/L and driven by R. R. was exiting from a driveway and turned left thereby colliding with the truck which was oncoming at speed and at least in the middle of the road if not further to the right. Further, the collision occurred on a narrow roadway overhung by trees on which trucks were prohibited. The Magistrate found that the truck driver was 100% negligent for the collision and subsequent damage. Upon appeal—

HELD: Appeal dismissed.

1. Given that the Magistrate accepted that the accident occurred on a roadway on which trucks were prohibited, which was narrow and overhung by trees, and that the probability was that the truck was travelling 'at least in the middle of the road, if not further to the right' it was open to the Magistrate to find that the truck driver's negligence was a cause of the respondent's damage.

2. Likewise, the Magistrate's finding as to speed could not logically materially affect the case as to contributory negligence. In view of the Magistrate's finding that the truck driver 'was oncoming at a speed', this finding did not demonstrate error with respect to the issue of contributory negligence. It could not compel a conclusion the driver of the motor car was guilty of contributory negligence.

3. In the circumstances, the truck driver failed to demonstrate that the Magistrate was bound to conclude, either that there was no negligence on the motor car driver's part, or that the evidence as a whole necessarily required a finding of contributory negligence.

OSBORN J:

1. This is an appeal on questions of law from a decision of the Magistrates' Court with respect to a claim for property damage caused by a motor vehicle collision, brought pursuant to s109(1) of the *Magistrates' Court Act* 1989.

2. On 31 May 2010, Mr Ratnam drove a BMW sedan owned by the respondent out of a golf club driveway into Ross Street, Keysborough. In so doing, he attempted to turn left and proceed down Ross Street. As he was completing the turn manoeuvre, the offside front of the BMW collided with the rear offside wheel of an oncoming truck, driven by the appellant.

3. The Magistrate found that the collision was caused by the negligence of the appellant. She did so in circumstances where:

(a) Ross Street was closed to truck traffic, and Mr Ratnam's evidence was that he made the turn not expecting truck traffic;

(b) Ross Street is a narrow road and the trees which overhang it are not cut back. This circumstance tends to support the view the truck was travelling in part over the centre of the road;

(c) there was photographic evidence of the situation taken five minutes after the accident, showing debris on the road, tyre marks, the position of the car after the impact and the damage to the car;

(d) the Magistrate preferred Mr Ratnam's evidence to that of the appellant;

(e) Mr Ratnam described moving slowly forward because he was unable to see clearly to his left, due

to vegetation adjacent to the driveway exit;
(f) Mr Ratnam said he looked both ways, but he acknowledged that he did not see the truck before the impact; and

(g) Mr Ratnam said he was shocked by the impact.

4. The appellant's core complaint is contained in ground 2 of the notice of appeal:[1]
Having found that:

(a) the plaintiff 'didn't see the truck coming'
In circumstances where the plaintiff:

(b) was making a left-hand turn into Ross Street; and

(c) had an obligation to give way to oncoming traffic
her Honour erred:

(d) by finding that there was no contributory negligence on the part of the plaintiff; and that

(e) the defendant was entirely responsible for the accident
Where these conclusions were not open at law.

5. It can be seen that this ground attacks not the Magistrate's primary conclusion of negligence on the part of the appellant, but the subsidiary question of whether there was contributory negligence on the part of the driver of the plaintiff's vehicle. Mr Wilmoth addressed the factual matrix in issue with some eloquence and submitted as follows:

> It is submitted that even less than a proper look by the respondent to the left would have revealed to the respondent the large truck's presence on the road. Even more so given the Magistrate's finding that the car 'inched forward and collided with the truck'. Even allowing for the truck being on the road contrary to signs prohibiting trucks, and perhaps the truck not driving as far over to its left as it could have been, to some extent over the notional centre line, there is no other evidence of negligence on the part of the appellant truck driver. It is therefore submitted that the respondent has failed to keep a proper lookout when turning left. In these circumstances, liability is largely attributable to the respondent. There must have been at least some contributory negligence on the respondent's part.

6. There are three elements to the respondent's core response to this ground.

7. First, it is submitted that contributory negligence was not pleaded. The decision of the Court of Appeal in *Spotless Services v Herbath*[2] is in point. In that case, Mandie JA stated:[3]

> In my view the authorities establish that a defendant generally cannot rely upon a defence of contributory negligence without having specifically pleaded the same, nor should a court apportion liability in the absence of such plea. The only relevant exception is no doubt where, in the absence of a specific plea, the parties have in the way that the case has been conducted put the matter in issue at trial.

8. Mr Wilmoth submits that although contributory negligence was not pleaded, the matter was put in issue at trial. He points to the fact that the Magistrate encapsulated the issues before her as being the sole or single issue of 'how did the collision occur and effectively whose fault was it'.

9. I doubt that this is sufficient. I note that there was no evidence adduced or admission made of agency as between the respondent and Mr Ratnam. It seems to me that the better view is that the issue of contributory negligence, as a defence, was simply not specifically adverted to by counsel or the Magistrate. Nevertheless, I do not rest my decision on this technical ground.

10. The second matter to which the respondent draws attention is that the test which the appellant must satisfy to make out ground 2 is a difficult one. The appellant must show that the only view open on the evidence was that Mr Ratnam's negligence was a cause of the damage to the respondent's vehicle. The classic formulation of that test in respect of appeals on questions of law from the Magistrates' Court is that quoted by Mr Morrison from the judgment of Herring CJ in *Young v Paddle Bros Pty Ltd*:[4]

> If on any reasonable view of the evidence that decision can be supported, then the party who complains of that decision cannot have it set aside and the contrary decision he desires substituted for it. It is a question of what he is entitled to do as a matter of law, and he is only entitled to a contrary decision where that decision is the only possible decision that the evidence on any reasonable view can support.

11. The most lucid elaboration of the test is perhaps that found in the judgment of Phillips JA in *S v Crimes Compensation Tribunal*,[5] to which Mr Morrison also refers. In that case, Phillips JA stated:[6]

> It cannot be said as a matter of legal principle that a determination of fact can never give rise to an error of law, but ordinarily it will not be so unless it is shown that the fact-finding tribunal arrived at a finding that was simply not open to it. In so referring to a 'finding' I use the term not only to include a finding of a fact derived from the acceptance of direct evidence to that effect; I include also an inference of fact drawn by the tribunal from other facts found by it. If the finding (be it a finding on direct evidence or inference) was not open to the tribunal, that may bespeak a relevant error of law.

12. The consequences of the test are particularly problematic for an unsuccessful party in respect of issues upon which he or she bears the onus of proof. The reluctance of courts of appeal to reverse a decision of a judge of first instance which is against the party on whom the burden of proof lies was expressed by Griffiths CJ in *Dearman v Dearman*:[7]

> Now it is well settled that upon an appeal from a Judge of first instance who has had the advantage of hearing the witnesses, especially in a case where there is a conflict of evidence, the Court of Appeal cannot reverse his decision on questions of fact unless it sees that the decision is manifestly wrong. There is, perhaps, a distinction between a case where the Judge has found in favour of a plaintiff, or the party upon whom the onus of proof lies, and a case where he has found in favour of the other party. If the Judge has found in favour of the party upon whom the burden of proof lies the Court of Appeal may review the case with greater freedom, for instance, in the case of an application to enter a non-suit on the ground that, though there was some scintilla of evidence, there was nothing upon which reasonable men ought to act. But if the tribunal of first instance, having seen and heard the witnesses, comes to a conclusion in favour of the party upon whom the burden of proof does not lie, it is almost hopeless to try to induce a Court of Appeal to interfere with that finding unless it has clearly proceeded upon a wrong principle.

13. In the context specifically of appeals on questions of law, Brooking JA stated in *Ericsson Pty Ltd v Popovski*:[8]

> If I had been asked to decide, on the findings of primary fact made by the magistrate, whether it had been shown that the employment was a significant contributing factor to the injury, I should have concluded that the answer was yes. But the fact that a judge would differ from a magistrate on a question of fact does not necessarily show any more than that the view of the judge differs from that of the magistrate on a question of fact. If the primary judge in the present case had been exercising the jurisdiction which this court exercises in dealing with ordinary appeals from findings of fact made by judges of the Supreme Court or judges of the County Court, then the primary judge's view that the magistrate was wrong on a question of fact would have warranted and required that the finding be not allowed to stand. But the appeal given by s109 of the *Magistrates' Court Act* is only on a question of law, and it is not enough to show error of law simply to persuade a judge that the magistrate went wrong on a question of fact. The plaintiff accepts this, and acknowledges that it was necessary for her to satisfy the judge, as she did, not only that the finding of the magistrate was wrong in the sense that the judge himself would have come to a different conclusion on the primary facts found by the magistrate, but also that the magistrate was constrained to make the finding which commended itself to the judge. It is a strong thing to reach such a conclusion in a case where the burden of proof lies on the appellant, who is therefore submitting not that an affirmative finding had no evidence to support it, but that the evidence was such as to necessitate an affirmative finding which was not made. It will be impossible to sustain this burden in cases where the refusal to make the finding sought may be grounded in a refusal, open to the tribunal, to accept part or parts of the evidence.

14. In a case such as the present, Justice Phillips observed in *Nikolic v Schultz*:[9]

> As for the absence of negligence (contributory or otherwise) on the part of the respondent, counsel for the appellant argued that, even on his own version, the respondent must have been guilty of some negligence, for he was either not keeping a proper look-out (and hence, failed to see the appellant's vehicle until it was too late to avoid the collision) or his vision was obscured by the two vehicles immediately to his right and, if so, his speed was then unsafe. In effect, this was an argument that

> in the circumstances described, there must always be a finding of negligence, but I do not think that that is so. For instance, the relative widths of the intersecting carriageways and the relative speeds of the turning vehicle and the approaching vehicle must be relevant and the equation suggested by the argument put by counsel for the appellant made no allowance therefor. In brief, I am not persuaded that on the material put before him, the Magistrate was not entitled to reach the conclusion that there was no negligence on the part of the respondent.

15. The underlying problem is that this Court must conclude that the Magistrate was bound to be persuaded by the appellant of a conclusion which the Magistrate did not reach, where that conclusion logically depended upon assessment of a multifactorial matrix of fact which was the subject of conflicting evidence about which views might differ, and in circumstances where the appellant must fail unless a positive conclusion was necessarily the only conclusion open to the Magistrate.

16. Thirdly, the respondent submits that, in the factual context I have set out, it was open to conclude that Mr Ratnam was not negligent, or alternatively, if he did not take reasonable care, the court could still fail to be satisfied this was a cause of the collision.

17. I accept these submissions. On the best view of the evidence from the respondent's point of view, it was open to conclude that Mr Ratnam was not guilty of contributory negligence causal of the collision.

18. To succeed on this ground, the appellant would have to show that the Magistrate was necessarily positively to be persuaded of the contrary. I do not accept that this conclusion can be sustained on the evidence as a whole.

19. Ground 3 of the notice of appeal makes specific complaint with respect to the Magistrate's conclusions concerning speed:

Her Honour erred in finding that the defendant's truck was 'oncoming at a speed', where:

> (a) the defendant's evidence was that he was travelling at 'roughly 40 kilometres an hour';
>
> (b) the plaintiff's evidence was that he had 'no idea' of the speed the truck was travelling; and
>
> (c) there was no other evidence of the speed of the truck.

20. I am not persuaded that the statement contained in her Honour's *ex tempore* judgment concerning speed is to be understood as a finding that the appellant's speed was negligently excessive. That statement is as follows: 'I accept the plaintiff looked both ways, but that he could not avoid the truck which was oncoming at a speed. I cannot be satisfied how fast it was going.'

21. The bases of the Magistrate's findings of negligence were summarised in the immediately preceding passages of the judgment, namely that she accepted that the accident occurred as described by Mr Ratnam, that it occurred on a roadway on which trucks were prohibited, which was narrow and overhung by trees, and that the probability was that the truck was travelling 'at least in the middle of the road, if not further to the right'.

22. These matters provided more than sufficient basis to find that the appellant's negligence was a cause of the respondent's damage.

23. Likewise, the Magistrate's finding as to speed could not logically materially affect the case as to contributory negligence, which, as I understand it, is at the core of this appeal. I hold specifically that the Magistrate's finding as to speed, expressed as it was, does not demonstrate error with respect to the issue of contributory negligence. It could not compel a conclusion the appellant was guilty of contributory negligence.

24. The appellant has failed to demonstrate that the Magistrate was bound to conclude, either that there was no negligence on the respondent's part, or that the evidence as a whole necessarily required a finding of contributory negligence. Accordingly, the appeal will be dismissed.

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[1] Only grounds 2 and 3 of the notice of appeal were pursued.
[2] [2009] VSCA 285; (2009) 26 VR 373.

[3] [2009] VSCA 285; (2009) 26 VR 373, 379.
[4] [1956] VicLawRp 6; [1956] VLR 38, 41; [1956] ALR 301.
[5] [1998] 1 VR 83.
[6] *S v Crimes Compensation Tribunal* [1998] 1 VR 83, 89-90.
[7] [1908] HCA 84; (1908) 7 CLR 549, 553.
[8] [2000] VSCA 52; (2000) 1 VR 260, 265.
[9] (Unreported, Supreme Court of Victoria, 22 October 1991, Phillips J) 9.

APPEARANCES: For the appellant Singh: Mr S Wilmoth, counsel. Hall & Wilcox, solicitors. For the respondent Alston Post Pty Ltd: Mr A Morrison, counsel. Nathan Kuperholz, solicitors.
