**18/89**

## DISTRICT COURT AT BRISBANE

# *SELLIN v LOWCOCK*

**Shanahan DCJ**

**18 January 1989**

**NEGLIGENCE – MOTOR VEHICLE COLLISION – COLLIDING WITH REAR OF VEHICLE IN FRONT – FRONT VEHICLE ALMOST STATIONARY BEYOND A DANGEROUS BLIND CREST – WHETHER BOTH DRIVERS NEGLIGENT – WHETHER APPORTIONMENT APPROPRIATE.**

**Where a person drove his motor vehicle at a speed which was excessive in the circumstances and failed to keep a proper look-out and ran into the rear of another vehicle which was almost stationary a short distance beyond a dangerous blind crest, both drivers were negligent, with liability apportioned 80% against the driver of the near-stationary front vehicle.**

**SHANAHAN DCJ:** This is an appeal from a decision of a stipendiary magistrate. The appellant's car collided with the rear of the respondent's car. The collision took place on a country road at Dayboro. The stipendiary magistrate described it as being a "narrow gravel surface roadway". The appellant and the respondent were travelling in the same direction.

The stipendiary magistrate found that "prior to the point of impact the road curves about 70 metres before a crest and the point of impact occurred a short distance past the crest." He found, as a fact, that the respondent was testing his brakes at or shortly before the time of the collision but that he was not reversing his car at the time of or shortly before the collision.

The picture emerges of the appellant driving his car up and over the crest and being confronted with the respondent's car, which was either stopped or going forward very slowly at the time of impact, which occurred a short distance past the crest.

The stipendiary magistrate found that the appellant knew the road very well, that the visibility of the crest was not particularly good and that he was not aware of a car being ahead of him. He found that the appellant must bear the major responsibility for the collision. He found that he drove at a speed which was excessive for the circumstances and that he failed to keep a proper look-out. He also found that the respondent contributed to the collision in testing his brakes and bringing his vehicle to a stop, or a near stop, where it was not prudent to do so. He apportioned liability – 80% against the appellant, 20% against the respondent.

The appellant attacks the finding of facts made against him. It was submitted that there was no evidence of excessive speed or of failure to keep a proper look-out. My approach to the findings of fact made by the stipendiary magistrate is that of the High Court in *Warren v Coombes* [1979] HCA 9; (1979) 142 CLR 531; 23 ALR 405; (1979) 53 ALJR 293. *[After setting out a passage from this judgment, His Honour continued]* ... On the subject of speed the only evidence before the stipendiary magistrate was that of the appellant and his sister, a Mrs Ratley. The appellant's evidence was that his speed was between 60km/h and 70km/h but that he had slowed down. Mr Ratley's evidence was that the appellant's speed would have been between 60 and 70km/h, but that he had slowed down.

Counsel for the respondent submitted that the fact of the collision established that the appellant's car was travelling at an excessive speed. It is material to the appellant's submission to note that the crest on the appellant's evidence could be described as "blind". It has since been cut down, or made a smoother crest by the relevant local authority. The point of impact was very close to this crest. The available evidence as to distance was from Mrs Ratley – 10, 10 to 15 metres, the appellant 10 – 15 metres, and Mr Lee, a witness whose evidence impressed the stipendiary magistrate – 20 metres.

The stipendiary magistrate did not find that the point of impact was a particular distance in metres from the crest but his finding that the impact "occurred a short distance past the crest" is justified on the evidence. The question of excessive speed and failure to keep a proper look-out must be looked at in the light of the duty cast by the law on drivers. In *Fardon v Harcourt-Rivington* (1932) 146 LT 391 at 392, Lord Dunedin said:

> "If the possibility of the danger emerging is reasonably apparent, then to take no precautions is negligence; but if the possibility of danger emerging is only a mere possibility which would never occur to the mind of a reasonable man, then there is no negligence in not having taken extraordinary precautions."

In *Glasgow Corporation v Muir* [1943] UKHL 2, [1943] 2 All ER 44, 1943 SC (HL) 3, 1944 SLT 60; (1943) AC 448 at 457:

> "The standard of foresight of the reasonable man is, in one sense, an impersonal test. It eliminates the personal equation and is independent of the idiosyncrasies of the particular person whose conduct is in question. Some persons are by nature unduly timorous and imagine every path beset with lions. Others, of more robust temperament, fail to foresee or nonchalantly disregard even the most obvious dangers. The reasonable man is presumed to be free from over-apprehension and from over-confidence..."

The law on this topic is dealt with admirably, may I respectfully say so, by Stable J in *Solomon v Ryan* (1965) Qd R 448 at 453. I am of the opinion that this "blind" crest was dangerous. One would not know what was on the other side. I am of the further opinion that the appellant did not approach it with due care. His speed ought to have been less. His look-out more vigilant. Danger on the other side was not "a mere possibility which would not occur to the mind of a reasonable man." I see no grounds for interfering with the finding of the stipendiary magistrate that the appellant was driving at a speed which was excessive in the circumstances or that his look-out was defective. However I find that he has erred when he apportioned liability. Apportionments are not lightly interfered with. See *Pennington v Norris* [1956] HCA 26; (1956) 96 CLR 10 at 16 where the High Court said:

> "It is to be expected therefore that cases will be rare in which the apportionment made can be successfully challenged ... but giving full weight to these considerations in the present case, we are unable to avoid the conclusion that, in apportioning the responsibility equally, His Honour must have overlooked certain features of the case and that the amount by which he reduced the assessed damages cannot really be supported."

The same case decides that the apportionment is to be measured by the degree of departure from the standard of care of the reasonable driver. I find that the stipendiary magistrate to use the words of the case, "must have overlooked certain features of the case". The appellant's fault lay in his failure to direct his mind on what may have been on the other side of the crest. The respondent's fault lay in having his car stopped or near stopped "a short distance" – say 20 metres or so over the crest. The configuration of the crest ought to have drawn his attention to the danger of having his car where it was – hidden from cars coming over the rear. It almost constituted a trap.

I find on the facts as accepted by the stipendiary magistrate that the apportionments decided upon by him cannot really be supported. I find that the degree of departure from the standard of care of the reasonable man in the case of the appellant is venial compared with the degree of departure from that standard by the respondent. I find the apportionment of liability to be – as against the appellant 20% – as against the respondent 80%. I allow the appeal with costs to be taxed. I order that the $400 security for costs be paid out to the solicitors for the appellant.

*[Judgment supplied courtesy of the Chief Stipendiary Magistrate, Brisbane, Queensland].*

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