54/92

SUPREME COURT OF VICTORIA

GROVES v MASON

Coldrey J

3 April, 5 August 1992

CIVIL PROCEEDINGS – COLLISION BETWEEN TWO MOTOR BOATS – BOTH TRAVELLING ON A RIVER AT SPEED – HEAD-ON SITUATION – ONE DRIVER PULLED TO RIGHT AS PER NAVIGATION REGULATIONS – OTHER DRIVER PULLED TO LEFT – COLLISION OCCURRED – DAMAGE CAUSED – WHETHER DRIVER PULLING TO RIGHT NEGLIGENT TO ANY EXTENT: *NAVIGATION (COLLISION) REGULATIONS* 1983 (NSW) RR5, 8, 9(a), 14.

Whilst driving a speed boat on the Murray River 30 metres from the bank and at 40-60 km/h, G was faced with an oncoming speed boat driven by M. Believing that M. would observe the Navigation Regulations and move to the right, G. continued at the same speed until 5 metres from M's boat when he pulled to the right. M. pulled his boat to the left and the two boats collided causing damage. In subsequent proceedings, a magistrate apportioned G's liability as 25% in that he could have taken evasive action given the available reaction time of 2-3 seconds. Upon appeal against the apportionment—

HELD: Appeal upheld. Apportionment set aside. Finding of negligence against G. set aside.
In the circumstances, *G.* was confronted with an agony of the moment situation where he had only seconds to determine upon a course of action. His actions in complying with the Regulations and turning to the right were understandable. Accordingly, the magistrate was in error in finding that the collision was in any way caused by any negligence on G's part.

COLDREY J: [1] These two appeals against the decision of a learned Magistrate at Melbourne Magistrates' Court on 7 November 1991, come before this Court pursuant to s109 of the *Magistrates' Court Act* 1989 and Order 58 of the Rules of the Supreme Court of Victoria. Although the two actions are listed separately, they were argued together before this Court. The issues for determination in each were identical, namely whether the learned Magistrate erred in finding the appellants liable for negligence or, alternatively, erred in his apportionment of such liability between the appellants and the respondents in the light of his Worship's findings of fact relating to a collision between two speed boats which occurred on the Murray River on 13 March 1988.

At the time of the collision the speed boat owned by the appellant Van de Zand was being driven by the appellant Groves and the speed boat owned by the respondent Callaway was being driven by the respondent Mason.

It was not contested that both Van de Zand and Callaway were liable as principals for the actions of Groves and Mason, each of whom had permission to drive their respective boats. Each of the principals sued each other and the drivers of the respective boats, giving rise to the two actions before the Magistrates' Court and to the form of the appeals before this Court. The quantum of damages was agreed by the parties as being $10,000 in relation to the boat owned by the appellant Van de Zand and $9,000 in relation to the boat owned by the respondent Callaway.

[2] It was common ground that, although the collision occurred in New South Wales (the Murray River being in New South Wales – see *R v Ward* (1980) 142 CLR 308), the Magistrates' Court at Melbourne had jurisdiction to hear the matters since all of the parties resided in Victoria at the time of being served with the complaints (see s100(4) of the *Magistrates' Court Act* 1989). It was also common ground that, since the collision occurred in New South Wales, the law of that State should be applied (see *Breavington v Godleman* (1988) 169 CLR 41). The relevant New South Wales statutory law is to be found in the *Navigation (Collision) Regulations* 1983, (hereafter called the regulations) and more particularly in Rules 5, 8, 9(a) and 14, the applicable portions of which are as follows:

Rule 5 Look-out
Every vessel shall at all times maintain a proper look-out by sight and hearing as well as by all

available means appropriate in the prevailing circumstances and conditions so as to make a full appraisal of the situation and of the risk of collision.

Rule 8 Action to avoid Collision
(a) Any action taken to avoid collision shall, if the circumstances of the case admit, be positive, made in ample time and with due regard to the observance of good seamanship.
(b) Any alteration of course and/or speed to avoid collision shall, if the circumstances of the case admit, be large enough to be readily apparent to another vessel observing visually or by radar; a succession of small alterations of course and/or speed should be avoided.
(c) If there is sufficient sea room, alteration of course alone may be the most effective action **[3]** to avoid a close-quarter situation provided that it is made in good time, is substantial and does not result in another close-quarters situation.
(d) Action taken to avoid collision with another vessel shall be such as to result in passing at a safe distance. The effectiveness of the action shall be carefully checked until the other vessel is finally passed and clear.
(e) If necessary to avoid collision or to allow more time to assess the situation, a vessel shall slacken speed or take all way off by stopping or reversing her means of propulsion.

Rule 9 Narrow Channels
(a) A vessel proceeding along the course of a narrow channel or fairway shall keep as near to the outer limit of the channel or fairway which lines on her starboard side as is safe and practicable...

Rule 14 Head-on Situation
(a) When two power-driven vessels are meeting on reciprocal or nearly reciprocal courses so as to involve risk of collision each shall alter her course to starboard so that each will pass on the port-side of the other.
(b) Such a situation shall be deemed to exist when a vessel sees the other ahead or nearly ahead and ... by day she observes the corresponding aspect of the other vessel.
(c) When a vessel is in any doubt as to whether such a situation exists she shall assume that it does exist and act accordingly."

A transcript of the proceedings at the Melbourne Magistrates' Court is exhibited to the affidavit sworn by Kathryn Lucy Harper on 6 December 1991. The Magistrate's findings and decision are recorded at pp167-171 of the transcript. I was informed by Mr O'Callaghan, who appeared on behalf of the appellants that the Magistrate's findings were **[4]** not disputed for the purposes of this appeal. Those findings involved a substantial acceptance by the Magistrate of the evidence adduced by the appellants.

Insofar as they are relevant to these appeals, the Magistrate's findings of fact are as follows. At all material times the appellant Groves was travelling on his starboard (i.e. correct) side of the river in accordance with the provisions of Rule 9(a) of the regulations, whilst the respondent Mason was travelling on his port (i.e. wrong) side of the river. Each was travelling 30 metres from the New South Wales bank of the river and at the same speed of between 40-60 kilometres per hour. Groves first saw the boat driven by Mason adjacent to a bend in the river and some 50 metres from his boat. He continued at the same speed in the belief that Mason would move to the right (i.e. starboard) as required by Rule 14 of the regulations in order to avoid a collision. When Groves' vessel was about five metres from that driven by Mason, the former driver, observing that the latter had not altered the course of his vessel, took his foot off the accelerator, almost immediately re-applied it, accelerated and, at the same time, turned to the right. At the same approximate time Mason pulled his boat to the left. The two vessels thereupon collided with the front of the bow of Groves vessel striking the right lower side of the bow of that driven by Mason. On the basis of these factual findings the learned Magistrate held that Mason was negligent in that he:

(i) failed to keep a proper look-out.
(ii) failed to observe the other vessel until almost the last moment.
(iii) was in breach of Rules 5, 9(a) and 14 of the regulations.

The learned Magistrate held that Groves was negligent in that:

(i) having observed the other vessel 50 metres away he proceeded without altering his speed or course when, he could have—
(a) manoeuvred his vessel onto another path; and
(b) taken his foot off the accelerator in which case his vessel would only have travelled on for

some 20 metres.

(ii) he assumed that Mason would comply with the regulations and move to the right as required by Rule 14 thereof.

(iii) he was in breach of Rule 8 of the regulations in failing to take appropriate action to avoid the collision.

(iv) his expectation that Mason would move to the right, as required by Rule 14 of the regulations, was not reasonable given that Mason was already driving his vessel on the wrong side of the river in breach of Rule 9(a).

Having made these findings of negligence the learned Magistrate proceeded to apportion liability. Again it was common ground that, under the applicable New South Wales law it was open to the Magistrate to make such apportionment (see *Schlederer v The Ship "Red Fin"* (1979) 1 NSWLR 258).

The appellants' liability as assessed by the Magistrate was 75 percent and that of the respondent was **[6]** assessed as being 25 percent. It is against that determination that the appellants have appealed. The grounds of appeal relied upon before this Court were that the Magistrate erred because:

(a) it was not open to him on the evidence to find that the appellants were guilty of any negligence; or, alternatively

(b) to attribute only 25 percent of the responsibility for the collision to the respondents was to make an assessment of their responsibility which was so disproportionate to that revealed by the facts found by the Magistrate, that his discretion must have miscarried.

The question as to whether a finding of negligence may be made upon a given fact situation or, alternatively, whether, on such a fact situation, the determination of the degree of fault as a basis for apportioning responsibility for a collision reveals the miscarriage of a judicial discretion, are each questions of law which this court has jurisdiction to decide pursuant to s109 of the *Magistrates' Court Act* 1989.

Moreover the power of an appellate Court to interfere with a trial judge's apportionment is affirmed in the case of *Watt v Bretag* (1982) 56 ALJR 760 at 761; 41 ALR 597. As is also made clear by that case, such intervention is only to be contemplated in exceptional circumstances. Such circumstances would exist if an appellate Court was satisfied that the discretion of the Judge or Magistrate in making an apportionment, had clearly miscarried. **[7]** In determining the present appeal, it is not necessary to go behind the findings of fact of the Magistrate which I have already set out.

On behalf of the respondents Mr Hurley submitted that the Magistrate's findings of fact, entitled him to conclude that the conduct of the appellant Groves prior to the collision constituted negligence. Further, the apportionment arrived at by the Magistrate was open on the facts found by him and consequently did not involve any miscarriage of the exercise of his discretion such as would attract the operation of the principles enunciated in *Watt v Bretag*.

On behalf of the appellants Mr O'Callaghan submitted that the Magistrate's approach in segmentalising the actions of the appellant Groves into the sighting of the boat, considering the situation, the taking of the foot off the accelerator, the change of mind and, the accelerating and turning to starboard, was entirely artificial and completely overlooked the urgency of the situation which was inherent in the Magistrate's finding of facts. In support of this argument, Mr O'Callaghan referred to calculations based upon the distances and speeds which were found as facts by the Magistrate.

Implicit in the majority judgment in *Watt v Bretag* is a warrant for utilising this form of analysis in assessing the circumstances of a collision, provided that a sufficient factual basis exists. Even so, caution must be exercised so as not to attribute to the results of such calculations a precision and weight which cannot be justified.

[8] In the instant case, for example, in calculating reaction times from speeds and distances one is faced with the indeterminate effect of the momentary deceleration of the appellants boat. Nonetheless, on the Magistrate's findings of fact, a reaction time in the order of two to three

seconds was available to Groves when faced with the oncoming vessel driven by Mason. In these circumstances the Magistrate's analysis of the initial actions of the appellant Groves fails to take into account what is necessarily inherent in the Magistrate's findings of act, namely, that this was an agony of the moment situation.

The approach of the Courts to such a situation is exemplified by the case of *Vayne v State Government Insurance Commission (SA)* (1991) 13 MVR 446 at 448. That was a case in which the Full Court of South Australia considered a head on collision between two motor vehicles. In the course of delivering a judgment with which the other members of the Court concurred, King CJ stated:

> "... it is to be remembered that the defendant was confronted with what could be fairly described as a desperate situation. He had a vehicle coming towards him on the incorrect side of the road, placing him in imminent peril. He reduced his speed and endeavoured to manoeuvre his vehicle in a way which seemed to him, in the agony of the moment, to be the best way of avoiding the accident. The inclination to move to the right was perfectly understandable when he was faced with a vehicle coming directly at him on the incorrect side of the road. Likewise, however, his indecision that the manoeuvre was too dangerous and that he should veer to the left was also understandable and, in my view, correct. I cannot blame the defendant for not stopping. To stop would have placed him in a sitting-duck position, directly in the path of the oncoming vehicle, and I think it would be unreasonable to expect a driver to place himself in that position."

I agree with the submission of Mr O'Callaghan that the reasoning employed in this case is apposite to the present situation where Groves, who was driving on the correct side of the Murray River at a permitted speed and keeping a proper look-out, was confronted with a fast travelling boat on the wrong side of the river, with only seconds to determine upon a course of action. In these circumstances the finding of the Magistrate that the conduct of the appellant Groves up until the time he swerved to starboard constituted negligence is, in my view, untenable, as is the finding that he was in breach of Rule 8 of the regulations.

The ultimate course of action taken by Groves in turning his boat to starboard in accordance with the requirements of rule 14 of the regulations, whilst equally falling under the umbrella of action taken in the agony of the moment, constitutes, in itself, an unimpeachable manoeuvre. To impugn it as unreasonable because Groves should not have assumed that Mason would comply with the regulations is to impose upon the reasonable man a prescience which has no basis in logic or law.

In summary, therefore, given the urgency of the situation, negligence could not be attributed to Groves for failing to stop, for failing initially to alter course, for decelerating or, thereafter, for taking appropriate and legally specified evasive action. **[10]** It follows from the foregoing that I am of the view that the Magistrate was in error in finding that this collision was in any way caused by the negligence of the appellant, Groves. Having reached that conclusion upon the undisputed findings of fact by the Magistrate, I see no point in remitting the matter to the Magistrates' Court for any form of rehearing.

Accordingly the appropriate order, pursuant to s109(6) of the *Magistrates' Court Act* 1989 is that the orders made by the Magistrate, at the Melbourne Magistrates' Court on 7 November 1991 in complaints numbered 39001639 and 91524735, be set aside and, in lieu thereof it is ordered that the respondents pay to the appellant Van de Zand damages in the sum of $10,000 together with interest to be calculated and costs to be fixed.
