24/89

SUPREME COURT OF VICTORIA

RICHARDSON v NICOLESI

Full Court, Young CJ, Kaye and King JJ

6 April 1989

EVIDENCE – CROSS-EXAMINATION – RULE IN *BROWNE v DUNN* – NATURE OF THE RULE – WHETHER APPLIES TO INSIGNIFICANT MATTERS.

In a jury action for damages for negligence, R. gave evidence that whilst driving her motor vehicle she collided with a vehicle driven by N. which had entered the intersection from R.'s left against a 'Give Way' sign. R. said that as she approached the intersection she had to veer slightly to the left to avoid roadworks in the middle of the road. She further said that another vehicle was travelling about two car lengths behind her. In defence, N. gave evidence of two matters which were not put to R. in cross-examination namely, that the roadworks were not in R.'s path but in fact in N.'s, and that N. had not seen a vehicle following R.'s vehicle. The jury found no negligence on the part of N. and dismissed the claim. On appeal—

HELD: Appeal dismissed.
1. The rule in *Browne v Dunn* (1894) 6 Co R 67 is a question of fair play when dealing with witnesses and generally speaking, should be adhered to.

2. However, the evidence concerning the position of the roadworks and the question of the motor car following were not matters of such significance whereby it could be said that the failure to put those matters in cross-examination vitiated the jury's verdict.

YOUNG CJ: [1] This is an appeal from the verdict of a jury and the judgment entered in accordance with it in the County Court sitting in Melbourne. The verdict was in an action for damages for negligence brought by Robyn Richardson, who was the driver of a motor car, on 17th May 1982, which collided with a truck driven by the defendant at or near the intersection of Station Road and Main Road West, Deer Park.

The negligence relied upon was particularised in the statement of claim in a number of paragraphs which is not necessary to read in full. Most of them are the familiar particulars of failing to keep a proper lookout and travelling at excessive speed, as well as failing to control the vehicle so as to avoid the collision, and more particularly, failing to stop at the intersection and to give way to the plaintiff's vehicle in accordance with the directions of a "Give Way" sign, and failing to comply with the regulations made under the *Road Traffic Act*.

As a result of the collision the plaintiff suffered injuries with which we are not presently concerned, it not being in dispute on this appeal that the plaintiff did suffer injury. The evidence about the intersection was very scanty indeed. No map or plan was placed before the jury and no witness was asked to indicate on any map or plan the features of the intersection which were referred to in evidence.

The plaintiff was driving a motor car in a westerly direction along Main Road West at the point of **[2]** the intersection of that road with Station Road. Station Road is called on the southern side of the intersection, Station Road, but on the northern side it is referred to as Kings Road. As the plaintiff approached the intersection she said that she saw roadworks in the middle of the road and veered slightly to the left to avoid them. The defendant on the other hand said that the roadworks were not in the middle of Main Road West, but were to the north of the intersection, from which I would assume that he meant that they were in Kings Road. But more significantly, he said that the plaintiff's vehicle appeared to be turning to the left into Station Road.

That appearance, according to the defendant, was indicated not only by the fact that the plaintiff's car's trafficator light was flashing for a left-hand turn, but also because the vehicle appeared to be turning in that direction. The plaintiff's vehicle did not, however, turn to the left

but proceeded west across the intersection, and the truck driven by the defendant entered the intersection and collided with the plaintiff's car squarely on its left or nearside. The jury were asked a number of questions, the first of them being, "Was there any negligence by the defendant which was a cause of the plaintiff's injuries, loss and damage?" to which the jury gave the answer, "No". The other questions, of course, did not then arise and judgment was accordingly entered for the defendant.

It is against that verdict and judgment that the plaintiff now appeals. In accordance with principles **[3]** which are invariably applied in cases of this kind, the appellate court must have regard to the view of the evidence most favourable to the respondent. That is derived from the decision of the High Court in *Australian Iron & Steel Ltd v Greenwood* [1962] HCA 42; (1962) 107 CLR 308; [1963] ALR 710; 36 ALJR 171, which has been applied times without number in this Court.

Mr Ball, who appeared for the plaintiff/appellant before us, put first of all a submission to the Court under three headings, which he said dealt with critical matters of evidence which were not put to the plaintiff during cross-examination and which, in accordance with the principle enunciated in *Browne v Dunn* (1894) 6 Coke's King's Bench Reports 67, should lead to the conclusion that the jury's verdict was perverse and should not be allowed to stand.

The three points which Mr Ball made under that heading were, first, the evidence given by the defendant that the plaintiff appeared to be preparing to execute a left-hand turn into Station Road. That evidence was derived partly from the observation made by the defendant but also from his account of the conversation which he had, he said, with the plaintiff after the collision. He said that in that conversation he had asked her why she put on the indicator if she did not want to turn, and she replied, "I changed my mind".

The second matter which Mr Ball said was never put to the plaintiff in cross-examination was the evidence of the defendant that the roadworks which he observed were not in Main Road West, as the plaintiff had said, but to the north of the intersection, which presumably put them in Kings Road.

[4] The third matter which was said not to have been put to the plaintiff in cross-examination was that the defendant said that he had not seen any car following the plaintiff, whereas the plaintiff's evidence included evidence from Mrs Anderson, who said that she was driving a car in the same direction as the plaintiff, about two car lengths behind her.

Of those three topics said not to have been put to the plaintiff in cross-examination, Mr O'Dwyer, for the respondent, assured the Court, he having appeared at the trial, that the conversation of which the defendant gave evidence was indeed put to the plaintiff during the course of that cross-examination. It is extremely unfortunate, to say the least, that no note of that piece of cross-examination is recorded in the learned Judge's notes, and indeed unfortunate that the respondent's advisers did not ensure that that material was otherwise placed before the Court for the purposes of this appeal.

I interrupt the judgment to say that this has been a continual problem for this Court on appeals from the County Court. In the most recent issue of the Victorian Reports can be found a judgment of this Court referring expressly to the difficulties with which the Court is often faced. See *Cook v Blackburn* [1989] VicRp 4; [1989] VR 35. Further than that, about a month ago the Court issued a Practice Note drawing to the attention of practitioners their obligations in respect of ensuring, on appeals from the County Court, or indeed from any other Court where there is no transcript, that the whole of the material is placed before this Court.

[5] I return to the three matters which Mr Ball raised. So far as the question of the car following is concerned, it seems to me that it is not a matter of great significance that it was not put to the plaintiff that she was being followed by another car, for it is quite possible that she was unaware of the fact at least until after the collision, and it would not have, I imagine, affected her evidence to be told that the defendant would say that he had not seen any such car. Nor was it significant to my mind that the driver of the following car, Mrs Anderson, was not apparently told that the defendant had not observed it. Indeed, the failure of the defendant to observe the

car following was something that probably operated more against the defendant than in any other way.

The second matter to which Mr Ball referred was the position of the roadworks. Again, the evidence about the roadworks was so slight on the part of both parties that it seems to me not significant that the fact that the defendant said they were in Kings Road, or to the north of the intersection, was not put to the plaintiff in cross-examination. In the long run the evidence relating to the roadworks was not significant in the case.

Whilst I would of course accept the view that, generally speaking what has been described as the principle of *Browne v Dunn* (1894) 6 Co Rep 67 should undoubtedly be adhered to, and departure from it would generally enable a court to decide more readily against the party making the departure, it is in the long run a question of fair play when dealing with witnesses, and we were told – although it does not appear **[6]** in the appeal book – that the plaintiff was given an opportunity, if she had been so advised, to return to the witness box after the defendant had given evidence to deal only with the question of the position of the roadworks. In my view the failure of the defendant's counsel to put those matters to the plaintiff in cross-examination does not vitiate the verdict.

The other matter upon which Mr Ball relied was the failure of the defendant to comply with Regulation 402(10) of the *Road Traffic Regulations* 1973. At the approach to the intersection taken by the defendant there was erected a "Give Way" sign, and it was common ground that the regulations required the driver approaching the intersection where there was such a "Give Way" sign to give or yield the right-of-way to traffic in the road intersecting his path.

The defendant's response to the suggestion that he should have given way to the plaintiff at the intersection was, in substance, that the plaintiff was apparently turning left and then appeared to accelerate and proceed directly in front of his car. The question whether in those circumstances the defendant was guilty of negligence was essentially a question for the jury, and in order to upset the verdict on the ground that it was unreasonable and perverse the appellant would have to achieve what was described by Dixon CJ in *Williams v Smith* [1960] HCA 22; (1960) 103 CLR 539 at pp544, 545; [1960] ALR 425; 34 ALJR 7. His Honour said:

> **[7]** "To show that they were not merely wrong but that the contrary view must conclusively have been taken, it would be necessary to have an incontrovertible state of facts whether by admission or otherwise which, on themselves, were as a matter of law equivalent to contributory negligence, and facts which also connected themselves with the accident so that they were the cause, or an effective cause, of the accident."

His Honour was there dealing with a case of contributory negligence, but what His Honour said is equally applicable to a case of negligence. That is a very heavy burden to discharge, to show that there was an incontrovertible state of facts which were equivalent to negligence, and as Dixon CJ observed a little later, on matters of the kind here in question, a jury might well work out for itself a view of the case which did not exactly represent what the witnesses said.

The fallibility of human testimony is notorious. The jury may well have taken the view that the plaintiff had first of all indicated an intention to turn to the left, had subsequently, and too late for the respondent to avoid a collision, changed her mind, that the respondent was not travelling at a very fast rate of speed, and that in the circumstances they were not satisfied that the plaintiff had discharged the onus of showing that the defendant was negligent.

No doubt there was much that could be criticised in the evidence of both parties. Mr Ball drew attention to the weaknesses in the evidence of the defendant, but it is another matter altogether to discharge the onus of showing conclusively that there was necessarily an incontrovertible state of facts which were as a matter of **[8]** law equivalent to negligence. The determination of the facts is a matter for the jury, the tribunal sought in this case by the plaintiff, and this Court can only interfere with the jury's verdict if the party upon whom the burden of proof rests can show that the evidence was such that the jury were bound to find in that party's favour.

The principles are clearly set out in the case of *Pujick v Savic, Cox and Cudgewa Dairy Co Ltd* [1971] VicRp 76; [1971] VR 632 and in my opinion in the present case the appellant has failed to discharge that burden. Accordingly I would dismiss the appeal.

KAYE J: I agree that the appeal should be dismissed. I wish only to add the following observation to the reasons for judgment expressed by the Chief Justice. In the appeal book, at the conclusion of the notes of evidence of the defendant's cross-examination, there appears in parenthesis the following: "The defendant denied Mrs Anderson was there at all after the scene of the accident and that her car had been following the plaintiff's". From that note it would seem that in the course of cross-examination of the defendant, no doubt in answer to questions put to her by plaintiff's counsel, the defendant denied that Mrs Anderson was present after the accident at the scene, and he denied that her car had followed the plaintiff's car. That observation, in addition to the matters which have fallen from His Honour, provide added reasons why there was no foundation for the criticism that the defendant had not put to the plaintiff the matters of the presence of Mrs Anderson after the accident happened and of her car following the plaintiff's car.

[9] KING J: I agree with the order proposed by the learned Chief Justice and with what has been said by both him and Kaye J.

YOUNG CJ: The order of the Court is that the appeal is dismissed. It must be dismissed with costs.

APPEARANCES: For the appellant Richardson: H Ball, counsel. Rennick & Gaynor, solicitors. For the respondent Nicolesi: T O'Dwyer, counsel. Phillips Fox, solicitors.
