23/86

SUPREME COURT OF VICTORIA

DALE v RUSSELL

O'Bryan J

30 October 1984

PROCEDURE – MOTOR VEHICLE COLLISION – CLAIM FOR DAMAGES – NEGLIGENCE – MOTORIST DRIVING OVER HATCHED AREA ON CARRIAGEWAY – PURPOSE OF HATCHED AREA – FORMING LANE PREMATURELY – FAILING TO KEEP PROPER LOOK-OUT – WHETHER NEGLIGENT.

A motorist drove his vehicle over a diamond or triangular area of white diagonal stripes on the surface of the carriageway and came into collision with a vehicle on his left. In a claim for damages arising out of the collision, it was open to the Court to find the motorist negligent in failing to keep a proper lookout and in forming a third lane prematurely in that the carriageway was clearly marked otherwise.

O'BRYAN J: **[1]** Order nisi to review the decision of the Magistrates' Court at Sandringham on the 4 August 1983, when two special summonses were heard together as cross claims. Mr Dale, who is the applicant, brought a claim against Mr Russell, who is the respondent, for damage caused to his motor vehicle arising out of a collision, which occurred near the intersection of Centre Road and Warrigal Road, Bentleigh, on the 20 April 1983. A few days later, Russell cross-claimed for damage caused to his car.

The collision occurred in Centre Road, a short distance west of the intersection, which is controlled by traffic lights. Some distance west of the intersection, the carriageway is divided into four traffic lanes, two being for east-bound traffic and **[2]** two being for west-bound traffic. As a motorist approaches Warrigal Road from the west, the two lanes become three lanes, the lane adjacent to the centre of the road being a 'right turn only' lane. There was a diamond, or triangular, shaped area of roadway marked with white diagonal stripes approximately eight metres wide by 63 metres long adjacent to the centre, indicating a lane change some distance west of the intersection. I shall refer to this area as "the hatched area".

Apparently it was marked on the roadway pursuant to *Road Traffic Regulations* 1973, statutory rule No. 178, Regulation 307 "for the purpose of controlling, directing, guiding, regulating or warning drivers or pedestrians" that a right turn only lane was imminent. One purpose of the hatched area is to advise a motorist, approaching Warrigal Road from the west in the outside lane, that the lane is about to subdivide into two lanes, one of which would become a right turn only lane. The hatched area meets the description of a 'minor traffic control item', defined in Clause 102 of the Regulations.

The accident occurred more or less on the hatched area when the vehicle being driven by Dale in an easterly direction was struck on the nearside front by a vehicle being driven by Russell in a general southerly direction.

On the north side of Centre Road, approximately opposite the hatched area, is a laneway which provides access for motorists entering Centre Road from a petrol station of a take way food business. When the accident occurred, traffic in Centre Road near the **[3]** hatched area was quite heavy There were two lines of traffic in Centre Road more or less stationary, waiting for the traffic lights to change at the intersection ahead. Russell intended to cross the east-bound carriageway of Centre Road and turn right to proceed west. He saw that the traffic was more or less stationary before driving his vehicle from the laneway across the two lanes of traffic through an opening left by the stationary cars. As Russell was crossing the two stationary lines of traffic, Dale apparently moved out to form a third line of traffic. He positioned his car on the hatched area, intending to enter the right turn only lane ahead of him. Russell failed to observe Dale's vehicle proceeding easterly in a third lane and a collision occurred.

The learned Magistrate determined that Dale's vehicle was travelling at about 20 kilometres an hour when the impact occurred. That finding cannot be disturbed now. After hearing evidence, the learned Magistrate found that each driver was negligent and he apportioned blame 70/30 against Dale.

Dale seeks to review the decision on the following grounds, one, that the Magistrate erred in finding that the applicant had a duty of care to vehicles crossing his path; two, the Magistrate erred in law in finding that the applicant should not have been in the hatched **[4]** area; three, the Magistrate erred in finding that the applicant was negligent and should not have been on the hatched area; four, the Magistrate erred in finding that the Red Rooster driveway was a public roadway; five, that there was no evidence to support a finding that the applicant was negligent. All the grounds, save No. 4, were argued by Mr Wilson of Counsel for the applicant. The relevant findings of the learned Magistrate are set out in the affidavits filed in support of and in opposition to, the order to review. In para. 17(2), of Russell's affidavit, the following appears:

> "I believe the Magistrate found and stated that he thought the hatched area has a meaning to a reasonably prudent driver, who is faced with these markings on the roadway and, indeed, a driver who is faced with a carriageway which veers to the left of the markings, knowing that at the end a clear defined carriageway or lane exists. The Magistrate stated that he would have to say that the markings have some meaning to a reasonably prudent driver."

Paragraph 20, sub-paragraphs (d) and (f) in the affidavit of Lindus Krejus, filed on behalf of the applicant, the following words are attributed to the Magistrate:

> "The applicant was under a duty to take every care on this hatched area, once he has overtaken other vehicles. The respondent had made a right hand turn into peak hour traffic from an obscure area and had a duty to all vehicles on his right. The respondent's vehicle, at the point of impact, was already in the turning position."

[5] Finally, in Russell's affidavit, para. 17, sub-paragraphs (4) and (5), the following appears:

> "The Magistrate stated in his findings that the applicant, as a reasonably prudent driver, should have said, prior to attempting his manoeuvre, that he will not pass on to the area for the purpose of making his turn. The Magistrate further stated that it must follow that the respondent did pass on to that area and that, whilst so doing, he was under a duty of care passing into a 'no-man's' area. The Magistrate further stated that he accepted that the applicant did pass out of a lane into the hatched area and he was passing into an area that he should not have been and that he was in an area, when the accident occurred, that a reasonably prudent driver would not have been on. Accordingly, the Magistrate found the applicant to have been negligent. The Magistrate then turned to the respondent's driving. He stated that the accident occurred in peak hour and that the respondent had come from a obscured area with stationary vehicles to his right. He stated that he preferred the respondent's version because it was put on the basis that he was driving in peak hour traffic through vehicles that had stopped to enable him to do a right hand turn. However, the Magistrate found that the respondent, in making his turn, owed a duty to all vehicles to his right. He stated the respondent owed a duty to the vehicle in the lane near the gutter and the van and to the vehicles in 'no-man's land'. The **[6]** Magistrate further stated that he did not lose his duty to give way to all vehicles coming from his right."

Mr Wilson of Counsel for the applicant submitted that the evidence did not show Dale was guilty of negligence or, alternatively, that the learned Magistrate found Dale was guilty of negligence upon a wrong principle, namely, that the hatched area was 'no man's land', meaning that it was negligent to drive over the hatched area. In essence, Mr Wilson submitted that the learned Magistrate made an error of law, in that he gave undue weight to the Regulations relating to the hatched area. He was in error, Mr Wilson submitted, because in effect he found that Dale was guilty of negligence simply in driving over the hatched area.

The relevant *Road Traffic Regulations* did not prohibit a motorist driving over the hatched area. Consequently, Dale was not guilty of a breach of the *Road Traffic Regulations*, so as to provide *prima facie* evidence of negligence. The learned Magistrate appears to have decided that, at the time of the collision, Dale was guilty of negligence because he was driving along the hatched area when the collision occurred. He determined that, as a prudent motorist, Dale should not have been on the hatched area and because Dale was in an area when the accident occurred in which a reasonably prudent driver would not have been, Dale was guilty of negligence.

I do not believe that the learned Magistrate **[7]** made a finding of negligence against Dale merely because Dale drove onto the hatched area. Rather, the Magistrate determined that a prudent motorist would not drive over the hatched area without exercising considerable care. In Dale's case, he did not take sufficient care, presumably, in failing to keep a proper lookout and was guilty of negligence. Perhaps the learned Magistrate did not clearly express the basis upon which he found Dale was guilty of negligence. Nevertheless, the finding of negligence was clearly open upon the basis that Dale formed a third line of traffic prematurely, in that the carriageway was clearly marked otherwise.

The carriageway, at the point of collision, was marked and used by prudent motorists as a two lane carriageway. In travelling easterly at 20 kilometres an hour in an unauthorised third lane, Dale took a considerable risk. He failed to keep a proper lookout for traffic attempting to cross the carriageway from his left. I believe Dale inevitably had to be found guilty of negligence because he prematurely made a third line of traffic and failed to keep a proper lookout. A finding of negligence was open to the Magistrate. Mr Wilson submitted that, were I to conclude that no error of law occurred in the finding of negligence, the Magistrate was in error in apportioning 70% of the blame against him. Mr Wilson relies upon Russell's clear breach of Regulation 607, which requires a driver entering a highway from land abutting on the **[8]** highway to give way to all vehicles travelling in either direction.

Mr Batten of Counsel, who appeared for Russell, did not seek to disturb the primary finding of negligence made against his client. Mr Batten submitted, however, that the decision of the learned Magistrate as to apportionment should not be disturbed. Mr Batten relies upon the decision of the former Chief Justice, Sir Edmund Herring, in *Young v Paddle Brothers Pty Ltd* [1956] VicLawRp 6; (1956) VLR 38; [1956] ALR 301, where it was held that:

> " ... on review, a decision of a Magistrate on a question of fact must be dealt with as a verdict of a jury. The decision cannot, therefore, be set aside unless the complaining party is entitled, as a matter of law, to have the decision set aside or it appears that there is no reasonable view of the evidence that is consistent with the decision."

That decision is complemented, I believe, by the decision of the Full Court, in *Zoukra v Lowenstern* [1958] VicRp 94; (1958) VR 594: [1959] ALR 42. I shall read the headnote:

> "Where, pursuant to the *Wrongs (Contributory Negligence)* Act 1951, the proportion of the plaintiff's total loss and damage, which the plaintiff and defendant respectively should bear, has been determined by the verdict of a jury, then, if the finding of negligence on the part of both parties is not disputed and the verdict is not vitiated by misdirection or otherwise, an appellate Court will not interfere with the apportionment made by the jury unless it is such that no reasonable jury could have come to the conclusion reached."

That decision, I think, can be transposed to the situation I am dealing with here, namely, I am faced with a finding of negligence on the part of both parties which is supportable by the evidence and an apportionment of responsibility for the accident made by the learned Magistrate. It is no easy task **[9]** to disturb an apportionment of negligence made by a Magistrate, who has heard the evidence and seen the witnesses. On the one hand, Mr Wilson relies upon Russell's failure to 'give way' to Dale's vehicle. Yet Russell had safely negotiated two lines of vehicles and was entitled to assume that his main danger would come from the east from vehicles entering Centre Road at Warrigal Road and not from a motorist making a third line of traffic prematurely. No doubt, Russell failed to keep a proper lookout. Again, Dale was pursuing an unorthodox manoeuvre, making a third line of traffic and driving over a hatched area serving to warn of a change in lanes ahead. He also failed to keep a proper lookout. Each party, therefore departed from the standard of care expected of a prudent motorist. I am not persuaded, on the evidence, that no reasonable Magistrate could apportion liability 70/30 against Dale.

Perhaps the apportionment against Dale might have been less but the test is not what I might have done, rather, it is whether a Magistrate, acting reasonably, could not have reached the decision he did. In my opinion, none of the grounds argued have been made out and the order nisi should be discharged with costs.

APPEARANCES: For the applicant Dale: Mr P Wilson, counsel. Nicholas J Sevdalis & Associates, solicitors. For the respondent Russell: Mr J Batten, counsel. Millars, solicitors.