05/93

SUPREME COURT OF VICTORIA

CARISBROOKE v RANFORD

Ashley J

7 December 1992

NEGLIGENCE – MOTOR VEHICLE COLLISION – MOTOR VEHICLE ACCIDENTALLY REVERSED – COLLIDED WITH VEHICLE BEHIND – DAMAGE CAUSED – WHETHER DRIVER OF REVERSING VEHICLE NEGLIGENT.

Where the driver of a motor vehicle accidentally slipped the vehicle's transmission into reverse, the car reversed and collided with the front of the vehicle behind thereby causing damage, it was not reasonably open for a magistrate to conclude that the driver reversing was not negligent.

ASHLEY J: [1] This is an appeal under s109 of the *Magistrates' Court Act* 1989 from a decision of a Magistrate, made on 17 August 1992, in which the Magistrate dismissed the plaintiff's civil claim for damages.

The claim arose out of a road traffic accident, which occurred on 8 February 1992. The accident involved a collision between a motor vehicle driven by the appellant plaintiff and a motor vehicle driven by the defendant. The collision occurred at the intersection of Harker Street and Flemington Road in North Melbourne. It was common ground before the Magistrate that the plaintiff's and defendant's vehicles were, shortly before the accident, stationary in Harker Street at its intersection with Flemington Road. The plaintiff's vehicle was behind the defendant's vehicle. The two vehicles were stationary by reason of a traffic light being red.

Before the Magistrate there were conflicting versions as to what happened when the lights turned green. According to the plaintiff, the defendant's vehicle unexpectedly reversed into the front of her stationary vehicle. According to the defendant, his vehicle stalled. He then restarted the vehicle, which had automatic transmission, whilst the transmission lever was in the "neutral" or "park" position. Whilst the lever remained in that position the plaintiff's vehicle ran into the rear of his stationary vehicle.

The Magistrate accepted the plaintiff's account, thereby finding that the defendant's vehicle had reversed into the front of the plaintiff's motor car. He nonetheless found that there was no negligence on the part **[2]** of the defendant. This appeal by the unsuccessful plaintiff is against that finding. It is said that a finding of "no negligence" in the circumstances that I have described was not reasonably open. That is the test that must be applied in these circumstances.

The affidavit in support of the appeal is that of the appellant plaintiff, Margaret Carisbrooke, being an affidavit sworn 10 September 1992. The Magistrate's conclusions are set out in paragraphs 23 and 24 of that affidavit.

It appears that the Magistrate found that the reason whereby the defendant's vehicle reversed was that the defendant, having started his vehicle which had been stalled, had then slipped the transmission into "reverse" accidentally. It seems also that the Magistrate found that there was no intent on the part of the defendant to put his car into reverse, and that the Magistrate also said that he did not know why the defendant had slipped the car into reverse.

It is not altogether clear from the affidavit material why the Magistrate said that he did not know why the defendant had done what he did. It may be that he intended to say no more than that what had happened was not intentional, and was accidental. Certainly, his finding that the car had gone into reverse because the transmission had been accidentally put into reverse provides a quite adequate explanation of what had occurred, and why it occurred.

It appears to me that the Magistrate reached a conclusion that, on the circumstances before him, was not **[3]** reasonably open. It may be that he was misled by his references to the conduct of the defendant being not intentional and accidental. But be that as it may, I find it impossible to conclude that a finding of negligence as against the defendant should not have been made upon the facts found.

Mr McEachern for the appellant plaintiff pressed me to take into account in considering the circumstances of the case not only the facts as they were found by the Magistrate, but also an apparent breach of statutory duty on the part of the defendant. He further invoked the maxim *res ipsa loquitur*. It is unnecessary for me to consider either of those submissions which were, in truth, subsidiary.

The question that arises – my being satisfied that negligence must have been found against the defendant – is what course I should now follow. Section 109(6) of the *Magistrates' Court Act* permits me to make such order as I think appropriate, including an order remitting the case for rehearing to the Magistrates' Court, with or without direction in law. This is not a case where, as it appears to me, a remission is appropriate. There were really only three issues before the Magistrates' Court: First, was the defendant negligent? Second, was there any contributory negligence? Third, what were the damages?

The Magistrate found there was no negligence on the part of the defendant, and I have said that that conclusion was not reasonably open. He also found that there was no contributory negligence on the part of the plaintiff. That finding is unexceptional and is not **[4]** challenged. As to the third issue, the quantum of damage claimed by the plaintiff, $2,024.71, was not a subject of dispute before the Magistrate.

There is no occasion in the circumstances to remit the case for rehearing afresh. Sufficient findings were made to enable me to deal with the matter.

An order was made by the Master who granted the appellant leave to proceed that material be served upon the respondent and the appropriate Registrar of the Magistrates' Court. I am told that that has been done, but no affidavit of service has been filed. An undertaking has been given that an appropriate affidavit of service will be filed.

I should, before concluding, say a little in relation to the question of costs. So far as the costs of the substantive proceedings are concerned, I see no reason why the appellant should not have her costs as if the matter were heard in the Magistrates' Court. The effect of the *Magistrates' Court (Arbitration) Regulations* 1990, pursuant to which the matter was heard by the Magistrate, are that professional costs were capped at $614, plus necessary disbursements. I have been informed that the disbursements were, respectively, $75 stamp duty, and $29 costs of service of documents. As to the costs of the appeal, I see no reason why they should not be allowed to the appellant. Mr McEachern, for the appellant, sought a certificate pursuant to s14A of the *Appeal Costs Fund Act* in circumstances where, today, the respondent has not appeared. I am not prepared to grant an indemnity certificate under that section. I do not refuse to order the respondent to pay the appellant's **[5]** costs of the appeal. (See s14A(c)).

It will be open to the respondent to seek an indemnity certificate in respect of the appeal. (See s13(1) of the Act). That certificate, if sought and granted, will entitle the respondent to payment of costs, including the appellant's costs of the appeal. It will, no doubt, be in the interests of the appellant to ensure that the respondent is made aware of the right that he has to seek grant of a certificate pursuant to s13.

Upon the filing of an affidavit or affidavits of service, and not before, I will make the following orders:

1. The order of the Magistrates' Court that the appellant's claimed be dismissed is set aside.

2. Order that the respondent pay to the appellant damages in the sum of $2,024.71, together with costs of $614 and disbursements fixed at $104.

3. Order that the respondent pay the costs of the appeal.

4. Reserve liberty to apply pursuant to the *Appeal Costs Fund Act* for an indemnity certificate.

I will make no order in respect of damages in the nature of interest.

APPEARANCES: For the appellant Carisbrooke: Mr I McEachern, counsel. Sholl Nicholson Pty, solicitors. No appearance for the respondent RAnford.
