B. A UNIQUE APPLICATION OF THE DECISION IN THE "MUSGRAVE RANGE"

We publish here, with the kind permission of the Queensland Bar Association Bar News, *a judgment which clearly has implications for maritime lawyers and members of the Association. In* Toper *v.* Cringe[1] *Judge Hevans in the District Court at Sandgate on 1 April 1983 applied* Baggermaatschappij Boz & Kalis B. V. and Ors *v.* Australian Shipping Commission (the "Musgrave Range")[2] *to the facts before him.*

In case readers have any doubt as to the significance of this judgment we refer you to the date of the judgment.

Negligence — Road Accident — Foreseeability — Subjective necessity to swerve due to threatening attitude.

If a driver of a vehicle parks it in such a way as to make it appear to another driver that if he (the first driver) were to move his (the first driver's) vehicle a collision might occur with his (the second driver's) vehicle, a swerve by him (the second driver) to avoid such a collision is a reasonably foreseeable consequence of the way in which he (the first driver) has parked his (the first driver's) vehicle, and he (the first driver) is liable for any damages caused to his (the second driver's) vehicle if as a result of the swerve it (the second driver's vehicle) collides with an obstacle.

Baggermaatschappij Boz & Kalis B. V. and Ors v. *Australian Shipping Commission*[3] applied.

ACTION

The relevant facts appear sufficiently in the judgment reported herein.

T. Bold, for the Plaintiff.

U. Gottem, for the Defendant.

JUDGE HEVANS

This action arises out of a motor vehicle accident which occurred in May 1981, when a vehicle owned and driven by the Plaintiff collided with a tree in the vicinity of the Defendant. The road where the collision occurred is a typical country road, except that it is quite straight, with visibility for over a mile. According to the Defendant he saw the Plaintiff's vehicle approaching when it was quite some distance away and he gave a rather colourful description of its behaviour. I have difficulty accepting his evidence on this point, as he became

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[1] No. 68942813/1982. 1983 1 Q.B.A.B.N.O.U.R. 8 — these are the Occasional Unofficial Reports of the *Queensland Bar Association Bar News.*

[2] (1980) 54 A.L.J.R. 382.

[3] *Ibid.*

rather heated when describing the movements and, in any event, the actions of the Plaintiff's vehicle as he described them would have been quite extraordinary, bearing in mind that the road was straight at this point. In any event, they induced the Defendant to pull off to the side of the road and drive on to the verge (in fact behind a tree), stop his car and switch off his motor, so as, in his words, "to let this loonie get safely past" — the heated nature of his evidence can be seen from this passage. In fact as the Plaintiff approached he swerved to the left, ran off the road and collided with a tree, causing damage to his vehicle which has been agreed in the sum of $5,281.17.

The Plaintiff said in evidence that he swerved becauses it appeared to him, from the position in which the Defendant's vehicle was situated, that the Defendant might be about to come suddenly on to the road, which would result in a collision and that, therefore, he swerved to the left to avoid this danger. Although a strong attack was made on his credibility, on grounds to which I shall refer later, I accept his evidence as to the position of the Defendant's vehicle and as to his reactions, and find that this was the cause of the collision with the tree.

Mr Bold, for the Plaintiff, relied on the recent decision of the High Court in *Baggermaatschappij Boz & Kalis B. V. and Ors* v. *Australian Shipping Commission,*[4] a decision of which I expect much more will be heard in these Courts as soon as more counsel learn to pronounce the name. In that case a ship changed course to avoid a dredge, which was at the time stationary and which had advised the harbour control that it would allow the ship to enter first but which was pointing in a direction such as to suggest to those in charge of the ship that it might be going to come into collision with the ship; as a result the ship changed course and ran aground on a sandbank. The High Court held, by majority, that the dredge was negligent and liable to the ship for the damage so caused. In the circumstances, I think that this decision applies and as a result I am bound to find that the Defendant's negligence in positioning his parked car was the cause of the Plaintiff's damage.

Mr Gottem sought to distinguish the High Court decision on various grounds, including that it was concerned with a collision at sea, where different rules apply; however, I do not regard this as a valid distinction. Recently the Full Court applied a number of decisions involving collisions at sea when holding that it is not reasonably foreseeable for a Queensland solicitor to be driving a Jaguar: see *Zappulla* v. *Perkins.*[5] The other grounds raised by counsel are too spurious to mention.

Various allegations of contributory negligence were made against the Plaintiff but I find that none of them have been made out. I do not think that he was negligent in failing to take into account the presence

[4] *Ibid.*

[5] [1978] Qd R. 92.

of the tree when he swerved; the Defendant having created a dangerous situation cannot expect the Court to be too strict in measuring the Plaintiff's reaction to that situation. I also find that there is no evidence to make out the allegation that the Plaintiff was affected by alcohol in his driving at the relevant time. Mr Gottem sought to tender under section 92 of the Evidence Act 1977 (Qld) a report on the accident by a Constable Boot, the investigating officer, which contained a note of a statement by the Plaintiff at the time of the collision that he had thought that the Defendant's vehicle was a herd of pink elephants. There was evidence that Constable Boot has since left the Police Force and is now engaged in pearl diving in the Caspian Sea but there is no evidence that the signature on the report is that of Boot and, in any case, he has not signed on that side of the paper on which the versions appear. In any event, I have a discretion under section 98 of the Act to exclude such evidence, which I would exercise, as I think it is a very dangerous situation where this sort of misleading material is being put before the Court. I also do not attach any significance to a certificate tendered, purporting to show that the Plaintiff had been tested on a breathalyser and found to have a blood alcohol concentration of .38, since it is established that the Courts will not assume the accuracy of the breathalyser in civil proceedings: *Zafiri* v. *Pippos.*[6] The Plaintiff under cross examination denied that he had spent the six hours before the collision drinking solidly at the King Charles Hotel nearby and I reject the evidence of the six witnesses called by Mr Gottem to the effect that they saw him there doing to, since on their own admission they had also been consuming some alcohol on that day and their powers of observation are therefore suspect. I, therefore, find that the collision was caused solely by the negligence of the Defendant.

There will be judgment for the Plaintiff for the agreed sum of $5,281.17 with costs to be taxed.

Judgment accordingly.

Solicitors: *Thuckett & Thee (plaintiff): Skinnem & Filchett (defendant).*

Note: On 15 May 1983 the Full Court refused special leave to appeal to the Privy Council against this decision, on the ground that the margin on the Notice of Motion filed by the Applicant Defendant was too narrow.

D. J. McG.

[6] [1980] 5 Q.L. 201.