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IN THE HIGH COURT OF NEW ZEALAND
DUNEDIN REGISTRY

M58/83

BETWEEN FIONA McDONALD of 10 Pitt Street, Dunedin, Student

Appellant

A N D RICHARD N. TAMBLYN of Coal Creek, Roxburgh, Farmer

Respondent

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Hearing: 19 September 1983

Counsel: J.M. Conradson for Appellant
G.L. Wilson for Respondent

Judgment: - 9 FEB 1984

JUDGMENT OF HARDIE BOYS J.

In the lower Court, the respondent obtained judgment against the appellant for $2,865, being the admitted loss he sustained when the appellant, who was driving his Holden utility with him as a passenger, drove it off the road and wrecked it. The learned District Court Judge held that it was a case of res ipsa loquitur, and dismissed defences of volenti non fit injuria and contributory negligence. Against those three conclusions, the appellant now appeals.

Both parties were at the time aged 18. Both were working on a farm at Millers Flat. At the end of the day they joined a group for a few drinks. Miss McDonald had some wine: she said only one glass although there was some difference between the witnesses about that. Mr Tamblyn had considerably more, to the extent that he realized he ought not to drive. One of the others in the group, who also had a car, was in the same condition. It was suggested that in order to get him home to Roxburgh where he lived, one of the girls in the group, not so affected, should drive him in his car and Miss McDonald should take Mr Tamblyn's utility, with him as passenger, so that they could bring the other girl back. Mr Tamblyn was not happy about the suggestion, because his vehicle was

uninsured for drivers under 25 years of age and in any event he did not allow other people to drive it. Miss McDonald had thus not driven it before. However, he finally agreed, and has regretted his decision ever since.

Mr Tamblyn had no recollection of the accident. He remembered "moving along to Roxburgh, quite normally ... and listening to the radio," but that was all. No one saw the accident. The girl driving the other car, following along a little later, found the utility down a bank. At that point the road, looking in the direction the utility had travelled, curves to the left and rises slightly. The surface is sealed, the road of normal width. Visibility was good. The vehicle had run off to the left. This witness noticed a black mark on the road surface where it had run off. It was about three metres long and extended almost the width of the road: "a U turn sort of". The vehicle was upright, the front left hand wheel buckled or pushed underneath.

Miss McDonald did remember what had happened. She said she had no difficulty handling the vehicle. She was travelling at about 75 kph. (There was evidence of a higher speed earlier, but not close in time to the accident.) As she was coming into the corner - "a very sweeping long corner not at all difficult" - the vehicle suddenly veered to the right as if someone had pulled the steering wheel. She tried to correct it and it veered again. Then very quickly it turned 180 degrees and went over the bank, backwards she presumed.

The only explanation that could be offered was a blow-out or other tyre failure. A motor mechanic and car wrecker, who bought the vehicle after the accident, said that none of the tyres had had a blow-out, although the left front tyre had been damaged in the accident. The learned District Court Judge found as a fact that the vehicle was in good order; and that the accident was not caused by any failure of the tyres. He therefore rejected a defence of inevitable accident, and that conclusion was not challenged on this appeal.

In holding Miss McDonald liable in negligence the Judge made no specific findings of negligence. He held that she was a responsible and comparatively experienced driver; that on the evidence "there was no acceptable reason for the accident"; and that there being no other reasonable explanation "I find the accident to have been caused by the carelessness of the defendant". Mr Conradson challenged this reliance on res ipsa loquitur. Miss McDonald, he said, gave an explanation which showed she was not negligent, and there was no reason not to accept it.

The phrase res ipsa loquitur is much misunderstood. It is no more than a convenient means of expressing one of the two ways in which negligence may be proved. It may be proved either by direct evidence of negligent acts or omissions or by inference drawn from the very occurrence of the accident itself. The latter will be the case where "the accident is such as in the ordinary course of things does not happen if those who have the management use proper care" (Erle CJ in Scott v London and St Katherine Docks Co (1865) 3 H & C 596, 667). However, all that that inference can do is enable a plaintiff to make out a prima facie case: "... its purpose is to enable justice to be done when the facts bearing on causation and on the care exercised by the defendant are at the outset unknown to the plaintiff and are or ought to be within the knowledge of the defendant" - (Lord Normand in Barkway v South Wales Transport Co Ltd [1950] 1 All ER 392, 399). Just as with a prima facie case made out by direct evidence of negligence, the defendant will escape liability if he shows that, on the balance of probabilities, he was not negligent. It is not the law that if it can be said that res ipsa loquitur, the plaintiff must inevitably succeed (see Swan v Salisbury Construction Co Ltd [1966] 2 All ER 138, 143 (PC)). Once the plaintiff's prima facie case has been answered, it is for the Court to determine on all the material before it whether the plaintiff has proved that the defendant was negligent. (See also Watson v Davidson [1966] NZLR 853 and Hawke's Bay Motor Co Ltd v Russell [1972] NZLR 542).

The fact of the accident in this case was in my view sufficient in itself to present a prima facie case of negligence on the part of Miss McDonald. A vehicle in good mechanical order, being driven in good conditions on a safe road does not in the ordinary course of things spin around and go down a bank unless the driver is negligent. In answer to that prima facie case, the driver here has said that she drove carefully, and that something happened to the car which she could not have foreseen and could not control, and for which no explanation has been adduced. I do not think that she was necessarily required to furnish an explanation. In a case such as this, where the vehicle did not belong to her, that could produce an injustice. What she did have to do, however, was show (on the balance of probabilities) that whatever the cause was, it was not her negligence. I think that is how the Judge approached the case, and I think his conclusion was correct.

This case is very similar to Ludgate v Lovett [1969] 2 All ER 1275 where the Court of Appeal held that a simple assertion by the defendant that he drove carefully is not enough to displace the inference arising from the accident itself. "There being no explanation" Harman LJ said (p 1278) "it must have been some cause for which the defendant was responsible." And he went on to point out how easily a momentary lack of concentration, unnoticed at the time and unremembered later, can produce an accident of this kind. Edmund Davies LJ (pp 1279-1280) was prepared to allow that a simple denial of negligence by the defendant may convince the Court that there was none. But in this case, as in that, there was no finding by the trial Judge to that effect. The dictum of Harman LJ is therefore in my view applicable here.

The defence of volenti was based on the proposition that the appellant was under the influence of liquor, and that the respondent knew that, but was nonetheless willing to allow her to drive. However many glasses of wine Miss McDonald consumed, Mr Tamblyn's evidence was that he did not know she had had more than one; and he said that he did not think she was affected by it. The Judge held that she was not under the influence of alcohol. There is therefore no

evidential basis for the defence, and Mr Conradson, as discussion of the topic proceeded during his argument, was not disposed to press it. However, as a parting shot he suggested that Mr Tamblyn had consented to run the risk of Miss McDonald's inability to control the vehicle. I regard that as far-fetched. They were both satisfied before the journey began that she could drive it, and there was no evidence of any inability on her part having become apparent before the accident.

Finally, Mr Conradson argued that the respondent was guilty of contributory negligence in two respects, first in encouraging and directing Miss McDonald to drive at an increased speed "to see how it handled" and secondly in not informing her that she was not covered by his insurance policy.

The first of these allegations is based on certain evidence Miss McDonald gave, and upon which Mr Tamblyn was able to offer little comment, due to his loss of memory. But inasmuch as Miss McDonald herself asserted that at the time of the accident her speed was quite proper - and there is no evidence to the contrary - I am unable to appreciate how this particular allegation has any factual basis.

The second allegation raises a novel point. Mr Tamblyn said that on an earlier occasion that week he had made a general statement "to no one in particular" that it was his principle not to allow anyone under 25 to drive his vehicle because it would then be uninsured. He accepted that Miss McDonald may not have heard him, although he thought his view was generally understood. Miss McDonald denied hearing him say anything at any time about insurance. The transcript of her cross-examination on this topic is:

> "Miss MacDonald are you suggesting that this accident would not have happened if you had been told that you were not insured whilst you were driving the vehicle?.....I am saying that if I had known that I was not insured and Mr Tamblyn had shown any hesitation whatsoever that I would not have driven his vehicle.

Do I take it from that you did not have sufficient faith in your ability to drive the vehicle after you knew you were uninsured?....No the vehicle that I have to use, I know it has an insurance policy and that we have to name anyone under the age of 25. As far as I am concerned I must take the responsibility for anything that happens and because of that I do not let anybody else drive my vehicle.

You were happy to drive somebody else's vehicle without inquiring if that situation applied? ....No I presume that because I was not told anything rightly or wrongly, that because I was not told anything I thought I was insured to drive.

And you drove that car believing that you were insured, is that what you are telling us?....Yes."

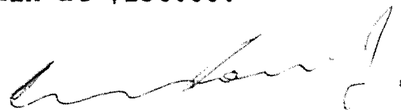
The Judge's finding on the subject, which I agree shows some misunderstanding of these answers, was:

> "I do not regard the matter of lack of insurance to be a matter which should have been disclosed by him and in any event the Defendant knew of the restrictions on insurance for younger drivers."

The defence of contributory negligence is available "where a person suffers damage as the result partly of his own fault and partly of the fault of any other person or persons" (s 3 of the Contributory Negligence Act 1947). "Fault" in this section means a failure by the plaintiff to take reasonable precautions to guard against the injury or loss he has sustained. And that fault must have a causal connection with the sustaining of the injury or the loss. Mr Tamblyn's failure to tell Miss McDonald that she would be uninsured did not in my view constitute "fault" at all. It may be that Mr Tamblyn should have disclosed the position for Miss McDonald's own sake, to ensure that she was aware of the risk she was taking, but that is not the issue. The issue is whether by not disclosing it he failed to take reasonable care for his own sake, to avoid damage to himself. As the only relevant consequence of disclosing the position would have been that she declined to drive, the allegation is really

no different from one that he ought not to have allowed her to drive in the first place. That allegation would have been justified had he known, for example, that she was a bad driver, or was intoxicated, but not if there was no cause for concern as to her capacity. Furthermore, there is no causal nexus between Mr Tamblyn's failure to inform Miss McDonald and the damage that was sustained. That damage arose from an accident caused by Miss McDonald's negligence. Mr Tamblyn's omission did not contribute to the accident, nor did it contribute to the loss caused by the accident. At best it was, in the old terminology, a causa sine qua non, for had he disclosed the position Miss McDonald may not have driven his car. But it was not a causa causans, for once she became the driver nothing he did or omitted to do affected her driving in any way contributing to the accident. And it was the accident that was the only direct cause of the loss.

Mr Conradson has ably put forward every possible argument in support of this appeal, and although I have some sympathy for Miss McDonald in the situation which these rather unchivalrous proceedings have produced for her, I must hold that the learned District Court Judge was correct in his conclusions and dismiss the appeal. The respondent is entitled to costs, which I fix at $150.00.



Solicitors:

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