IN THE HIGH COURT OF NEW ZEALAND M. 377/84

AUCKLAND REGISTRY

BETWEEN JENNIFER MARGARET D'ALMEIDA

APPELLANT

A N D AUCKLAND CITY COUNCIL

RESPONDENT

Judgment: 9.7.84

Hearing: 21 June 1984

Counsel: P.T. ~~Keiley~~ Kiely for Appellant
R.S. Katz for Respondent

JUDGMENT OF CASEY J.

This is an appeal by Mrs D'Almeida against her conviction on a charge of reckless use of a motor vehicle around the Parnell area on 24th May 1983. After being spoken to by a traffic officer she took off and drove in a display of bad temper and bad driving during which she was chased by the officer and others for a distance of 6.5 kilometres through busy streets, attaining speeds of up to 87 kilometres per hour on occasions. The Judge made a careful review of the evidence to determine whether the standard was bad enough to justify a conviction for reckless driving and looked first at the test based on R. v. Storey (1931) NZLR 470 which has set the New Zealand approach to "recklessness" in criminal cases, involving an appreciation by the defendant of a real risk of injury or damage, which he nevertheless went ahead and took. He also noted the view recently adopted by the House of Lords for driving cases in R. v. Lawrence (1981) 1 All E.R. 974, where recklessness was held to include not only a mental element of the kind accepted by Storey, but also the situation when the accused gave no heed at all to that risk. He felt this was now the proper test to apply in New Zealand, notwithstanding the insistence by the Court of Appeal in Storey of the need for that positive mental element, and that this approach was warranted by the developments with motor vehicles since 1931.

He also noted that the latter case dealt with a charge of manslaughter and might not be conclusive on the meaning of reckless driving under the Transport Act.

He rightly considered the Appellant's driving created an obvious and serious risk of physical injury to other road users, but concluded that because she was upset by the pressures of the day, she gave no thought to the manner of her driving. I think I must respect this inference - surprising as it might appear - as it would depend heavily on his own assessment of the demeanour and character of the witness. Applying the Lawrence test this was enough to convict her. But on the Storey approach this was a finding that the necessary mental element had not been proved in order to sustain a charge of reckless driving.

For the Respondent, Mr Katz acknowledged the distinction between our own Transport Act and the comparable U.K. legislation. The latter has only two categories of driving - reckless and careless, whereas ours contains three, adding dangerous driving to these two. The concept of recklessness discussed by Lord Diplock in Lawrence's case, involving lack of thought to the possibility of the risk, accords more closely with the ordinary perception of recklessness. Most Judges directing a jury on the basis of Storey have no doubt experienced on occasions the same sense of unreality as I have in telling them that a person is reckless only if he had an appreciation of the risk involved in his conduct. Often the accused has obviously never given it a thought in the heat of anger or other emotions, yet his behaviour would plainly be regarded by the average person as reckless - sometimes extremely so.

In the New Zealand driving context, our penal provisions recognise the three categories: the first careless use, based on the standard of care of the reasonable prudent driver; the second dangerous driving, in which the only test is whether the driving was objectively dangerous, and finally reckless driving. This recognises the mental state of the driver, going a step beyond dangerous driving into what may

be regarded as a more blameworthy offence. Hardie-Boys J. discussed the impact of Lawrence in McBreen v. Ministry of Transport (unreported Dunedin M. 108/82; 27th September 1982), accepting its recognition that there had to be a risk of danger present in recklessness, but he also accepted that reckless driving included a mental element that is not necessary for dangerous driving. I was also referred to his judgment in Mutual Rental Cars Ltd v. Forster (unreported Dunedin M. 241/82; 6th Devember 1983) in which he applied to a contractual situation the meaning of "reckless" adopted in Lawrence and in the judgment of R. v. Caldwell (1981) 1 All E.R. 961 delivered the same day, in which the word was held by the majority to have the same extended meaning in the Criminal Damage Act, 1971 (U.K.).

However, I think the threefold distinction made in our Transport Act militates against giving a similar meaning to reckless when it is used in s.51. To do so would assimilate driving of that character with dangerous driving, whereas the section clearly contemplates two different categories. I believe "reckless" was chosen in the light of the long-standing authority of Storey in all aspects of our criminal law, requiring an appreciation of the risk as an added mental element beyond the purely objective standard involved in dangerous driving.

Accordingly it was not open to the Judge to convict of reckless driving in view of his finding that Mrs D'Almeida lacked that appreciation. The appeal is allowed and the conviction for reckless driving set aside, but in its place she will be convicted of driving the vehicle in a manner which, having regard to all the circumstances of the case, was dangerous to the public, pursuant to s.57(c) of the Transport Act. There is no appeal against the lenient penalty and that will remain.

M.B. Casey J.

Solicitors:
Holmden Horrocks & Co., Auckland, for Appellant
Butler White & Hanna, Auckland, for Respondent