HIGH COURT OF AUSTRALIA

GUMMOW, KIRBY, HAYNE, CALLINAN AND HEYDON JJ

WAYNE EDWARD MANLEY APPELLANT

AND

IAIN STEWART ALEXANDER RESPONDENT

Manley v Alexander
[2005] HCA 79
14 December 2005
P18/2005

ORDER

Appeal dismissed with costs.

On appeal from the Supreme Court of Western Australia

Representation:

B W Walker QC with P Kulevski for the appellant (instructed by Edward John Myers)

C L Zelestis QC with B G Bradley for the respondent (instructed by Bradley & Bayly)

CATCHWORDS

Manley v Alexander

Negligence – Accident – Respondent struck and injured by a vehicle driven by the appellant – Respondent lying on road carriageway at time of accident – Respondent heavily intoxicated at time of accident – Appellant's attention drawn to a third person at the side of the road – Appellant continued to drive vehicle at same speed – Appellant changed vehicle direction by veering to the centre of the road – Whether appellant had exercised reasonable care in carrying out his duty to other road users.

1 GUMMOW, KIRBY AND HAYNE JJ. At about 4.15 am on 7 October 2000 the respondent was struck and injured by a tow truck driven by the appellant. When he was struck, the respondent was lying down on the carriageway of Middleton Beach Road, Albany, near the intersection with Vine Street.

2 By his own account the respondent had drunk 12 stubbies of beer in the preceding eight hours. He had no recollection of how he came to be on the roadway. At about 4.00 am he had set out to walk home with a housemate, Mr Cameron Turner. The route home took them along Middleton Beach Road.

3 At the trial in the District Court of Western Australia of the respondent's claim for damages, the appellant gave the only account of what happened when the respondent was struck. As noted earlier, the respondent had no memory of what had happened immediately before he was struck. Mr Turner was not called as a witness. He had, it seems, moved interstate before the respondent's action came to be tried.

4 At trial, and on appeal to the Full Court, reference was made to the absence of evidence from Mr Turner, it being submitted by the defendant in the action (the appellant in this Court) that Mr Turner's absence weakened the plaintiff's case. In the appeal to this Court, however, nothing turns on Mr Turner's not having given evidence. The appellant in this Court did not submit that the Full Court acted upon erroneous findings of fact.

5 The appellant said, in the evidence he gave at the trial, that he was driving along Middleton Beach Road when he saw a man standing on the side of the road. (It has always been accepted that the man the appellant saw was Mr Turner.) Because the man that the appellant saw was "moving around a fair bit like he had been drinking", the appellant kept his eye on him. The appellant did not slow down; he maintained his speed of about 55 to 60 kilometres per hour. Rather, the appellant started to veer to the centre of the road. When he looked back at the roadway ahead of his truck, he saw something lying on the road. He said he "went to brake ... thought I shouldn't brake, so I lifted my foot ... and then I felt that I ran over something".

6 Upon the trial of the respondent's action, the trial judge, O'Sullivan DCJ, held that the appellant was not negligent. The reasoning which led to that conclusion was expressed in the following terms:

> "In my view as the defendant [the present appellant] drove his vehicle along Middleton [Beach] Road towards the scene of the accident his attention would naturally have been drawn to the figure of Cameron Turner standing on the side of the road near the junction with Vine Street. There is no evidence to justify the conclusion that at that time the

> defendant was not keeping a proper lookout. While it seems that the lighting at the scene was adequate, whether or not the street light near the Gull Service Station was burning, the plaintiff [the present respondent] was wearing dark clothing and his presence on the road could hardly have been expected nor easily perceived in the conditions which prevailed. There is no evidence of excessive speed on the part of the defendant nor of any failure by him to handle his vehicle in a reasonable manner. In all the circumstances I am not satisfied that the defendant was negligent in the respects pleaded or at all."

The respondent's claim was therefore dismissed.

7 On appeal to the Full Court of the Supreme Court of Western Australia (Steytler, E M Heenan and Le Miere JJ) the appeal was allowed[1], the judgment entered at trial was set aside, judgment was entered for the plaintiff in the District Court (the respondent to the present appeal) and an order made that the defendant (the appellant in this Court) pay the plaintiff 30 per cent of his damages to be assessed. From that order the appellant now appeals. The appeal should be dismissed. No error is shown in the reasoning of the Full Court.

8 The statutory provisions that govern the task that was to be undertaken by the Full Court in deciding the appeal to that Court[2] are set out in the reasons of Callinan J in *Commissioner of Main Roads v Jones*[3]. As Callinan J recorded in *Jones*[4], the principles governing the appeal to the Full Court were stated by this Court in *Fox v Percy*[5]. It is unnecessary to repeat what is said in either *Jones* or *Fox v Percy*.

9 The principal reasons of the Full Court in relation to the issue of negligence were given by Le Miere J. The steps in that reasoning were as follows:

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1 *Alexander v Manley* (2004) 29 WAR 194.

2 *District Court of Western Australia Act* 1969 (WA), s 79; *Supreme Court Act* 1935 (WA), s 58(1)(a); Rules of the Supreme Court (WA), O 63 r 10(2).

3 (2005) 79 ALJR 1104 at 1117-1118 [71]-[75]; 215 ALR 418 at 434-436.

4 (2005) 79 ALJR 1104 at 1117-1118 [72]-[73]; 215 ALR 418 at 435-436.

5 (2003) 214 CLR 118 at 126-127 [24]-[25] per Gleeson CJ, Gummow and Kirby JJ.

(a) the trial judge made no express finding about when the respondent moved onto the road[6];

(b) because movement attracts attention, and the appellant did not see the respondent move onto the road, it should be inferred that the respondent was already on the roadway when the appellant saw Mr Turner standing on the side of the road[7];

(c) the appellant having continued to drive at the same speed, changing the direction of his vehicle while taking his eyes off the road, and having taken his eyes off the road for some two to three seconds, the appellant failed to take reasonable care in breach of his duty to other road users who might, however unexpectedly, happen to be on the road[8].

10 In this Court, the appellant did not contend that the Full Court had failed to apply proper principles of appellate review. That is, the appellant did not contend that the Full Court had failed to "conduct the appeal by way of rehearing"[9] and "give the judgment which in its opinion ought to have been given in the first instance"[10] having regard to its power[11] to draw inferences of fact. And, as noted earlier, the appellant did not contend that the factual bases underpinning the reasoning of Le Miere J were flawed. In particular, the appellant did not contest the findings that he had continued to drive his vehicle at the same speed, changing direction by veering to the centre of the road, while taking his eyes off the road for some two to three seconds. Rather, the appellant contended that it had not been open to the Full Court to conclude from those facts that the appellant had failed to take reasonable care.

11 No doubt the appellant's attention was drawn to the figure of Mr Turner standing at the side of the road and behaving in a way that suggested that he

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6 (2004) 29 WAR 194 at 204 [44].

7 (2004) 29 WAR 194 at 205 [46].

8 (2004) 29 WAR 194 at 206 [51].

9 *Fox v Percy* (2003) 214 CLR 118 at 127 [27] per Gleeson CJ, Gummow and Kirby JJ.

10 *Dearman v Dearman* (1908) 7 CLR 549 at 561 per Isaacs J, cited in *Fox v Percy* (2003) 214 CLR 118 at 125 [23].

11 Rules of the Supreme Court (WA), O 63 r 10(2).

might act in some way that would require the appellant to respond. But recognising one possible source of danger does not mean that a driver can or must give exclusive attention to that danger. Driving requires reasonable attention to all that is happening on and near the roadway that may present a source of danger. And much more often than not, that will require simultaneous attention to, and consideration of, a number of different features of what is already, or may later come to be, ahead of the vehicle's path.

12 It may readily be accepted that the possibility that someone would be found lying on a roadway like Middleton Beach Road at 4.00 am is properly to be described as remote. But the reasonable care that a driver must exercise when driving a vehicle on the road requires that the driver control the speed and direction of the vehicle in such a way that the driver may know what is happening in the vicinity of the vehicle in time to take reasonable steps to react to those events.

13 When driving at night, the driver must take account of how well the road is illuminated: both by the vehicle's lights and by any street or other lighting. In the present case, there was a street light close to where the respondent lay on the road. Its light illuminated the area where the respondent was. Of course, it is important to remember that the respondent was wearing dark clothing and lying down, generally parallel with the direction the appellant's truck was travelling. The contour of the road gave the appellant an uninterrupted view of the road ahead for a distance considerably greater than the light cast by his low beam headlights. The light cast by those headlights extended about 60 metres ahead of his vehicle. The respondent, even clad in dark clothing and lying parallel to the direction of travel, could have been seen as some form of obstruction to be avoided at least by the time the headlight beams illuminated where he was. But the appellant did not see him. For two to three seconds the appellant continued to look to the side of the road rather than to the roadway over which his vehicle would travel and he maintained his vehicle's speed while veering towards the centre of the road.

14 It was well open to the Full Court to conclude, as it did, that the appellant had failed to exercise reasonable care. In this appeal, this Court's function is to correct any error that has been shown in the decision and hence the resulting orders of the Full Court. It is not, as such, to exercise for itself the powers of the Full Court, absent demonstrated error. The very large discount that the Full Court allowed for contributory negligence on the respondent's part was not challenged in this Court.

15 The appeal should be dismissed with costs.

16 CALLINAN AND HEYDON JJ. The question in this appeal is whether, in the particular circumstances of the case, an intermediate court of appeal was justified in taking a different view of substantially undisputed facts from that taken by the trial judge, and reversing his decision in an action for damages for personal injuries arising out of the driving of a motor vehicle.

Facts and previous proceedings

17 The respondent who was then about 29 years old spent about four hours until midnight on 6 October 2000 talking to a friend and drinking alcohol. Immediately afterwards he went to a nightclub in Albany where he remained until about 4 am. Among other people, he there met Mr Turner, who shared the house he owned and rented rooms in it from him. While he was there he continued to drink alcohol.

18 When the respondent left the nightclub he and Mr Turner decided to walk home. Beyond walking for a period along a footpath with Mr Turner, the respondent has no recollection of the events of that early morning. He denied that he was intoxicated when he left the nightclub despite the fact that he had drunk about 12 small bottles of full strength beer between 8 pm and 4 am.

19 Shortly after 4 am, the respondent was struck by a tow truck driven by the appellant on Middleton Beach Road, near its junction with Vine Street in the town of Albany. The respondent suffered serious injuries in the collision. He sued for damages in the District Court of Western Australia.

20 Because the injuries sustained by the respondent in the collision have deprived him of any memory of the events immediately leading up to it, and because of Mr Turner's absence from the witness box, it is necessary to turn to the evidence of the appellant at the trial before the trial judge, O'Sullivan DCJ for an account of them.

The appellant's evidence

21 The appellant was an experienced driver of large vehicles. He was 22 years old. In the early morning of 7 October he answered a call to come to the assistance of a driver of a motor vehicle, but, on reaching the given location, found no vehicle there. On his return journey he proceeded along Middleton Beach Road at a speed of between 55 and 60 kilometres per hour.

22 This is the appellant's account of the collision:

> "I was driving along Middleton Beach Road and there was a male standing on the side of the road which I spotted, so I was keeping my eye on the male because he was moving around a fair bit like he had been

> drinking. I was veering. The man didn't do any movements, nothing. He just stared at me through the windscreen of the vehicle, looking at me, didn't wave his hands or nothing like that. So I started to veer because I thought he was going to walk out. I started to veer to the centre of the road. Then I looked back on the road. I was braking this time – not at this time. I seen something laying on the road. I went to brake. I thought I shouldn't brake, so I lifted my foot off the thing and then I felt I ran over something. Once I went over what I ran over, I jammed on the brakes, put the emergency lights on the truck, so no-one else could run it over, rang 000, spoke to the Albany police station and told them that ... I grabbed a torch out of the truck, ran back to the victim, to the thing that was laying on the road. There was a male laying face down with his head facing towards the town. There was a lot of blood on the road."

23 He said that at the time the road was wet, but rain was not then falling. The headlights on the tow truck were functioning normally. The respondent was dressed in a black shirt and other dark clothing. The respondent admitted that at the time he had dark coloured hair.

24 The appellant was cross examined on a written statement that he had made to a police officer. In it, he had said that light rain was falling at the time of the accident, and that his windscreen wipers were working intermittently. His attention was drawn to his omission to say in the statement what he had said in his evidence in chief, that one nearby street light was out and another was illuminated at the time. In the same statement, the appellant had said that he had kept his eye on Mr Turner for a couple of seconds to make sure "he wasn't going to step out in front of me". He admitted that, in consequence, he had taken his eyes from the road for a couple of seconds or so.

25 Some brief reference may be made to some further evidence called on behalf of the respondent. It was given by Dr Chew who held a doctorate in philosophy in mechanical engineering from the University of Canterbury in New Zealand.

26 Dr Chew had apparently travelled as a passenger in a motor vehicle driven along the road in the same direction, and at about the same speed as the appellant, in June 2002, in an attempt to replicate the appellant's course immediately before the collision, with a view to expressing an opinion in evidence as to what the appellant could and should have seen of the respondent as he lay upon the roadway. That attempt involved the placement on the roadway of an object approximately the same size and shape as the respondent in the assumed position of the respondent when he was struck.

27 Counsel for the appellant objected to the reception of the evidence on the basis that it was, in effect, a reconstruction (and an imperfect one at that) and not

admissible as expert evidence. The trial judge decided to receive the evidence provisionally, postponing a ruling upon it pending further submissions.

28 According to Dr Chew, and on the basis of the attempted replication, the respondent would have been visible to the appellant when the latter was about 116 metres away. It was also his opinion that the combined effect of the headlights of the tow truck, and the street lighting, would have provided adequate illumination for the appellant to see the respondent, and to stop in time to avoid striking him after making allowance for reaction time. The premise for this conclusion was that the driver of the vehicle in which Dr Chew was a passenger was able to do so.

29 Photographs of the roadway where the respondent was struck were tendered in evidence. It was not disputed that these accurately showed that the road was quite wide, and that there were no obstructions or topographical features to impair an approaching motorist's view of it. The photographs also verified another matter that could not be disputed, that the area in question was not one where, particularly at 4 am, a motorist would ordinarily expect to encounter pedestrians.

The trial judge's reasons

30 In his reasons for dismissing the respondent's action, his Honour referred to the fact that the respondent had given evidence that he did not know where Mr Turner could be found: he believed that he had returned to the eastern States from which he had earlier come. With respect to the appellant's objection to Dr Chew's evidence, his Honour held that there was little or nothing of it that could legitimately be described as expert opinion evidence[12]. He accepted that Dr Chew could give evidence of the observations that he had made, but that it was of little weight. Dr Chew had never been at the scene between 4 am and 4.30 am, and the weather conditions on the night of the accident were quite different from those at the time that he made his observations. Furthermore, Dr Chew knew of and was no doubt looking for, the object which had been placed on the roadway in the position where the respondent was believed to have been struck, and was not distracted by any activity on the side of the road; on the other hand, the appellant did not know of the respondent's position on the road and was distracted by Mr Turner. In all of the circumstances, his Honour, although not excluding the evidence of Dr Chew, thought it of little or no value.

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12 cf *Fox v Percy* (2003) 214 CLR 118 at 166-167 [149]-[150]; *Anikin v Sierra* (2004) 79 ALJR 452 at 465-466 [84]; 211 ALR 621 at 639.

31 The critical findings which led his Honour to dismiss the respondent's claim were as follows[13]:

> "I have given careful consideration to the evidence of the [appellant] and in particular to the significance of his statement to the police and his answers to interrogatories which were the subject of extensive cross-examination.
>
> While the absence of any reference in the statement to the street light being out is puzzling I am not prepared to conclude that the [appellant] has sought to mislead anyone so as to deflect blame for the accident. He stated in an answer to interrogatories that he believed that the light was out and he has freely conceded in evidence that the scene was lit by the light at the junction itself, an illumination which was of course augmented by the headlamps of the truck as it approached the scene.
>
> Nor am I persuaded that by his answers to interrogatories the [appellant] knowingly conceded that he must have seen the [respondent] on the road before he passed through the junction. The answer to interrogatory 5 is inconsistent with the statement he had already made to the police and which was substantially repeated by him in his evidence at trial.
>
> Cameron Turner may, of course, have been able to give valuable evidence in this case. He was standing on the side of the road and would have been in a position to see the [appellant's] vehicle pass over the [respondent]. His absence as a witness, it seems to me has not been well explained and in those circumstances the discharge by the [respondent] of the onus which he bears is made harder.
>
> In my view as the [appellant] drove his vehicle along Middleton Road towards the scene of the accident his attention would naturally have been drawn to the figure of Cameron Turner standing on the side of the road near the junction with Vine Street. There is no evidence to justify the conclusion that at that time the [appellant] was not keeping a proper lookout. While it seems that the lighting at the scene was adequate, whether or not the street light near the Gull Service Station was burning, the [respondent] was wearing dark clothing and his presence on the road could hardly have been expected nor easily perceived in the conditions which prevailed. There is no evidence of excessive speed on the part of the [appellant] nor of any failure by him to handle his vehicle in a

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13 *Alexander v Manley* [2003] WADC 109 at [33]-[37].

reasonable manner. In all the circumstances I am not satisfied that the [appellant] was negligent in the respects pleaded or at all."

The Full Court of the Supreme Court

32 The respondent appealed, successfully, to the Full Court of the Supreme Court of Western Australia (Steytler, E M Heenan and Le Miere JJ). The principal judgment was given by Le Miere J who was of the opinion that both the appellant and the respondent had been negligent, the appellant to the extent of 30 per cent and the respondent 70 per cent. Steytler and Heenan JJ agreed with this conclusion and the reasons for it of Le Miere J, giving separate consideration only to a controversy at the trial as to the admissibility of evidence of statements attributed to Mr Turner, and to which it is unnecessary for this Court to give consideration.

33 Le Miere J said this of the trial judge's reasons[14]:

"The learned trial Judge made no express finding as to when the [respondent] moved onto the road. Counsel for the [respondent] at trial submitted that the [appellant] must have seen the [respondent] lying on the road as he approached the junction of Middleton Road and Vine Street, that the [appellant] had a clear view of the road for up to 200 m before the scene of the accident, that the lighting at the scene was good and that there was no reason why the [appellant] should not have been able to avoid driving over the [respondent]. His Honour rejected that submission on the basis that it wrongly assumed that the [respondent] was lying on the road as the [appellant] approached the junction. His Honour said that there was no evidence as to when the [respondent] came to be on the road and thus there was no basis for concluding that the [appellant] should have seen him earlier than he did."

34 His Honour then criticised the trial judge's reference to Mr Turner's absence from the trial[15]:

"The learned trial judge observed that Mr Turner may have been able to give valuable evidence. His Honour said that: 'His absence as a witness, it seems to me, has not been well explained. In those circumstances the discharge by the [respondent] of the onus which he bears is made harder.'

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14 *Alexander v Manley* (2004) 29 WAR 194 at 204-205 [44].

15 (2004) 29 WAR 194 at 205 [47]-[48].

> It is difficult to know what his Honour meant by that observation. The absence of Mr Turner as a witness could not place any greater or different onus on the [respondent] to make out his case. Nor could the absence of Mr Turner as a witness permit an inference that his evidence would in fact have been damaging to the [respondent]. Mr Turner was an eyewitness. It was open to either party to call him as a witness. Neither party did. That may be explained by Mr Turner having returned to the Eastern States. Whatever the reason for his absence as a witness it did not permit the drawing of any inference adverse to the [respondent]."

35 The basis upon which Le Miere J concluded that the appellant was negligent appeared from this passage[16]:

> "One can readily accept, as his Honour did, that as the [appellant] drove his vehicle along Middleton Road towards the scene of the accident his attention would naturally have been drawn to the figure of Cameron Turner standing on the side of the road near the junction with Vine Street. However, that does not extinguish the [appellant's] duty of care to all users of the road, including the inattentive and those whose faculties were impaired by alcohol. In my view the appeal must succeed. The [appellant] continued at the same speed and changed the direction of his vehicle while taking his eyes off the road for some two to three seconds. He thereby breached the duty of care he owed to any other motorist or pedestrian who might happen to be on the road, however unexpectedly."

The appeal to this Court

36 It is accepted on both sides that the Full Court had power to do what it did here, that is, to find the facts differently, and to draw different inferences from them from those of the trial judge: *Commissioner of Main Roads v Jones*[17]. The appellant submits however that, as in that case, the Full Court erred in doing so. That submission should, as it was in *Jones*' case, be accepted.

37 It should be accepted for a number of reasons. It seems to have been part of the reasoning of Le Miere J that the trial judge erred in saying that the absence of Mr Turner as a witness made it harder for the respondent to discharge the burden of proof which he bore. It may be that either party could have called Mr Turner. As a housemate and social companion of the respondent however, and a person unknown to the appellant, the more logical expectation, in the absence of any contrary explanation, is that the respondent would be the one to do so,

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16 (2004) 29 WAR 194 at 206 [51].

17 (2005) 79 ALJR 1104; 215 ALR 418.

particularly when the respondent could not give any account of the accident himself, and the appellant could do so relatively completely, and without any need to call evidence from anyone else to supplement his evidence about it. The trial judge did not fall into error in saying what he did. It was open to him to find that Mr Turner's absence was not well explained, and, in any event it was objectively true that his absence did make it harder for the respondent to make out his case. The trial judge was not suggesting that the respondent was confronted by a higher or different onus by reason of Mr Turner's absence. His Honour was simply recording the fact of the difficulties with which the respondent was faced by the absence of another eyewitness to the accident.

38 In the judgment of Le Miere J there also seems to be an implied criticism of an omission, on the part of the trial judge, to make an "express finding as to when the [respondent] moved onto the road". The criticism is unjustified. There was no evidence as to that at all. Any conclusion about it could be speculative only. Again onus is relevant. If the respondent who bore it left the Court in such a state of uncertainty as to make it impossible for the trial judge to find relevant facts, the respondent's case failed[18].

39 When and how the respondent came to be upon the roadway was not however decisive. Even if it were to be assumed, contrary to the only evidence on this aspect of the case, that of the appellant, that the respondent moved on to the roadway as the appellant approached, there would have needed to be an inquiry whether he did so suddenly and upright, and how soon before the accident. Even if the assumption were open, a finding of negligence on the basis of it by no means followed. The better view, and one not itself unfavourable to the respondent, was taken by the trial judge, that the respondent was lying upon the roadway and visible to an approaching motorist, subject of course to distraction by the need to deal with different situations as they emerged. The trial judge did not fall into error in not making a finding about when and how the respondent came to be on the roadway.

40 The approaches identified by Le Miere J as erroneous on the part of the trial judge, on examination, can be seen to have been orthodox and correct, and certainly not such as to justify interference with his decision.

41 There are however further reasons why the decision of the Court of Appeal should be set aside and the trial judge's decision restored.

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18 cf *Nesterczuk v Mortimore* (1965) 115 CLR 140 at 149-150 per Kitto J, 153 per Windeyer J.

42 Credibility was relevant to the outcome of the case. The trial judge accepted that the appellant's recollection on factual matters was a generally correct one. He rejected the evidence of the expert for the respondent on the basis that it was unreliable. Acceptance of the appellant's evidence involved acceptance of his professed inability to see the respondent sooner than he did, in the circumstances of the distraction of Mr Turner's unsteady presence beside the roadway which not unreasonably engaged his attention.

43 The decision of the Full Court cannot stand for yet another reason. It assumes that a motorist is not entitled to give attention to a particular and potentially dangerous emergency situation in priority to an apparently benign one. To the appellant the situation on the road itself appeared benign, because it was extremely unlikely that at the time and place in question, a mature adult dressed in dark clothing, whether drunk or sober, would be lying in the centre of a wet roadway, approximately parallel to it, and unable to move, or uninterested in moving, out of the way of a relatively slow moving large motor vehicle with its headlights illuminated.

44 In these circumstances it was reasonable for the appellant to concentrate his attention for a time on the peril presented by the risk of Mr Turner, who had apparently been drinking, moving on to the road. We would accordingly allow the appeal with costs. The orders of the Court should be:

1. Appeal allowed with costs;

2. The orders of the Full Court of the Supreme Court of Western Australia be set aside and in place thereof order that the appeal to that Court be dismissed with costs.