*50 M.V.R. 356 COURT OF APPEAL OF WESTERN AUSTRALIA*



Motor Vehicle Reports (Australia)

BARTHOLOMAEUS v NEWCOMBE

2008 WASCA 136

COURT OF APPEAL OF WESTERN AUSTRALIA

50 M.V.R. 356

3 July 2008 -- , delivered

**CATCHWORDS:**
Negligence - Buses - Plaintiff standing beside vehicle struck by passing bus in next lane - Plaintiff stepping into side of passing bus - Failure of bus driver to sound horn - Failure of bus driver to move to right to give pedestrian more room - Contributory negligence.

**HEADNOTES:**
The plaintiff parked his truck on the left side of the road. His employer parked his truck immediately behind the plaintiffs vehicle. His employer took a number of boxes out of his vehicle and gave them to the plaintiff to put into the back of the plaintiffs vehicle, The plaintiff walked on the side of the two vehicles adjacent to the edge of the traffic lane. The defendant, driving a bus in the same direction, stopped at a red light. He saw the two men. When the bus came through the intersection he passed the two men close to the edge of the lane of traffic. The plaintiff did not check for oncoming traffic and was unaware of the bus. The commissioner found that the plaintiff probably stepped laterally into the side of the bus as it passed him. The bus had not deviated from its lane. The commissioner found that the defendant should have sounded his horn and should have moved to the right as he passed the plaintiff. He held that the defendant was negligent but that plaintiff had failed to take reasonable precautions for his own safety. He reduced the plaintiff's **damages** by two-thirds as he bore the major responsibility for the accident. The plaintiff appealed.

**Held**, dismissing the appeal:

(i) The findings were open to the commissioner.

(ii) The defendant should have sounded his horn in these circumstances.

(iii) The defendant should have moved to his right to make sure that the two men did not do anything unexpected.

*Stocks & McDonald Hamilton Co Pty Ltd v Baldwin* (1996) 24 MVR 416, mentioned

**COUNSEL:**
D R Clyne instructed by Donna Percy & Co for the appellant.

D W Williams instructed by Williams Handcock for the respondent.

**JUDGES:** Pullin and Buss JJA, and Murray AJA

**JUDGMENTS:** Pullin JA.

**[1]** I agree with Murray AJA.

**Buss JA.**

**[2]** I agree with Murray AJA.

**Murray AJA.**

**[3]** The appellant was injured on 29 September 2005, in Hay St, Perth, near the intersection of that street and Colin St, when he was struck by a Central Area Transit (CAT) bus driven by the respondent. It was an impact to which, by his conduct, the appellant contributed. As a result, the appellant fell to the ground. The major **injuries** he suffered arose out of the fact that, while he was on the ground, the left rear wheel of the bus ran over his left leg.

**[4]** The appellant sued for **damages** for negligence in the District Court. By his statement of claim he alleged that the defendant was negligent by:

1. Failing to keep any or any proper lookout or have any sufficient regard for pedestrians on the said road.

2. Failing to have or to keep any or any proper control of the said vehicle.

3. Failing to stop, swerve or in any other way manage or control the said vehicle so as to avoid colliding with the plaintiff.

**[5]** By his defence, the respondent denied that he was negligent and he pleaded, "that the accident was caused solely by the negligence of the [appellant] as he walked into the side of a bus being driven by the [respondent] as it was passing him". The respondent further pleaded that he:

(i) saw the [appellant] and left enough room to drive past him;

(ii) controlled his bus adequately;

(iii) moved his vehicle in such a way that he had sufficient room to pass the [appellant] who was walking on the road.

**[6]** Ultimately the matter came on for trial in the District Court before Commissioner O'Neal. The learned commissioner was required only to deal with the issues of the liability of the respondent and, if it should arise, the question whether the appellant was guilty of contributory negligence and, if so, what apportionment of liability should be made, pursuant to s 4(1) of the Law Reform (Contributory Negligence and Tortfeasors' Contribution) Act 1947 (WA), which, so far as material, provides that in a case of contributory negligence:

[t]he Court shall reduce the **damages** which would be recoverable by the plaintiff if the happening of the event which caused the **damage** had been solely due to the negligence of the defendant to such extent as the Court thinks just in accordance with the degree of negligence attributable to the plaintiff.

**[7]** The commissioner found that the respondent was negligent, but he also found the appellant guilty of contributory negligence and he apportioned liability as to one-third against the respondent and two-thirds against the appellant. Judgment was therefore entered for the appellant for one-third of the **damages** to be assessed.

**[8]** From that judgment the appeal is now brought on a ground alleging that the commissioner:

... [e]rred in law, in fact and in the exercise of his discretion in apportioning liability in favour of the Appellant to the extent of only one-third, such determination failing to apply established principles of common law negligence and in particular principles of contributory negligence in that he failed to consider properly or at all the issue of the relative importance of the conduct of each party in causing the **damage.** Had he done so he would have determined a far greater proportion of liability in favour of the Appellant.

**[9]** The appellant did not challenge any of the findings of fact made by the commissioner, but, as can be seen from the ground, the challenge was to the exercise of the court's discretion in relation to the apportionment of liability in accordance with the accepted legal principles. It will therefore be the case that to succeed in the appeal, the appellant will need to establish, as the ground asserts, that there was a failure to consider the proper approach to the exercise of the discretion, or at least that the exercise of the discretion miscarried because, having regard to the facts as found, the apportionment is plainly unjust: see the useful discussion in *Gorman v Scofield* [2008] WASCA 78 by Buss JA, Steytler P and Newnes AJA agreeing at [17]-[21].

**[10]** Given the nature of the discretionary judgment to be made, the authorities make it clear that the judge who has to make the apportionment will be allowed considerable latitude in the exercise of the judgment. Having found that not only was the defendant negligent, but the plaintiff was also negligent, in the sense that he has failed to meet the standard of care of the reasonable person in respect of his own safety, the apportionment process involves a comparison of the relative significance of the conduct of each party in the contribution made to the **damage** caused: *Pennington v Norris* (1956) 96 CLR 10 at 16.

**[11]** In *Podrebersek v Australian Iron & Steel Pty Ltd* (1985) 59 ALR 529 at 532-3, the High Court said:

The making of an apportionment as between a plaintiff and a defendant of their respective shares in the responsibility for the **damage** involves a comparison both of culpability, ie, of the degree of departure from the standard of care of the reasonable man, and of the relative importance of the acts of the parties in causing the **damage.** It is the whole conduct of each negligent party in relation to the circumstances of the accident which must be subjected to comparative examination. [Citations omitted]

As their Honours observed at 532, it will therefore be the case that the resultant apportionment by the judge, "is not lightly reviewed".

**[12]** *Stocks & McDonald Hamilton Co Pty Ltd v Baldwin* (1996) 24 MVR 416 was a case which concerned a pedestrian who was injured as she crossed a busy street through banked-up vehicles. She stepped out into the kerbside lane without checking at all or sufficiently whether it was safe to do so. She was struck by a car which was travelling too fast, although only at 40 km per hour. To some extent, as will be seen, that case and this are factually similar, but I do not refer to it for that reason, but because the Court of Appeal of New South Wales made the point, in the circumstances described, that while the driver of a vehicle on a busy city street was entitled to assume that ordinarily pedestrians would take simple precautions for their own safety, because "to think otherwise would be to ignore the realities of city life", drivers must also have regard to the fact that pedestrians do sometimes act carelessly, and reasonable precautions against that eventuality must be taken: see Mahoney P at 418, where his Honour observed that the gravity of the harm which might occur was to be considered:

The **damage** which a driver may do to a pedestrian is great: the **injuries** suffered by the present plaintiff show this. This is an important matter when deciding what a driver must do. The inconvenience of driving slower is to be

measured against, inter alia, what may be done to a pedestrian if the driver's estimate of the risk is wrong.

**[13]** The culpability of a negligent driver will be greater, I think, if the risk of hitting a pedestrian is heightened in the particular circumstances of the case; perhaps because of some particular impediment to visibility or because there is a greater than ordinary risk that a pedestrian may behave unpredictably, for example, because there are children about or because there is some evidence that a particular **pedestrian** is in some way **distracted** from paying attention to their own safety.

**[14]** Against that background, I turn to the circumstances of this case as they were found to be by the commissioner, who seems to me to have paid thorough attention to all the evidence in the case which he reviewed in detail and analysed with care.

**[15]** It was a short trial, completed in a day. There were four witnesses: the appellant, who was at the time working as a delivery driver for a packaged drink company; his employer Mr Velkovski, who was with the appellant when the accident happened; the respondent bus driver; and a Mr Allen, a passenger in the bus who was seated immediately behind and slightly to the left of the driver. The exhibits in the case were principally 20 colour photographs of the scene of the accident and the vehicles involved.

**[16]** The facts as found by the learned commissioner are as follows. On the morning in question the appellant was making his delivery rounds in a truck which had an enclosed tray with three doors on each side. In the vicinity of Colin St, Hay St has two traffic lanes divided by a broken white line. It is a one-way street for vehicles travelling west. The intersection of Hay St and Colin St is controlled by traffic lights. The photographs reveal a leafy streetscape with small shops and wide footpaths. On either side of the traffic lanes of Hay St, parallel parking is provided, with a road surface which is clearly marked off from the traffic lanes by the colour of the asphalt, but not by a raised kerb. The parallel parking area appears to be little more than the width of an average vehicle.

**[17]** The appellant parked his truck in Hay St, just to the west of the Colin St intersection, on the left-hand or southern side of the road. He had parked correctly. While he was parked, the appellant's employer, Mr Velkovski, arrived, driving a Toyota Corolla station wagon. He had some boxes or cartons of juice which were to be transferred to the appellant's truck for delivery to customers. Mr Velkovski parked his vehicle immediately behind the appellant's truck. They were the first two vehicles parked on that left-hand side of the street after, or to the west of, the intersection with Colin St. Behind Mr Velkovski's vehicle, the raised footpath widened at the intersection and extended out to the traffic lane. For a vehicle travelling west in Hay St there was no impediment to a clear view of the two parked vehicles and persons in the vicinity of those vehicles.

**[18]** After he parked and made contact with the appellant, Mr Velkovski opened the rear door of the station wagon. He took boxes from the rear of the vehicle and gave them to the appellant, who carried them to the truck and placed them in the rear of that vehicle. There were a number of such trips. The appellant walked on the side of the vehicles which was adjacent to the traffic lane. He did that because it was in that side of the rear of the truck that the boxes of juice were to be placed. There was uncertainty about how many trips there were. It matters not. The commissioner found that in walking in this area the appellant could not have remained entirely within the parking lane, but must, to some extent at least, have been in the traffic lane.

**[19]** The respondent, when approaching the intersection of Colin St as he drove west in Hay St, was confronted by a red light. He stopped. There was no vehicle between him and the intersection. The bus is quite wide. There is a photograph which shows the very bus travelling west in Hay St, having just crossed over the Colin St intersection. There is not much space between the sides of the bus and the edges of the traffic lane. As the commissioner said, at [41] of his judgment, "Even a small lateral movement by the bus or a lurch or a missed step by the pedestrian could easily cause contact between the bus and the pedestrian in that gap".

**[20]** The respondent saw the two men, the appellant and Velkovski, as he waited at the intersection. They were standing at the rear of the station wagon. They had a box. The respondent himself said that he did not know what the men would do with the box or where either of them would go. Mr Allen said that he saw the men and one of them, presumably the appellant, was standing close to the edge and perhaps, to some extent, in the traffic lane. The

respondent did not make eye contact with the men. He did not know whether they had seen the bus.

**[21]** In his judgment, *Bartholomaeus v Newcombe* [2007] WADC 94 at [37], the commissioner said:

[37] The defendant of course could not know where the men might go, as he did not know what they were doing. He could not know whether the man holding or receiving the box would wait in a position of safety or foolishly blunder towards the shops on the opposite side of the street. He could not know whether one or both of the men might walk down the driver's side of the station wagon either to access one of its side doors or to walk towards the truck parked in front. He assumed, no doubt, that the two men would take care for their own safety. He accelerated "normally" making no allowance for the chance that they would not. He did not sound his horn as he came through the intersection and, other than perhaps shifting somewhat to the right within his lane of traffic, he did not otherwise pull out around the area where the two men were standing. That was despite the fact that, as I have found, the plaintiff was standing close to the edge of the lane of traffic.

**[22]** The commissioner found that immediately prior to being hit, the appellant took the box and started down the right-hand side of the station wagon, walking partly in the traffic lane. By that time, the bus was accelerating smoothly and relatively quietly across the intersection and up the road after the lights changed. The commissioner found that the appellant did not check for oncoming traffic. Had he done so, it was inevitable that he would have seen the bus. The bus reached a speed of between 20 and 25 km per hour.

**[23]** The appellant took perhaps no more than a step or two down the side of the station wagon when he was struck a glancing blow by the side of the bus, probably just past the position where Mr Allen sat immediately behind the respondent. The commissioner found that it was probable that the appellant, "stepped laterally into the side of the bus as he walked along the side of the station wagon, at the instant the bus passed him. That is, a slight sideways movement brought the [appellant] and the bus into contact". I have mentioned the finding that the bus had not deviated to the right to any appreciable extent.

**[24]** When the appellant was struck that glancing blow by the bus he was, and had been for a short period before, out of sight of the defendant. He was propelled into the station wagon, damaging the right rear passenger door. He fell to the ground and while he was on the ground his left leg was run over by the wheel of the bus.

**[25]** The learned commissioner summed up his views about negligence and the apportionment of blame as between the appellant and the respondent in his judgment at [55]-[57] as follows:

In my view the primary responsibility for the accident and the resulting **injuries** was that of the plaintiff. It was for him to see that he could safely step from around the station wagon while carrying the box and to ensure that there was not a bus or other large vehicle approaching, or a smaller vehicle approaching that was travelling close to the parked cars. If he had looked he would have seen the defendant's bus crossing the intersection. The lack of room between the parked vehicles and traffic in the adjacent lane was a fact that was obvious to him as well as the defendant.

However, while "in general" a driver in a busy street may act on the assumption that pedestrians will take normal precautions for their own safety, that assumption gives way in the face of "something to indicate the contrary". In this case the defendant could see that the plaintiff and Mr Velkovski were standing in the parking lane and that the plaintiff was close to the lane of traffic. He could see that they were dealing with a box and talking. He could see that they were doing something but he had no indication as to what that was and where the plaintiff might go with the box. He could see that they had not seen him. He had no indication that the plaintiff and Mr Velkovski were aware that the bus was approaching. From all of the evidence it would seem, as counsel for the defendant

submitted, both of them had their backs to what was happening and they did not observe the bus bearing down behind them. The bus was accelerating smoothly and relatively quietly. The narrowness of the margin for a misstep by the plaintiff and the consequences of such a misstep required that the defendant do something.

In the particular circumstances here, it was incumbent on the defendant to at least briefly sound his horn to ensure that a pedestrian in the parking lane and at the edge of the lane of traffic was aware of the presence of the bus. He did not do so and he did not otherwise alter the course or speed of the bus to take account of the risk of a blunder by the plaintiff. To that extent he contributed to the accident and the **injuries** suffered by the plaintiff. That contribution I find to be one-third and I find the defendant liable in that portion.

**[26]** In my opinion, there is no more to be said about this case. It was clearly open to the commissioner, upon his findings of fact, to conclude that the respondent had been established to be negligent because, seeing that the appellant and Velkovski were apparently oblivious of his approach, he should have sounded his horn to make sure they knew he was there, and he should have moved his vehicle to the right to make sure that if either man did something unexpected and walked out into the traffic lane, there was a good chance that they would not come into contact with the bus. There was no evidence to suggest that the bus could not have been moved to the right, even if that involved, as it no doubt would, intruding into the right-hand traffic lane.

**[27]** However, the appellant was, in my respectful opinion correctly, found to bear the major responsibility for the accident. He walked in the traffic lane without looking what was coming and without seeing whether it was safe to do so. Not only did he do that, but he moved in such a way as to bring himself into contact with the side of the bus. His failure to take reasonable precautions for his own safety was a failure at the most basic level. In my opinion, the one-third two-thirds apportionment of liability was well open to the commissioner and his exercise of discretion has not been established to have miscarried.

**[28]** I would dismiss the appeal.

**Orders**

Appeal dismissed.

**ORDER:**
Appeal dismissed.

[Note. Regulation 190(a) of the Road Traffic Code 2000 (WA) relevantly provides, that a person shall not sound the horn unless it is necessary to use the horn to warn other road users of the approach of the vehicle. Rule 224 of the Australian Road Rules is in pari materia with regulation 190, except that it uses the word "driver" in preference to "erson". Two findings of the commissioner were approved by the Court of Appeal. First, the defendant driver of the bus should have sounded the horn. Second, he should have moved into the second lane on his right to allow more space between the passing bus and the two men. Regulation 190 is a positive prohibition. The plaintiff and his employer were moving boxes and were within the parking lane on the left of the bus. To find that the defendant should have blown the horn and undertaken (possibly) a hazardous move into the lane on his right, was, with respect, not justified. The bus was not noiseless. Bus drivers in the City of Perth rarely make lawful or unlawful use of the horn. The plaintiff knew the street and knew that space was limited. The bus did not run into the plaintiff. It was he who probably moved out of the parking lane into the side of the passing bus. That move seems to have begun a second or so after the bus had travelled a metre or two past the plaintiff. This was not deliberate carelessness on the part of the plaintiff. But it was surely his responsibility to keep within the parking lane. The defendant did not cross-appeal against the finding of negligence against him and that question was not directly in issue in the appeal. How effective the sounding of the horn might have been in these circumstances is uncertain. Even if the plaintiff had heard the horn, would he have immediately realised that it was sounded to warn him to keep within the parking lane? That, with respect, is speculative.]

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