

## CLOUT v. HUTCHINSON.

1950. In Banco : Street C.J., Maxwell and Herron JJ.

Aug. 25 ; Sept. 6, 1950.

*Vehicles and Traffic—Offences—Negligent driving—Acquittal on previous charge of negligent act causing grievous bodily harm—Degrees of negligence required to prove each offence—Issue estoppel—Crimes Act, 1900 No. 40, s. 54—Motor Traffic Act, 1909 No. 5, s. 4.*

The negligence which it is necessary to prove in order to constitute the offence of negligent driving within the meaning of s. 4 of the Motor Traffic Act, 1909, is a different and lesser degree of negligence than that which it is necessary to prove in order to establish an offence under s. 54 of the Crimes Act, 1900, and an acquittal on an indictment charging an offence under s. 54 cannot be used to raise an issue estoppel when summary proceedings under s. 4 are instituted against the same accused arising out of the same facts and circumstances.

## CASE STATED.

The following statement of facts is taken from the judgment of the Court delivered by *Street C.J.* : On 20th February, 1950, the respondent on the present appeal was indicted under s. 54 of the Crimes Act, 1900, the offence alleged to have been committed being that he by a negligent act, to wit, negligent driving, caused grievous bodily harm. At the hearing before the Sydney Quarter Sessions the infliction of the grievous bodily harm was not contested by the accused, and the only issue for decision by the jury was the question of negligent driving, evidence being adduced by the prosecution in support of that allegation. At the conclusion of the Crown case, counsel for the accused asked the learned Chairman to inform the jury of its right to acquit the defendant at that stage without requiring evidence to be given for the defence, and his Honour thereupon instructed the jury as to the position in law, and the jury, having retired, then acquitted the defendant. In the course of his instructions to the jury his Honour stressed, quite rightly, the necessity for proof by the Crown of a culpable degree of negligence, higher than that necessary in order to enable a plaintiff to succeed in a common law action for damages. His Honour told the jury, as was quite correct, that any negligence, however slight, if in fact it caused injury to another person, was sufficient to cast a civil liability upon the person guilty of that negligence, and in civil actions no question arises as to the degree of negligence. In criminal charges, however, such as the one then under consideration, it was necessary that the jury should be satisfied that the negligence was of a gross character, amounting to a criminal act, before they could convict.

Following upon this acquittal the defendant was charged before a magistrate under s. 4 of the Motor Traffic Act, 1909, the charge being that he "on the 11th June, 1949, being the driver of a motor vehicle . . . upon a public street . . . did drive the same negligently." The learned magistrate found that the evidence adduced at the trial before the quarter sessions

was substantially identical with the evidence relied upon to support the information before him, and inasmuch as the defendant had already been acquitted on that earlier charge he applied the unreported decision in the case of *Doerner v. Reed*, decided by myself in November, 1949, and acquitted the defendant. From that acquittal this appeal is now brought by way of case stated, the question being whether the learned magistrate's determination to uphold the plea of "issue estoppel" raised by the defendant was erroneous or not, and that, in effect, involves the question of the correctness or otherwise of the decision in *Doerner v. Reed*.

*H. Snelling*, for the appellant, Clout. On the assumption that issue estoppel applies to criminal proceedings and where proceedings on indictment are followed by a prosecution for an offence punishable summarily, the degrees of negligence are different under s. 54 of the Crimes Act, 1900, and s. 4 of the Motor Traffic Act, 1909. Under s. 54 there must be culpable, palpable or marked negligence; whereas under s. 4 any lack of care is sufficient. There are degrees of negligence under s. 54: *Stephen's Digest* 4th edn, p. 152; *R. v. Deady* (1); *Dabholkar v. The King* (2), *R. v. Costello* (3). On the first reading of s. 4 it might seem that the various expressions in sub-s. (1) require the application of the *ejusdem generis* rule, but in s. 10 (3A) (a), the word "negligently" is omitted from the provisions imposing automatic disqualification, a matter which suggests that the same degree of negligence does not apply in the various expressions. Mere carelessness is the test: *Waugh v. Campbell* (4). Negligence need not be flagrant or wilful: *Wintulich v. Lenthall* (5), which was consistently followed until the Act was amended to include the word "culpable." This view is implied in two cases in this Court: *Brownette v. Purcell* (6); *Dennis v. Watt* (7).

A verdict of not guilty on a charge that by a negligent act, to wit, negligent driving, a person caused grievous bodily harm is not necessarily a finding of each element in the charge or a finding on the issue of negligence. There must be a finding on the precise issue for issue estoppel to arise: *Mungatah v. Public Trustee* (8). The elements in s. 54 of the Crimes Act, 1900, are (i) negligence; (ii) causes; and (iii) grievous bodily harm. [He referred to *Reg. v. Ollis* (9); *R. v. Barron* (10); *Jackson v. Goldsmith* (11)]

The jury by acquitting cannot necessarily be taken to have decided there was no negligence; they may have decided it did not cause the grievous bodily harm: *Maynard v. Vercoe* (12).

But issue estoppel, if it applies to criminal proceedings, does not apply when the first proceeding is by indictment and the second is summary. Proceedings upon indictment are pleas of the Crown, whereas a prosecution for an offence punishable summarily is a proceeding between subject and subject: *Munday v. Gill* (13). A summary proceeding is not one by the Crown. The parties in an indictment under s. 54 and summary proceedings under s. 4 are not the same. [He referred to the Fines and Penalties Act,

(1) (1896) 2 A.L.R. 298.

(2) [1948] A.C. 221.

(3) [1932] 2 D.L.R. 410.

(4) [1920] S.C. (J.) 1.

(5) [1932] S.A.S.R. 60.

(6) (1941) 53 W.N. 69.

(7) (1942) 43 S.R. 32.

(8) (1925) 25 S.R. 546 at 549.

(9) (1900) 2 Q.B. 758 at 768-770.

(10) (1914) 2 K.B. 570 at 575.

(11) (1950) A.L.R. 559.

(12) (1942) 59 W.N. 186 at 188.

(13) (1930) 44 C.L.R. 38 at 86.

1901; *Kavanagh v. Herbig* (1); *Ex parte W. A. Grubb Pty Ltd.*(2)] Issue estoppel is not applicable because the parties are different. [On the application of issue estoppel to criminal proceedings he referred to *R. v. Wilkes*.(3)]

The Court is invited to overrule *Doerner v. Reed* (Street J.—unreported) on which the magistrate relied.

*E. G. Whillam*, for the respondent, Hutchinson. The degree of negligence under s. 54 of the Crimes Act, 1900, is less than that for manslaughter: *Andrews v. Director of Public Prosecutions* (4); *Dabholkar v. The King*.(5) *Doerner v. Reed* (Street J.—unreported) was decided on the assumption that the degree of negligence under s. 4 of the Motor Traffic Act, 1909, is the same as that under s. 54 of the Crimes Act, 1900. To hold otherwise would be to introduce a third degree of criminal negligence and to distinguish between the three degrees on the basis that the penalties are progressively less severe.

It is not satisfactory to take mere carelessness, such as would suffice to establish liability in tort, as the test under s. 4 of the Motor Traffic Act. Under the Motor Traffic Act, a person may be guilty of negligence although no other person is affected by his negligence; in tort a person is not liable in negligence unless another person suffers damage from his negligence, whether slight or gross. Under the Motor Traffic Act the Court inquires into negligence in the abstract; in tort it is not concerned with the degree of negligence.

If *Doerner v. Reed* was correctly decided, the magistrate was bound to acquit the respondent.

*Cur. adv. vult.*

Sept. 6.

The judgment of the Court was delivered by

STREET C.J. [after stating the above facts, continued:] I have come to the conclusion that *Doerner v. Reed* was wrongly decided. Section 54 of the Crimes Act, 1900, provides that "whosoever by any unlawful or negligent act, or omission, causes grievous bodily harm to any person, shall be liable to imprisonment for two years." It has been laid down in innumerable decisions that the negligence referred to in such a section, and which must be proved before an accused can be convicted, is of a different type or degree to that which is sufficient in order to establish civil liability. As was pointed out by *Hewart L.C.J.*, in *R. v. Bateman* (6) "In order to establish criminal liability the facts must be such that, in the opinion of the jury, the negligence of the accused went beyond a mere matter of compensation between subjects and showed such disregard for the life and safety of others as to amount to a crime against the State and conduct deserving of punishment." This case was expressly approved and applied by the Court of Appeal in *Andrews v. Director of Public Prosecutions* (7), and, as I have already stated, the learned Chairman of Quarter Sessions was at pains to point out to the jury that the Crown was bound to establish a culpable and criminal degree of negligence before they could convict.

(1) (1921) 9 W.A.L.R. 121.

(2) (1949) 66 W.N. 224 at 227.

(3) (1948) 77 C.L.R. 511 at 518.

(4) [1937] A.C. 576.

(5) [1948] A.C. 221.

(6) (1925) 19 Cr. App. R. 8 at 11, 12.

(7) [1937] A.C. 576.

Section 4 of the Motor Traffic Act, 1909, is in the following terms :—

“(1) Any person who drives a motor vehicle upon a public street, negligently, furiously, or recklessly, or at a speed or in a manner which is dangerous to the public, shall be guilty of an offence under this Act.

(2) In considering whether an offence has been committed under this section, the court shall have regard to all the circumstances of the case, including the nature, condition, and use of the street upon which such offence is alleged to have been committed, and to the amount of traffic which actually is at the time, or which might reasonably be expected to be, upon such street.”

At first sight it might seem that the use of the various expressions in sub-s. (1) requires the application of the *ejusdem generis* rule, and that the negligence referred to was intended to be something analogous to furious or reckless driving and therefore to be of the same type of criminal negligence as would be required to establish an offence under s. 54 of the Crimes Act. I think, however, that the Legislature has evinced a clear intention to distinguish between driving which was merely regarded as negligent and driving which came within the other categories of offences dealt with in s. 4. By s. 10 provision is made for the penalties which may be imposed for offences under the Motor Traffic Act and the court before whom any person is convicted of such an offence is given power to suspend the offender's licence. By sub-s. (3A) a suspension follows automatically for any conviction under s. 4, except a conviction for negligent driving, and this makes clear the legislative intent that negligent driving was regarded as something less serious than reckless or furious driving, and suggests that the high degree of negligence which must be proved in order to justify a conviction under s. 54 of the Crimes Act, need not be proved in order to justify a conviction under s. 4 of the Motor Traffic Act.

The matter is not free from authority. In 1932, *Murray C.J.*, in South Australia, in the case of *Wintulich v. Lenthall* (1), when considering a section of the corresponding Act in terms practically identical with s. 4, came to the conclusion that the standard of care with which that Act was concerned was not the standard of gross or culpable criminal negligence, and it was sufficient to constitute the offence to show that there had been some negligence of a lower degree. The same principle was also laid down in *Waugh v. Campbell* (2), in which their Lordships held that the statutory offence could be constituted by negligence falling short of gross negligence of the type to which I have already referred and which it was necessary to prove in order to justify a conviction on a criminal charge.

I am of opinion, therefore, that the negligence which it is necessary to prove in order to constitute the offence of negligent driving within the meaning of s. 4 of the Motor Traffic Act is a different and lesser degree of negligence than that which it is necessary to prove in order to establish an offence under s. 54 of the Crimes Act. It results from this that a jury would be entitled to acquit on an indictment charging an offence under the section of the Crimes Act, but the evidence might yet be amply sufficient to establish an offence under s. 4 of the Motor Traffic Act, and in those circumstances an acquittal on the more serious charge cannot be used to raise an “issue estoppel” when summary proceedings are instituted against the same

(1) [1932] S.A.S.R. 60.

(2) [1920] S.C. (J.) 1.

accused arising out of the same facts and circumstances. While the learned magistrate, quite properly, followed the decision in *Doerner v. Reed*, I think that that case was wrongly decided and should be overruled, with the result that the question submitted should be answered in the affirmative.

The appeal will be allowed and the case remitted to the magistrate, but, as the appellant asks for no costs, no order will be made in that regard.

*Appeal allowed. Case remitted to magistrate. No order as to costs.*

Solicitor for the appellant: *F. P. McRae* (Crown Solicitor).

Solicitor for the respondent: *John Hickey*.

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PERPETUAL TRUSTEE CO. (LTD.) *v.* KILLICK AND OTHERS.

1950. In Equity: Roper C.J. in Eq.

Feb. 24 ; May 24, 1950.

*Executors and Administrators—Administration—Mortgaged realty specifically devised—Exoneration—Marshalling—Applicability to exonerated specific devises and to residuary realty—Insufficient funds to pay pecuniary legacies—Conveyancing Act, 1919 No. 6, s. 145.*

A testatrix, by her will, bequeathed pecuniary and specific legacies, and specifically devised certain realty "free and discharged from all my debts and funeral and testamentary expenses," and bequeathed and devised the whole of her property both real and personal not otherwise disposed of to certain beneficiaries. At the date of her death two portions of the specifically devised realty and most of the residuary realty was mortgaged to secure a bank overdraft. After realisation of the residue and payment of debts, including the mortgage debt, the funds in the hands of the executor were insufficient to pay pecuniary legacies in full.

*Held*, (1) that the testatrix intended to exonerate the specifically devised realty from the mortgage debt; (2) that, in spite of that intention and the sufficiency of the words used to give effect to that intention, the pecuniary legatees were entitled to marshal against the devisees of the realty which was subject to the mortgage.

*Lutkins v. Leigh* (1734) Cas. temp. Talb. 53; 25 E.R. 658, applied.

ORIGINATING SUMMONS.

The testatrix, Lavinia Moulds, died on 4th January, 1930, and Letters of Administration with the will annexed of her estate were granted to the plaintiff company on 14th August, 1930. By her will she bequeathed a large number of general pecuniary legacies and some specific legacies, and she specifically devised one portion of her real estate each to two of her