

Insurance Case Note

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The High Court and the Driver's Duty of Care

In *Manley –v- Alexander* [2005] HCA 79 (14 December 2005) the High Court had the opportunity to reconsider the duty of care owed by the driver of a motor vehicle in the circumstances of a claim for damages for personal injury made by a pedestrian.

The subject accident occurred at about 4.15 am on 7 October 2000. The pedestrian, Alexander, had been walking home with his housemate, Turner. Alexander had no recollection of the circumstances of the accident and Turner did not give evidence at trial. Accordingly, the only version of the accident in evidence at trial was that given by the driver, Manley. Manley said he was driving a tow truck along Middleton Beach Road, Albany, when he saw Turner standing at the side of the road. He said that Turner was *...moving around a fair bit like he had been drinking* (paragraph 22). Manley assumed that Turner was intoxicated, thought he might walk out on to the road in front of him and accordingly kept him under observation. Manley also started to veer the tow truck towards the centre of the road. He then looked back in front of him, saw something lying on the road, and ran over it.

As it turned out, Manley had run over Alexander, who was wearing dark clothing and was lying near the centre of the roadway, roughly parallel to the path of travel of Manley's tow truck.

The Trial Judge, O'Sullivan DCJ, was not satisfied that Manley was negligent and dismissed Alexander's claim for damages. The Full Court of the Supreme Court of Western Australia did not agree, finding Manley to be negligent, but also making a finding of contributory negligence against Alexander. The Full Court ordered that Alexander recover 30% of his damages to be assessed.

On appeal, the High Court found by a majority of 3 to 2 that the tow truck driver, Manley, was guilty of negligence and that the appeal from the Full Court's decision should be dismissed. In their joint judgment, Gummow, Kirby and Hayne JJ said this

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 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...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.

Callinan and Haydon JJ delivered a joint dissenting judgment. They were of the view that the acceptance of Manley's evidence generally, meant the Court should also accept as true his professed inability to see Alexander lying on the road any sooner than he did, in the circumstances of the distraction provided by Turner's presence beside the roadway. They went on to say ...

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...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 (paras 43, 44).

CONCLUSION

The protracted litigation in which the parties to this claim were involved illustrates the difficulties judges face when called upon to decide whether a person's conduct satisfied the duty of care imposed on that person. Judges are well aware of these difficulties. Gleeson CJ recently warned of the traps which a tribunal of fact may fall into when trying to determine what a reasonable person might do by way of response to a foreseeable risk of injury to another. He warned against adopting a mechanistic approach to this issue, noting that ...*There have been occasions when Judges appear to have forgotten that the response of prudent and reasonable people to many of life's hazards is to do nothing (New South Wales –v- Fahy [2007] HCA 20. 22 May 2007).*

The majority judgment of the High Court in *Manley –v- Alexander* demanded a duty of care from the defendant driver which obliged him to give simultaneous attention to, and consideration of, an

apparent peril at the side of the road, as well as the roadway in front of him. The minority judgment, in contrast, thought it reasonable for the driver to concentrate his attention on the peril presented by the obviously intoxicated Mr Turner on the basis that it was the obvious peril and Alexander's presence on the roadway was unlikely. The outcome demonstrates that "reasonableness" is a concept that, like beauty, lies in the eye of the beholder.

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