CA on appeal from Luton County Court (HHJ Everall QC) before Pill LJ; Keene LJ; Thomas LJ. 20th December 2007

Lord Justice Pill:

1. This is an appeal against a judgment of HHJ Everall QC given at Luton County Court on 3 April 2007. In an action by Mrs Christine McGeough, (“"the respondent”") for damages for personal injuries, the judge ordered that the respondent have judgment against Thomson Holidays Limited, (“"the appellants”"), with damages to be assessed. The respondent was injured in a road accident. Other people were injured in the same accident. We are told that some of their claims have been settled; others have been stayed pending the outcome of the present proceedings. The accident happened in Turkey and there have been proceedings there, we are told, in relation to the Turkish casualties.

The Facts

2. The trial of the action lasted five days and the judge gave a reserved judgment. He described the relevant events in this way:

   “"*The accident occurred on the B350 State Highway between Fethiye and Korkutuli in Turkey at about 16:30 on 7th September 2002. At the time of the accident the respondent was a passenger on a coach near Korkutuli. The coach left its side of the road [that of course is the right-hand side in Turkey] and moved onto the opposite side of the road and into the oncoming traffic. The coach struck a Fiat Palio motor car, driven by a Mr Erogul, which was coming in the opposite direction. The coach left the road entirely and rolled onto its right side. The [respondent] sustained personal injuries as a result of the accident. …the driver and two passengers in the Fiat Palio were killed.*”"

3. An accident investigator instructed by the appellants, Mr Andrew Craig, visited the scene within three days of the accident. He described the scene for drivers approaching the accident site from the Fethiye direction:

   “"*…the road climbs an uphill gradient from the Fethiye direction and reaches a plateau before commencing to bend to the left and then run downhill. The carriageway straightens and then bends acutely to the right with the downhill gradient continuing, although at the apex of the right hand bend the gradient is less severe. The road straightens after the right hand bend and then curves into a more gradual left hand bend as it continues to wind downhill towards Korkuteli and Antalya.*”"

4. The accident took place on that right-hand bend. The coach was driven by Mr Tahir Yollu, a Turkish national. It has not been in issue that the appellants, as holiday tour operators, are vicariously liable for any negligence of his, and there has been no challenge to this case being heard in this jurisdiction. Mr Yollu was convicted of road traffic offences at Korkutuli on 30th December 2004. Many documents relating to his trial were placed before the judge and considered at the present trial.

5. The Turkish judge stated, finding the driver guilty of at least one criminal offence:

   “"*Considering that according to the contents of the dossier on the date of the incident the Defendant [Mr Yollu] crossed over to the opposite lane and collided with the vehicle under deceased Hayrettin's control and steering coming from the other direction with his coach with license plate 07 TY 774 under his control and steering when he arrived at the site of the incident with victim tourists of foreign citizenship by committing control and steering error by failing to adjust the vehicle and its speed according to weather and road conditions, failing to give the required attention and care to the road, failing to show due care in control of the steering wheel, that as a result of the collision, Hayrettin Erogul and his children Doruk and Defne Erogul died and mother Bahar Erogul was injured without risk to life having to stay away from work for 2 days... the defendant was at fault 8/8 from all gathered evidence, specifically as stated in the report by Forensic Medicine Agency Traffic Specialization Department…*”"

6. Mr Yollu was sentenced to six years" imprisonment and fined. It was accepted at the trial in the present case that the fact of Mr Yollu"s conviction was not admissible for the purpose of proving that he had committed the offence -- section 11, Civil Evidence Act 1968. The judge stated that he had put the conviction out of his mind in determining liability in the present case.

7. The respondent alleged that Mr Yollu had driven negligently. He had lost control of a 46-seater passenger coach, which was in good mechanical repair and condition. On behalf of the appellants it was submitted that a sufficient explanation for the loss of control had been given, one consistent with an absence of negligence on the driver"s part.

The Law

8. The classic statement of the test to be applied, in circumstances such as these, and upon that issue, is that of Lord Porter in the House of Lords in ***Barkway v South Wales Transport Company Limited*** [1950] 1 All ER 392. A man was killed while a passenger in an omnibus after the offside front tyre of the omnibus had burst. The bus veered across the road and fell over an embankment. Evidence was given that the cause of the bursting of the tyre was an impact fracture, which may occur without leaving any visible external mark. The main challenge was to the system of inspection of tyres the bus company practised.

9. Lord Porter used the expression *res ipsa loquitur*, which has not been used in the present case, but the principles stated are relevant:

   “"*Omnibuses, it is said, which are properly serviced do not burst their tyres without cause nor do they leave the road along which they are being driven. The evidence stopped there. The statement is unexceptional, as was said by CJ Earl in* ***Scott v London Dock Co*** *(3 H&C 601):*

''Where the thing is shown to be under the management of the defendant or his servants and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants that the accident arose from want of care''.

The doctrine is dependent on the absence of explanation, and although it is the duty of the defendants, if they desire to protect themselves, to give an adequate explanation of the cause of the accident, yet, if the facts are sufficiently known, the question ceases to be one where the facts speak for themselves, and the solution is to be found by determining whether, on the facts as established, negligence is to be inferred or not.'"

10. In the present case the judge was rightly referred to the decision of McKenna J in ***Richley v Faull*** [1965] 1 WLR 1454 which in this case is accepted to be a correct statement of the law. That too was a case where a vehicle went onto the wrong side of the road. McKenna J stated, at page 1457E:

"'I, of course, agree that where the respondent''s lorry strikes the plaintiff on the pavement or, as in the present case, moves onto the wrong side of the road into the plaintiff''s path, there is a prima facie case of negligence, and that this case is not displaced merely by proof that the defendant''s car skidded. It must be proved that the skid happened without the defendant''s default. I respectfully disagree with the statement that the skid by itself is neutral. I think that the unexplained and violent skid is in itself evidence of negligence. It seems hardly consistent to hold that the skid which explained the presence of the respondent''s lorry on the pavement or, as here, on the wrong side of the road, is neutral, but that the defendant must fail unless he proves that the neutral event happened without his default. Whether I am right in this or wrong, the conclusion is the same: the defendant fails if he does not prove that the skid which took him to the wrong place happened without his default.'"

11. On behalf of the appellants, Mr Davenport has also referred the court to the decision of this court in ***Custins v Nottingham Corporation & Anr*** [1970] RTR 365.

"'...after a freezing night and a fall of snow, a bus was being driven very slowly along a road; the driver, on seeing [a man] 70 yards away standing in the road by a bus stop, applied the brakes slowly and stopped the bus without difficulty. The bus thereupon slid sideways [at right angles to the previous line of travel] and struck the pedestrian...'"

Giving the leading judgment, Salmon LJ stated, at page 368, in relation to the driver''s conduct:

"'What more could he have done than drive very slowly, keep a proper lookout and apply his brakes gently? It is common knowledge that if you are unlucky when you are driving on an icy road, whatever care you may take, it sometimes by mischance occurs that the vehicle does slide and gets out of control. In these circumstances, it does not mean that there is any negligence on the part of the driver so that he can be blamed in any way for the bus thus getting out of control.'"

12. In this case the appellants rely on that approach and submit that the loss of control was due to the poor surface of the road, compounded by torrential rain. Mr Yollu had been driving at a reasonable speed in the circumstances, and when the vehicle did skid he acted reasonably in the agony of the moment.

The Evidence

13. The judge considered the evidence, both oral and by way of written statements, both lay and expert evidence, in considerable detail. Several passengers on the coach gave evidence. They were asked, amongst other things, to express an opinion as to the care with which Mr Yollu was driving, and those opinions differed. There is no doubt it was raining very heavily at the time and that the coach was being driven downhill. Had the coach gone off the road to the right, it would have gone into a ravine, and some of the passengers were clearly and understandably relieved that it had not.

14. The appellants placed considerable reliance on the witness statement of Mr N Poore, who is a bus driver in the United Kingdom, and was well placed in the coach to assess the driver''s conduct. He was unable to attend the trial because of ill-health. For reasons which he gave, the judge found the evidence of passenger Miss Sarah Hampton convincing. She was a truthful witness, fair and careful in the witness box.

15. The judge also took into account the expert evidence available to him when reaching his conclusion about the speed at which the coach was being driven, and as to the coefficient of friction -- that is, the amount of grip between the tyres and the road surface. On that issue the judge accepted the evidence of Mr Craig, as adjusted by Mr Magner to allow for the vehicle being a coach. At his visit Mr Craig tested the coefficient. On the first test it was .377 and on the second test .388. That is on a scale from 0 to 1.0. Mr Magner reduced that figure by 10 per cent because the vehicle was a coach, and stated that the figure was "'at the bottom end of what is an acceptable road surface"'.

16. On acceptability there was no contrary evidence, and the judge accepted the evidence of Mr Magner. Where snow or ice is present the conventional coefficient is 0.15 to 0.20.

17. There was also evidence before the judge of written statements from the driver, Mr Yollu. First, there was a statement which he gave on the day after the accident, 8th September 2002, in the presence of his attorney and having been reminded of his statutory rights. Mr Yollu said:

"'On the day of the accident [we were transporting tourists] from the district of Fethiye to Antalya by bus...under my steering and control. Close to 10 kilometres to Korkotuli it started raining. My speed was approximately 35 to 40 kph. I was travelling in first gear. While on course downhill on the road, sloping slightly to the right, the rear side of the coach suddenly started to skid. The rear side of the coach skidded to the right, got out of my control and started

to move. There were two vehicles coming uphill from the opposing direction. The vehicle which was ahead saved itself but the left corner of the coach I was driving hit the left side of the Palio model vehicle.""

The police officer recorded a justificatory statement made by the driver"s attorney, who claimed that Mr Yollu had "*"made every effort to prevent the accident"*".

18. A further statement was given by Mr Yollu to a Turkish lawyer, instructed on behalf of the appellants, on 24th December 2004. Mr Yollu stated:

""At about 16:00 or 16:30 hours, heavy rain started about 20 kilometers to Korkuteli. I put down my speed gradually. At 9 km to Korkuteli, my speed was down to about 15-20 [kph]. The rain was continuing rapidly and the road was totally covered by water.

As the road was very bad and poorly maintained and the asphalt surface was worn out, the tyres would not grip onto the asphalt surface and the coach suddenly started to skid under its own weight. Whatever I did to prevent skidding was unsuccessful.""

19. I should add a further reference to Mr Yollu"s statement in 2002. He said he was "*"extremely familiar with the road"*". He referred to the "*"heavy rain"*" and he referred to his knowledge that many more accidents had occurred in the area where he had the accident. That, in substance, was the evidence upon which the judge had to consider whether appropriate care had been taken by the driver of the coach.

The Judgment

20. The judge found:

""1. The road surface was poor and at the bottom end of what is acceptable.

2. In the period immediately leading up to the accident it was raining heavily and it could be described as ""torrential"". It was heavy enough to wake some of the passengers in the coach.

3. At about where the crash barrier begins on the plan Mr Yollu lost control of the coach. The rear of the coach swung to its right towards the crash barrier and ravine. The preponderance of the evidence is that the coach initially went right, and I so find. I find it did not hit the barrier. Only Mr Geoffrey Hampton said that it hit the barrier. His evidence was not tested. Miss Sarah Hampton and her boyfriend do not say that it hit the barrier. Miss Hampton was a good witness. Importantly, none of the Turkish witnesses who gave statements to the police the next day or so mentioned hitting the barrier. Mr Yollu, in the presence of his lawyer, does not say that he hit the barrier. Mr Magner"s evidence amounts to no more than that the crash barrier had an indent which is consistent with a coach hitting it. I find that the coach did not hit the barrier. I find that Mr Yollu never regained control of the coach after it moved to the right. In trying to control the coach, the coach skidded or was driven across the carriageway into the path of the oncoming traffic, and hit the second vehicle, the Fiat Palio. I find that when he lost control Mr Yollu was driving no slower than about 35-40 kph. The 35-40 kph range given by him in his criminal statement is consistent with the tachograph print-out and is consistent with the expert evidence of Mr Magner.

4. At the time of losing control of the coach Mr Yollu was driving too fast in a manner which was inappropriate to the circumstances on that day. His driving caused the coach to lose control.

5. Mr Yollu"s actions were negligent. He knew the relevant circumstances, namely:

(a) that it was a very poor road surface…For example, he had been working that route for one and a half years. He was extremely familiar with the road. He is familiar with Turkish road surfaces.

(b) it was raining heavily and, as a coach driver, he would know that the road surface would become more slippery as a result.

(c) he was driving up and down hills and round bends. At one kilometre he was driving without proper care. He was doing 60 kph at the point of the 60 kph. Given the torrential rain, in my judgment, he should not have been going at that speed in those conditions. I find that as he approached the right-hand bend he was driving too fast and in a manner which was inappropriate for the conditions as they were known to him. The conditions called for prudence and care which he failed to give them.

He drove below the standard to be expected of a reasonable coach driver in the circumstances.

Accordingly I find liability established.""

Submissions

21. On behalf of the appellants, Mr Davenport submits that having found, as he did, that the condition of the road surface was substandard or very poor, the judge should have accepted the appellant"s argument that the resulting low grip acted as a trap for the driver, who was otherwise driving well and was blameless. When a driver cannot do more, in treacherous or merely difficult conditions, he is exonerated from blame. The relevant speed limit was 88 kph, and even if affected by a road sign displaying 60 kph, it was an indication that it was safe to drive at least up to 35 to 40 kph, the speed which the judge found.

22. It is submitted that the judge did not explain how his conclusion that the coach was being driven too fast was linked with the driver losing control. The judge failed to give sufficient recognition to the evidence of Mr Poore and Mr Craig, it is submitted, as to the very poor condition of the road, and to the expertise of Mr Poore, who was a professional driver himself. He thought that the driver was taking all reasonable care. It is submitted that the speed of 35 to 40 kph was very modest in the circumstances. What explained all events was a dangerous loss of grip due to an inferior road surface. There was a history of at least four other accidents on this part of the road, and Mr Craig had to suspend his skid tests because he thought the road was too dangerous for them.

Conclusion

23. I make these few comments on the judge''s findings. The key issue was the reason for the loss of control which undoubtedly occurred. The driver''s conduct after that loss of control is not criticised. The factual issue as to whether or not the barrier on the driver''s offside was struck is not material to the issue in this case. Second, the judge was entitled to accept the finding of Mr Magner as to the acceptability, albeit bare acceptability, of the condition of the road. No contrary evidence has been relied on by Mr Davenport. Three, it is not disputed that the judge was entitled to find a speed of 35 to 40 kph at the time control was lost. In that context it is notable that in his statement to the police soon after the accident, as the judge noted, the driver accepted that he was driving at that speed. Two years later, when interviewed in relation to this case, he inaccurately put his speed at 15 to 20 kph. That speed was more like the speed at which he should have been driving, on the basis of the evidence. Four, the driver was very familiar with the road and its problems. This is not a case where he was confronted with problems he could not reasonably have foreseen; nor was he confronted by hazards such as snow and ice.

24. In my judgment the judge was entitled to make the findings of fact he did. He was entitled to conclude that this experienced driver was driving too fast in the circumstances. The judge was entitled to conclude that no explanation consistent with reasonable care on the driver''s part had in this case been given. The judge''s analysis in my judgment is entirely acceptable and I see no merit in this appeal.

Mediation

25. I add a word in relation to the question of mediation. When giving permission to appeal, Sir Henry Brooke gave a direction to the parties:

    "''I would strongly encourage the parties to consider mediation by an experienced personal injuries mediator.''"

26. Mediation is a valuable facility, which has a significant role to play in the administration of justice. It does not in my view assist the cause of mediation if parties are urged to mediate in a situation in which there is no real possibility that it will help. In this case both parties were advised by competent and experienced solicitors. The respondent had in his favour, following trial, a judgment wholly favourable to him, and one which in the event this court considers to be entirely sound. Of course, there may be room for negotiation in such a situation, the outcome of litigation, including litigation on appeal, never being free from hazard, but such negotiation could be conducted between legal advisers.

27. With respect to Sir Henry Brooke, who has great experience in mediation, I see no advantage in the present circumstances in bringing in a third party, however efficient and well-intentioned. Indeed there is a danger that such intervention will be used to bring additional pressure to bear upon a party who has every prospect of upholding a judgment in his favour. I add that the danger has not materialised in this case, because the appellants'' solicitors, very properly in my view, did not succumb to the encouragement given to them.

Result

28. For the reasons I have given I would dismiss this appeal.

Lord Justice Keene

I agree.

Lord Justice Thomas

I also agree.

Order: Appeal dismissed

Mr S Davenport (instructed by Messrs Plexus Law) appeared on behalf of the Appellant.
Mr R Coster (instructed by City Lawyers) appeared on behalf of the Respondent