[HIGH COURT OF AUSTRALIA.]

DOONAN . . . . . APPELLANT;
DEFENDANT,

AND

BEACHAM . . . . . RESPONDENT.
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

H. C. OF A. 1953.

MELBOURNE, *June* 15, 16.

Williams A.C.J., Webb, Fullagar, Kitto and Taylor JJ.

Negligence—Sufficiency of case to go to jury—Running down case—Particulars of negligence specifying several items of negligence—Evidence warranting a finding that defendant guilty of negligence in the respect stated in either one or other of items—But not in respect stated in any one particular item separately.

Although a plaintiff in an action for negligence must make out his allegations of negligence within the limits of the particulars he has given, yet, if on the whole of the evidence which is properly admissible the jury can properly find that the damage was caused by negligence which must have taken some form falling within the scope of the particulars, it is no answer to the plaintiff's claim that the evidence does not enable the jury to find that the accident was due to any particular one of the causes itemised in the particulars.

The function of particulars in an action for negligence discussed.

Decision of the Full Court of the Supreme Court of Victoria (Full Court) affirmed.

APPEAL from the Supreme Court of Victoria.

On 3rd April 1952, Margaret Campbell Beacham commenced an action, as plaintiff, in the Supreme Court of Victoria against William J. Doonan, as defendant. The plaintiff claimed the sum of £5,000 damages for negligence. The statement of claim, so far as material was as follows: (1) On or about 9th August 1951 the plaintiff was struck down by a motor truck driven by the defendant whilst walking at the intersection of Flinders and Swanston Streets, Melbourne. (2) The collision was due to the negligent driving of the defendant. Particulars of negligence:—(a) driving at an

excessive speed under the circumstances; (b) failing to keep any or any proper lookout; (c) driving on the wrong portion of the roadway; (d) failing to observe the plaintiff on the roadway; (e) failing to slow down or stop when danger arose; (f) failing to apply the brakes at all or in time to avoid the collision.

By his defence to the statement of claim, delivered 9th April 1952, the defendant admitted the allegations contained in par. 1, denied those contained in par. 2, and pleaded contributory negligence.

The plaintiff replied joining issue and claiming that even if she was negligent, which she denied, the defendant could by the exercise of reasonable and proper care have avoided the collision.

The action was tried on 19th November 1952 before *Lowe* J. and a jury. The plaintiff's case consisted of oral evidence and certain of the defendant's answers to the plaintiff's interrogatories. The oral evidence may be summarised as follows:—the collision occurred at about half past one in the afternoon of a fine day, when the visibility was good and the road surface dry. The plaintiff, who was seventy-one years of age, came out of Prince's Bridge Station on the footpath on the southern side of Flinders Street and walked along the footpath in a westerly direction to the intersection of Flinders Street and Swanston Street. That intersection was controlled by traffic lights which were operating at the time. Desiring to cross Swanston Street from east to west the plaintiff, when on the eastern kerb of that street, looked north to her right and saw that there was no traffic approaching from that direction. She then looked ahead to the west and saw that the green light was showing as a signal for pedestrians and vehicles to proceed across Swanston Street from east to west and from west to east. She thereupon set off from the eastern kerb of Swanston Street and walked with other pedestrians in a westerly direction across the street with the green light still showing until she reached the eastern-most rail of the tramlines running north and south in Swanston Street. As she reached that rail she was struck a very severe blow in the back below the right shoulder blade. She did not see what hit her because it hit her from the back; and her next recollection was of waking up in hospital. No vehicle passed in front of her while she was walking across the road. She did not look behind her but she did not notice any vehicle pass at the back of her before she was hit. There was a truck driven by a witness named Irving which, just before the impact, was stationary in the north-eastern quadrant of the intersection waiting to complete a right hand turn and travel south along Swanston Street. Irving moved off on his right hand turn as soon as the lights changed in his favour, and as

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he was doing so he saw another truck which had then half completed, or almost completed, a fairly wide turn to its left from Flinders Street into Swanston Street. He did not notice any other vehicle turning left into Swanston Street, although he could not say there was no such other vehicle. He overtook the other truck and was passing it on the incorrect side when he heard a scream. He stopped his truck and gave a quick glance back and saw the plaintiff on the ground well underneath the back of a truck which appeared to him to be the same truck that he was alongside when he heard the scream.

The interrogatories and answers put into evidence were as follows :—

(1.) On 9th August, 1951, did a motor truck driven by you collide with the plaintiff in Swanston Street south of Flinders Street, Melbourne ? If yea, describe the point on the roadway where the collision took place.

Answer.—Yes. On the eastern side of Swanston Street a short distance south of the southern kerb of Flinders Street if continued across the intersection.

(3.) Did you see the plaintiff at any time shortly prior to the said collision ?

Answer.—Yes.

If yea then state as at the time you first so saw the plaintiff (a) Upon what part of the roadway the plaintiff then was.

Answer.—On the eastern portion of Swanston Street.

(c) How far and in what direction the plaintiff was from (i) your motor truck.

Answer.—A short distance south-west.

(ii) the point of the said collision.

Answer.—A short distance west.

(d) Upon what part of what roadway you then were.

Answer.—Approximately in the south-eastern portion of the intersection.

(e) At what speed you were then travelling.

Answer.—Approximately five miles per hour.

(f) How far you were from the point of the said collision.

Answer.—A short distance north-east.

(7.) Did you give any and if so what warning of your approach and if so how far from the point of the collision ?

Answer.—Save by the physical presence of the motor truck on the roadway—no.

(10.) At the time of the said collision what was the state of—(i) the weather ?

Answer.—Fine.
(ii) the road surface ?
Answer.—Dry.
(iii) the natural light ?
Answer.—It was daylight.
(v) the visibility ?
Answer.—Fine.

At the close of the plaintiff's case, the defendant elected to call no evidence and submitted that there was no case to go to the jury. The trial judge examined each of the particulars of negligence separately and considered whether the evidence warranted a finding that the defendant had been guilty of negligence in the respect stated in that particular. In each case his conclusion was in the negative and he considered that it followed that there was no case to go to the jury. Accordingly, at his direction the jury brought in a verdict for the defendant.

The plaintiff appealed from the judgment of *Lowe* J. and the verdict of the jury to the Full Court of the Supreme Court of Victoria which was constituted by *Martin* and *Smith* JJ. and *Hudson* A.J. That Court on 1st April, 1953, allowed the appeal (*Martin* J. dissenting), but granted leave to appeal from its decision to the High Court of Australia under s. 35 of the *Judiciary Act* 1903-1950. The present appeal was brought in pursuance of that leave.

L. Revelman, for the appellant.

J. X. O'Driscoll Q.C. and *Kevin F. Coleman*, for the respondent.

Cur. adv. vult.

June, 16.

The following judgments were delivered :

WILLIAMS A.C.J. This is an appeal by the defendant, by leave of the Full Supreme Court of Victoria, from an order of that Court that the appeal of the plaintiff should be allowed, that the verdict of the jury and the judgment for the defendant should be set aside, and that there should be a new trial by a jury of the action.

The action was one brought by the plaintiff against the defendant for damages arising out of an accident which occurred at the intersection of Swanston and Flinders Streets on 9th August, 1951, which is an intersection controlled by lights. In her statement of claim she alleged that on or about that day she was struck down by a motor truck driven by the defendant whilst walking at the intersection of Flinders and Swanston Streets, Melbourne. This allegation was admitted. She also alleged that the collision was due to the negligent driving of the defendant. This allegation was denied.

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Williams A.C.J.

The facts have been set out in detail in the judgments of the Full Court of Victoria. They fall into a short compass. Upon the events leading to the accident the plaintiff herself gave evidence and she was supported by a witness Irving. Certain answers to interrogatories by the defendant were put in evidence. The plaintiff then closed her case. The defendant elected not to go into evidence but submitted that there was no case to go to the jury. This submission was upheld by the learned trial judge, *Lowe* J., the Acting Chief Justice, who directed the jury to find a verdict for the defendant. The plaintiff appealed to the Full Supreme Court as I have said, and that Court by a majority made the order to which I have referred allowing a new trial.

The facts proved in the plaintiff's case were shortly these. The plaintiff arrived at the intersection at about 1.30 p.m. on 9th August. She was then on the south footpath of Flinders Street and intended to cross Swanston Street from east to west to proceed down Flinders Street to Elizabeth Street. She waited until the lights were in her favour and then commenced to walk across Swanston Street from east to west. She had just about reached the tram line when she felt what she described as a tremendous bump in the back and that was the last she knew of the accident. When she next recovered consciousness she was in hospital. She had suffered serious injuries including abrasions on her back on the right side under her shoulder.

The defendant admitted in his answer to interrogatories that his truck collided with the plaintiff whilst he was making a left-hand turn from Flinders Street into Swanston Street and whilst she was on the eastern side of Swanston Street. He said she was a short distance to the south-west of his truck and that he collided with her a short distance to the west which to my mind could naturally happen if the plaintiff was crossing as she said and he ran into her from behind whilst he was making a wide left-hand turn. That he was making such a turn is borne out by the evidence of Irving who had travelled up Flinders Street from west to east and had been waiting for the lights to change in order to make a right-hand turn from Flinders Street into Swanston Street so as to proceed over the bridge. In the course of making that turn he went to the left, that is to the east, of the defendant's truck. As he passed the defendant's truck he heard a scream and saw the plaintiff lying on the road beneath it towards its back.

The particulars of the negligence given by the plaintiff included items that the defendant was driving at an excessive speed, that he was failing to keep a proper look-out and also that he failed to slow

down or stop when danger arose. It was submitted to the learned trial judge that on the evidence which I have shortly stated it was impossible for the jury reasonably to infer that the accident was due to any particular one of the causes itemised in the particulars, and that, unless it could be so attributed, the plaintiff must fail. His Honour gave effect to this submission and for this reason directed the jury to find a verdict for the defendant. On appeal to the Full Supreme Court *Martin* J. took the same view as his Honour, but the other two learned judges of that Court, *Smith* J. and *Hudson* A.J., whilst agreeing that on the evidence the accident could not be attributed to any definite one or more of the acts and omissions specified in the particulars of negligence, came to the conclusion that on the whole of the evidence there was a case to go to the jury.

It was submitted to us, as it was submitted to the learned trial judge and to the Full Supreme Court, that if the evidence does not disclose any particular act or omission amounting to a failure to take reasonable care then the case cannot be left to the jury. I am quite unable to agree with this submission. In my opinion the jury are entitled to consider the evidence as a whole and if, on the whole of the evidence, the jury can reasonably infer that the accident was due to the negligence of the defendant, then they can find for the plaintiff. When I say the whole of the evidence I mean the whole of the evidence which is admissible within the scope of the particulars. This was the view taken by the majority of the Full Supreme Court and with this view I am in entire agreement. I think that it is succinctly and aptly expressed by *Smith* J. in the following passage: "A plaintiff in an action for damages for negligence must, it is true, make out his allegation for negligence within the limits of the particulars he has furnished, and any amendments thereto which he may be given leave to make. But if he adduces evidence upon which the jury can properly find, on the balance of probabilities and as a matter of reasonable inference, that the damage was caused by negligence on the part of the defendant which must have taken some form falling within the scope of the particulars, I do not think that it is an answer in law to his claim that the evidence does not enable the jury to find more specifically the nature of the defendant's negligence". His Honour proceeded to discuss a number of cases and then said: "It follows that in my view the plaintiff in the present case had made out a sufficient case to go to the jury, in that she had adduced evidence upon which it was open to the jury to find, on the balance of probabilities, and as a matter of reasonable inference, that the collision was caused by negligence consisting either of a failure to keep a

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proper lookout or else of a failure to slow down or stop when danger arose ". With those remarks of his Honour I find myself in entire agreement and they are sufficient, I think, to dispose of the appeal. In my opinion the appeal should be dismissed with costs.

WEBB J. I agree.

FULLAGAR J. I am of the same opinion.

KITTO J. I am of the same opinion. I should like to add only this, that in my opinion the argument which has been presented by Mr. *Revelman* rests upon a misconception of the function of particulars of negligence in a case of this description. The function of such particulars is not to divide a single issue of negligence into several distinct issues each requiring a separate finding, and to preclude a verdict from being given for the plaintiff unless he obtains a finding in his favour upon one or more of those issues. It is simply to confine the issue of negligence to the question whether the plaintiff's injury was caused by negligent conduct of the defendant falling within the limited category of acts and omissions which is defined by the particulars considered as a whole.

I agree with the reasons stated by the Acting Chief Justice for dismissing the appeal.

TAYLOR J. I agree with what has been said and that the appeal should be dismissed.

Appeal dismissed with costs.

Solicitors for the appellant: *D. Bruce Tunnock & Clarke.*
Solicitor for the respondent: *J. W. Galbally.*

R. D. B.