[HIGH COURT OF AUSTRALIA.]

JONES . . . . . APPELLANT;
DEFENDANT,

AND

CAPALDI . . . . . RESPONDENT.
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF QUEENSLAND.

H. C. OF A. 1956.

BRISBANE, *July* 17, 31.

Dixon C.J., McTiernan, Webb, Kitto and Taylor JJ.

Appeal—Action—Judge sitting alone—Findings of fact—Entirely negative conclusion—Demeanour of witnesses affording no assistance—Substitution by appellate court of positive conclusion—Whether interference with judge's findings justified.

A primary judge sitting without a jury dismissed a plaintiff's claim for damages for injuries sustained by him in a collision between his motor cycle and a utility truck driven by the defendant upon the ground that he was unable to reach an affirmative conclusion as to where responsibility for the collision lay. His Honour was not satisfied upon a balance of probability of the true explanation of the accident or the exact manner in which it had occurred, nor was he able to find any assistance in resolving conflicts as to the position in which the vehicles came to rest in the demeanour of independent witnesses.

Held, that an appellate court might legitimately interfere with the entirely negative conclusion arrived at by the primary judge and substitute for it a positive conclusion based on inferences appearing reasonably to arise from the evidence considered independently of the credibility of the witnesses as disclosed by their demeanour.

Decision of the Supreme Court of Queensland (Full Court), affirmed.

APPEAL from the Supreme Court of Queensland.

This was an appeal from the Full Court of the Supreme Court of Queensland (*Macrossan* C.J., *Mansfield* S.P.J. and *Philp* J.) which reversed the judgment of *Townley* J. in an action wherein one Capaldi had sought to recover against one Jones damages for personal injury sustained by him when his motor cycle came into collision with a utility truck driven by Jones.

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The relevant facts and the history of the action are sufficiently set forth in the judgment of the Court hereunder.

E. S. Williams, for the appellant.

R. H. Matthews, for the respondent.

Cur. adv. vult.

July 31.

THE COURT delivered the following written judgment :—

This appeal from the Full Court of the Supreme Court of Queensland relates to what is wholly a question of fact. It is an appeal by a defendant in an action of damages for personal injuries against an order of the Full Court reversing a judgment of *Townley* J. who, after a hearing without a jury, had entered judgment for the defendant in the action. The personal injuries in respect of which the plaintiff has recovered damages arose from a collision between a motor cycle ridden by the plaintiff and a utility truck driven by the defendant. The collision occurred near Mareeba at the junction of the Dimbulah Road with Byrne Street. Byrne Street makes a junction with Dimbulah Road at a very acute angle. The defendant drove his utility truck along Byrne Street towards Mareeba. When he reached the junction he made a right hand turn in order to round the corner into Dimbulah Road, a proceeding which necessarily meant making almost a " V turn ". The plaintiff was at the same time riding his motor cycle along Dimbulah Road towards Mareeba. The result was a collision in which the plaintiff and his motor cycle were injured.

Townley J., having taken time to consider his judgment, found himself unable to reach an affirmative conclusion as to where the responsibility for the collision lay. He was not satisfied upon a balance of probability of the true explanation of the accident or of the manner in which it exactly occurred.

His Honour began his judgment by stating the nature of the case and the conflicting versions of the parties as to the respective courses they pursued. It is unnecessary to set out the detailed account they respectively gave. A very brief statement of the opposing versions they gave is enough. On the one hand the plaintiff represents the accident as due to the defendant making a sharp turn round the acute angled corner so that his truck hit the left side of the plaintiff's motor cycle as the plaintiff swerved to his right. On the other side the defendant represents the plaintiff as riding with his head down to avoid some rain and as suddenly looking up and seeing the defendant's truck as it was making a right hand turn well out from the actual corner. He says that he,

the defendant, stopped but that the plaintiff swerved over to his right and hit the front of the truck between the front wheel and the mudguard. The plaintiff denies that his head was down and denies that it was then raining.

Townley J. in his judgment next described a conflict of evidence between independent witnesses as to the position in which the vehicles came to rest. His Honour was unable to find any assistance in resolving these conflicts in the demeanour of the witnesses. He treated the position of the vehicles after the accident as a critical test of the true explanation of the collision. But here again he found an insoluble conflict. His Honour said: "The evidence has not satisfied me on the balance of probability that the vehicles finished in the positions deposed to by the plaintiff and his witnesses. On all the relevant evidence I am unable to say that the plaintiff's account of how the collision took place is more probably correct than the account of the defendant. As I am left in that state of mind the plaintiff has failed to discharge the onus cast upon him and I must therefore give judgment for the defendant."

These circumstances included the damage to the vehicles. The evidence established beyond doubt that the left hand side of the motor cycle had come in contact with the front of the utility truck and that the front wheel of the former vehicle was undamaged. Upon the appellant's version of the happening it is difficult to account for this damage and though it may be possible that the cycle veered across the road at such a sharp angle as to bring it laterally across the front of the truck the probable explanation is that the accident happened as the respondent recounted. Indeed the probability that the damage to the cycle was caused by an impact in the manner described by the respondent is so great that this circumstance alone casts grave doubt upon the appellant's testimony. But there were other compelling reasons for rejecting the appellant's evidence. These were referred to and examined by *Philp* J. and, in consequence, he attached less weight than *Townley* J. had done to the exact positions in which the vehicles had come to rest. The judgment of *Philp* J. is highly persuasive and if the decision of this question of fact upon which the liability of the defendant depends can properly be reached on the materials disclosed by the transcript record it seems clear enough that the conclusion of the Full Court should stand.

The real question for decision, however, is whether, upon a proper application of the rules which govern the exercise by an appellate court of its jurisdiction to review a finding of fact, it is a case in which the Full Court might legitimately substitute its

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conclusion for the judgment of the primary judge. Those principles are explained in *Paterson* v. *Paterson* (1), where the decided cases in which they have been applied and expounded are collected. To these cases may now be added *Benmax* v. *Austin Motor Co. Ltd.* (2)

On this question it is of course a matter of considerable importance that *Townley* J. found no assistance in the demeanour of the witnesses. It is again a matter of importance that his Honour's judgment was of a wholly negative nature. It involved no positive conclusion as to the critical facts. Further, his Honour's inability to arrive at any affirmative conclusion on a balance of probability rested in no small degree upon his Honour's difficulty in choosing between the rival versions of the witnesses as to the place at which the vehicles lay at the scene of the accident after they had come to rest. But it is not easy to see an answer to the view of *Philp* J. that this, although of importance, is by no means a decisive consideration when it is weighed with the general probabilities and with the story which the state of the vehicles appears to tell. The criticisms made of the judgment of *Philp* J. during the course of the argument are scarcely borne out by an examination of the evidence. It is a judgment which gives satisfactory reasons for arriving at an affirmative conclusion as to how the accident did in fact occur and it is a conclusion which has every probability to recommend it. The inference is in truth quite strong that the collision occurred through the defendant taking the turn too sharply into Dimbulah Road and through an unsuccessful attempt by the plaintiff on his motor cycle to avoid him by veering over to his right.

On the whole this appears to be a case of a description in which a court of appeal might legitimately interfere with the entirely negative conclusion arrived at by the primary judge and substitute for it a positive conclusion based on inferences which appear reasonably to arise from the evidence considered independently of the credibility of the witnesses as disclosed by their demeanour.

For these reasons the appeal should be dismissed.

Appeal dismissed with costs.

Solicitors for the appellant, *MacDonnell, Harris & Bell*, Cairns, Queensland, by *J. J. Rowell.*

Solicitors for the respondent, *J. F. McNamee & Co.*, Cairns, Queensland, by *John P. Kelly & Co.*

R. A. H.

(1) (1953) 89 C.L.R. 212.

(2) (1955) A.C. 370.