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C L A R K

v

S O L O M O N S & S C O T T

J U D G M E N T

GAVAN DUFFY J.
RICH J.
DIXON J.

Delivered 22.9.1930

CLARK v SOLOMONS & SCOTT

JUDGMENT

This is an appeal from the decision of Piper J. in an action brought by the appellant to recover damages for personal injuries caused by the negligence of the defendant Scott, in driving a motor car as the servant of the defendant Solomons. The action was tried without a jury and Piper J. entered judgment for the defendants. The evidence was conflicting in respect of many of the circumstances of the accident, in particular in respect of the speed at which the defendants' car was travelling. But the learned Judge found the following facts :- " The collision occurred about

" 4.30 p.m. on 2nd April 1928 in Grenfell Street Adelaide, between
" the North side of the street and the safety zone north of the tram
" rails and about 100 feet East of King William Street. Defendant's
" car was going eastwards in a line of vehicles just released from
" Currie Street and the West side of King William Street. There
" were at least two motor cars ahead of it, and they and it were all
" proceeding at about 12 to 15 miles per hour. A few yards west of
" the place of the collision Plaintiff--who wished to get over to a
" tram car eastward bound--started with something of a rush to go in
" front of the first of the three cars,but he stepped back and moved
" along eastwards and the car passed him. Then he sprang to pass in
" front of the second car,it swerved a little to the north and passed
" behind him. When he found himself clear of it--having succeeded in
" his spurt in front of it--he eased his pace momentarily, and then
" sprang forward again not absolutely at right angles to the general
" line of traffic,but turned somewhat towards the east and with the

" coming traffic behind his right side. After the second car " passed him and just as he sprang back the last time,Defendant's " car struck him. "

Upon these facts,His Honour held that the plaintiff was guilty of negligence in crossing in front of the second car. Having so decided, he proceeded to consider whether the defendant Scott had been guilty of negligence. He thought that when the car immediately ahead of the defendant's car swerved to the north,as it did, in order to avoid the traffic which crossed in front of it, the defendant Scott deviated a little towards the right, and accelerated his speed somewhat but not " seriously " His Honour said " A natural " thought of a driver following a car which slowed down and swerved " towards the kerb would be the thought of moving out to the right

" in order to pass the car in front, and,with a prospect of a more
" open space ahead- Scott was nearing the end of the safety zone--
" of accelerating his speed." This means that,in the opinion of the learned Judge, the defendant Scott was proceeding to attempt to pass the car in front of him as and when the road space increased at the end of the safety zone. His Honour then said " the real
" difficulty I have felt in the case has arisen from a doubt whether
" Scott ought to have realised on seeing the plaintiff retreat from
" the first car,that plaintiff was likely to cross ahead of the
" second car and get into danger from Scott's car." He further said
" If Scott,knowing that the second car had paused and deviated,
" struck,at the spot where the plaintiff and his car collided, a
" pedestrian whom he had never seen, I think there would have been
" evidence of negligence on his part ". We think this clearly means that,in the opinion of the learned Judge,the defendants

would have been responsible for the accident if the plaintiff had not been noticed by the defendant Scott and had crossed in front of the car ahead of that of the defendants, because in spite of the plaintiff's own negligence in so crossing,the defendant Scott's negligence would have been the final cause of the collision. Such a case would have fallen within the proposition of Lord Hailsham speaking for the House of Lords in Swadling v Cooper 46 T.L.R. 597 at p. 598 :- If although the plaintiff was negligent " the defendant could have avoided the collision by the exercise of " reasonable care, then it is the defendant's failure to take that " reasonable care to which the resulting damage is due, and the " plaintiff is entitled to recover ". But the learned Judge considered that the defendant Scott was absolved from such negligence

because he had in fact seen the plaintiff, when he stepped back from the first car and moved along eastwards, and had been thereby misled into supposing that the plaintiff would not cross into danger. He said :- " But I must distinguish between the plaintiff and ~~the~~ a " person whom Scott had not seen. Plaintiff's retreat from the " first car was notice that he was taking some care of himself, and " was warned of traffic, and therefore, there was no obvious need then " to be prepared for rashness or negligence on his part. From that " retreat until the collision probably not more than three seconds " elapsed. On the whole the most I can say against Scott is that " he lacked appreciation of the possibilities (as shown by the event) " but that may have been without negligence on his part ". It thus appears that the critical inference upon which His Honour's finding for the defendant depended was that the defendant Scott saw the

plaintiff and was entitled to assume on what he saw that he would not cross into a position of danger from the defendants' car. Now the defendants' case was that the plaintiff crossed, not as the learned Judge found,in front of the second car, that ahead of the defendants', but behind it and in front of the defendants' car, and Scott swore that he saw the plaintiff leave the footpath. His Honour, in his reconstruction of the facts from the whole of the evidence, accepted the evidence of Scott that he saw the plaintiff at the point of time important for the question now critical, but rejected the defendant's view that the plaintiff passed behind the second car, and, having done this,His Honour inferred that the defendant Scott was misled by his

movements. It is upon the propriety of this inference that the correctness of his decision depends. Unfortunately the inference is in the teeth of the defendant Scott's own evidence. His evidence was as follows :- " I saw plaintiff leave the footpath. At " that time he started to run right off the footpath - when he left " the footpath. Plaintiff was running when he left the kerb. I " came to the conclusion that he was running to catch the tram. When " plaintiff left the footpath,he went as though he was going straight " across the street. He started off at right angles to the kerb. " I should imagine that plaintiff was well half way to the safety " zone before he dodged back. During that time I realised he was " running towards the tram quite regardless of the traffic coming " along. When plaintiff stepped back,he stepped back about a " couple of paces." Then follows evidence which is directly

opposed to the inference drawn by the learned Judge. " After that "stepping back,to me, he ran a couple of paces east. When he was " running the couple of paces east,his back was towards me. When he " turned and ran a couple of paces east I then formed the opinion that " he was off after his moving tram. Seemingly either he had not " seem me or was going to be reckless and ignore me ". It may be conceded that it was open to the learned Judge to disbelieve or disregard the whole of this account, but we do not think that he was at liberty to base upon it the conclusion that the defendant Scott did see the earlier movements of the plaintiff and then in flat opposition to it draw the affirmative inference,which there was no other evidence to support, that the defendant Scott was misled into supposing the plaintiff would not cross into a position in which he

might be run down if that defendant adopted the course which, in the Judge's view, he in fact took, of slightly accelerating and moving to the right for the purpose of taking advantage of the space which was opening to the right of the car in front of him. For these reasons, we are of opinion that the conclusion of fact upon which the learned Judge's decision turned in the view which he took of the circumstances of the accident cannot be supported. This Court cannot, upon the materials available to it, consisting only as they do of the printed record of conflicting evidence, form a judgment of its own as to the true cause of the accident and substitute it for that of the learned Judge, and for this reason as well as because damages

have not been assessed, greatly as it is to be regretted, there must be a new trial.

The appeal should be allowed with costs. The judgment of the Supreme Court should be set aside and a new trial ordered. The costs of the first trial should abide the event of the second.

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