No. 5 of 1941

IN THE HIGH COURT OF AUSTRALIA.

SPERIDON

v.

BOURNE

REASONS FOR JUDGMENT.

Judgment delivered at MELBOURNE

on TUESDAY 4th MARCH 1941.

H. J. Green, Govt. Print., Melb.

C.11235

SPERIDON V BOURNE.

ORDER.

Appeal dismissed with costs.

SPERIDON V BOURNE.

JUDGMENT. STARKE J.

Appeal from a decision of Angas Parsons J. in the Supreme Court of South Australia in favour of the plaintiff in the case of a collision between two motor vehicles. An appeal from the decision lay to the Supreme Court of South Australia but has been brought to this Court and heard in Melbourne at increased costs to the parties.

The motor vehicles were proceeding at night time in opposite directions along the roadway between Port Augusta and Whyalla, which has three tracks, but only the centre track has apparently been formed. The plaintiff was going north to Port Augusta in a light motor car on the track on his wrong side of the roadway and the defendant was going south to Whyalla in a heavy loaded truck along the centre and formed track. The roadway was unobstructed and the vehicles were visible to each other a considerable distance apart. But they continued on their courses until about 80 feet or so apart. The plaintiff in his light car veered across the roadway to his right side across the course of the defendant's truck whilst the defendant in his truck went across to his wrong side of the roadway. The plaintiff was on his right side of the roadway when the collision took place but the defendant was on his wrong side.

The learned judge was of opinion that both parties were in fault but that the defendant was responsible for the collision because he could by reaaonable care have counteracted the fault of the plaintiff. The propriety of the decision of Angas Parsons J. depends upon the facts of the case and not upon any question of law. The defendant took upon himself a grave risk in crossing to his wrong side of the road. A slight deviation to his right side would have enabled the vehicles to pass one another safely, or he might have pulled up. He chose however

the dangerous and imprudent course of going to his wrong side.

The usual argument was addressed to us that the faults on the part of the plaintiff and the defendant were contemporaneous and that in the stress and agony of the moment the defendant had no chance of avoiding the collision though even though he took an unwise course in going to his wrong side of the roadway. But all this, as I have indicated, was for the learned judge, and he has found that the defendant could with proper care have avoided the collision and the consequences of the plaintiff's fault. In my opinion, that conclusion was not only open to the learned judge but was plainly right.

The appeal should be dismissed with costs.

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JUDGMENT McTIERNAN J.

The facts upon which this case depends appear at page 52 of the Transcript from lines 11 to 49 inclusive. These facts are not in dispute.

The question is whether upon those facts the learned judge was right in finding the defendant, the present appellant, guilty of negligence and in finding that there was no negligence on the part of the plaintiff, the present respondent, which contributed to the collision. It was found that both the appellant and the respondent were negligent in maintaining their respective courses until a distance of about 80 feet only separated them. This finding is plainly right, especially as each of them was aware that the other's vehicle was approaching. The appellant's main contention, indeed, is that it was negligence on the part of the respondent to alter his course when he did and that he, the appellant, could not be expected to anticipate that the respondent would do so. The fact is, however, that by deviating to the left the respondent endeavoured to avert a collision; but the collision occurred because the appellant practically at the same time deviated in the same direction. It is clear that if he had deviated in the opposite direction, which was to his right side of the road, the collision would not have occurred. In making this deviation, did the appellant exercise the care which an ordinarily skilful driver would have used to avoid the approaching car? Now, it is clear that the appellant had the time and the opportunity to make a deviation, for in fact he did so. It is contended, however, that it was not negligence but merely an error of judgment produced by the emergency to go to his wrong side because he was justified in assuming that the respondent, who had approached so near to him on his wrong side, would not alter his course to his right side of the road. In my opinion, that is not an ass-

umption which ought to be made in the appellant's favour. There is no proper basis for it in the facts. I cannot understand how it can be imputed to the respondent as a negligent act that he did swerve to his right side of the road to avoid the impending collision. The appellant, like the respondent, had the approaching vehicle in view for a considerable time, and there was ample time for him to consider how a collision could be avoided. The respondent, on his part, took a proper course. He swerved a second or so before the collision to the left. There was time before the collision occurred for the appellant to stop or swerve to his left. The trial judge so found and I cannot see any ground for disturbing this conclusion. In deviating to his right the appellant did not in the circumstances exercise the care which an ordinarily skilful driver would have exercised to avoid the approaching vehicle.

The appeal should be dismissed.

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Judgment. Williams.J.

I agree that the appeal should be dismissed. The appellant, the defendant in the action, admits that he first saw respondent's (plaintiff's) car at a distance of a quarter of a mile. At that stage the appellant's truck which was heavily laden with 3½ tons of merchandise and the respondent's car were each on their wrong side of the road.

The appellant when he saw the headlight of the respondent's vehicle, whether he thought it was a car or a motor cycle, should have immediately driven on to his proper side of the road.

There was equally a duty on the respondent to drive to his proper side of the road when he saw the appellant's headlights, whenever this may have been.

Neither party adopted this course, so that when the vehicles were about 80 feet apart the position had arisen that if they kept on their respective courses a collision was inevitable. It was not the case of a sudden and unexpected emergency, as in Swadling v. Cooper 1931 A.C.1; in which the appellant had really no time to think and by mistake took the wrong measure. It was one which had commenced to arise when the parties neglected to go th their proper side of the road at an earlier stage. When the vehicles were 80 feet apart the respondent turned his car at an angle of about 45 degrees to drive on to his proper side. The appellant had not reduced his previous speed of 30 miles an hour. He knew he was on the wrong side of the road and something would have to be done to avoid a collision. He should have been very much on the alert and able to detect the respondent's move instantly. He should then have made a corresponding turn to the left, or, at least, while keeping his course, have tried to stop by applying the brakes. Instead he turned to his right and as a result the collision occurred on the respondent's proper side of the road. The respondent took a proper step to overcome the position of danger which had arisen. The appellant did the one thing which he ought not to have done. It was negligence on his part to swerve to the right and the learned trial Judge was amply justified in finding that the appellant could by the exercise of reasonable care have avoided the accident.

The appeal should be dismissed with costs.