(11)

IN THE HIGH COURT OF AUSTRALIA.

ORIGINAL

KERWICK.

V.

BRIGHT.

REASONS FOR JUDGMENT.

5/6

Judgment delivered at SYDNEY.

on FRIDAY THE 12th DECEMBER, 1941.

No. 46 of 1941

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

C.11235

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IN THE HIGH COURT OF AUSTRALIA.
NEW SOUTH WALES REGISTRY.

No. 46 of 1941

ON APPEAL from the Full Court of the Supreme Court of New South Wales.

K E R W I C K

v.

B R I G H T

ORDER ALLOWING ~~UPHOLDING~~ APPEAL.

NEW SOUTH WALES REGISTRY
FILED
22 DEC 1941
PAID... no fees ...

McFADDEN & McFADDEN
SOLICITORS
26 O'CONNELL STREET
SYDNEY
BW2878-79.

IN THE HIGH COURT OF AUSTRALIA.
NEW SOUTH WALES REGISTRY. No.46 of 1941

ON APPEAL from the Full Court of the Supreme Court of New South Wales

BETWEEN PATRICK ERNEST KERWICK.

(Plaintiff) Appellant.

and

WILLIAM BRIGHT

(Defendant) Respondent.

BEFORE THEIR HONOURS THE ACTING CHIEF JUSTICE, MR.JUSTICE STARKE, MR.JUSTICE McTIERNAN AND MR.JUSTICE WILLIAMS.

The twelfth day of December, one thousand nine hundred and forty-one.

WHEREAS on the 22nd day of September 1941 the above-named Appellant filed a notice of appeal to this Court from the whole of the judgment of the Full Court of the Supreme Court of New South Wales delivered on the fourth day of September 1941 dismissing an Appeal against the majority verdict of a Jury of four persons and the Judgment of His Honour Mr.Justice Herron in an action in the Supreme Court of New South Wales, No.2175 of 1940 in which the Appellant was the Plaintiff and the abovenamed Respondent was the Defendant AND WHEREAS this appeal came on to be heard before this Court on the Eleventh day of December 1941 WHEREUPON ANDUPON READING the Transcript Record of Proceedings transmitted to this Court by the Prothonotary of the Supreme Court of New South Wales AND UPON HEARING what was alleged by Mr.Wilfred Collins of Counsel for the Appellant and by Mr.C.A.Hardwick of King's Counsel with whom was Mr.Carson of Counsel for the Respondent IT WAS ORDERED that the appeal should stand for judgment and the appeal standing for judgment in the paper this day IT IS ORDERED that the appeal be and the same is hereby allowed AND IT IS FURTHER ORDERED that the said Order of the Full Court of the Supreme Court of New South Wales dated the Fourth day

of September, 1941 be and the same is hereby set aside AND IT IS FURTHER ORDERED that the Appellant be granted a new trial of the said Action in the Supreme Court of New South Wales AND IT IS FURTHER ORDERED that the costs of and incidental to the trial before His Honour Mr.Justice Herron and a Jury in the Supreme Court of New South Wales on the Third, Fourth and Fifth days of June, 1941 be andthe same are hereby costs in the second trial AND IT IS FURTHER ORDERED that it be referred to the proper office of the said Supreme Court to tax and certify such costs of the appellant of the appeal to the Full Court of the said Supreme Court as are appropriate to proceedings in forma pauperis AND to the proper officer of this Court to tax and certify such costs of the Appellant of the appeal to this Court as are appropriate to proceedings in forma pauperis AND that such costs when so taxed and allowed be paid by the Respondent to the Appellant or to his Solicitors Messrs.McFadden & McFadden.

BY THE COURT

HIGH COURT OF AUSTRALIA OFFICE SEAL SYDNEY REGISTRY

DISTRICT REGISTRAR.

KERWICK V. BRIGHT.

O R D E R

Appeal allowed. Order of the Supreme Court set aside and in lieu thereof order new trial to be had. The plaintiff to have such costs of the motion in the Supreme Court and on this appeal as are appropriate to proceedings in forma pauperis. Costs of the first trial to be costs in the second trial.

KERWICK V. BRIGHT.

JUDGMENT. RICH,A.C.J.

KERWICK V. BRIGHT.

Judgment Rich, A.C.J.

This is an appeal from an order dismissing a motion for a new trial in an action for negligence in which the jury returned a verdict for the defendant. The plaintiff was a passenger in a bus travelling along a road, in the country, 20 feet wide. A motor car coming in the opposite direction in passing grazed the bus and the plaintiff's right arm and hand were severely injured. Both vehicles were on their proper side of the road. At the trial the presiding judge left two issues to the jury (1) was the defendant guilty of negligence resulting in the injury? (2) was the plaintiff guilty of contributory negligence? The jury returned a general verdict for the defendant. It is impossible to say whether they found that the defendant was not guilty of negligence or that the plaintiff was guilty of contributory negligence. It follows therefore that the verdict cannot stand if there is no evidence fit to be left to the jury that the plaintiff was guilty of contributory negligence. It was contended that the issue of contributory negligence should not have been left to the jury for two reasons (1) that the evidence did not prove the conduct of the plaintiff charged as contributory negligence i.e. dangling his arm out of the window of the bus in which he was a passenger and (2) even if this charge could be sustained on the evidence it was not contributory negligence for the plaintiff to behave in that manner on the occasion in question. The direct evidence of what the plaintiff was doing is that of himself and another witness who being in the bus could observe the plaintiff's posture - both of these witnesses said that the plaintiff was resting his elbow on the sill and his arm was not hanging out of the window. The opinions of the medical witnesses were conflicting. The doctor called on behalf of the plaintiff considered that the injury supported the version given

by the plaintiff as to the position of his arm. In cross-examination he said - "That the plaintiff's injury would not be consistent with his arm hanging out of the window." The doctor who was called on behalf of the defendant said that the fractures of the arm and hand were the result of a direct blow received while the arm was protruding from the bus. But in cross-examination he admitted that after the humerus was broken the whole limb could be carried in any direction. The theory of this witness who could give no direct evidence of the facts is the only support for the allegation of contributory negligence. And as the onus of proving this allegation was on the defendant I do not consider this theoretical opinion sufficient foundation for a jury's verdict in favour of the defendant on this issue. It does not amount to more than a scintilla of evidence. This would be sufficient to dispose of the appeal but on the second question viz. if there were sufficient evidence for the jury to find that the plaintiff's arm was dangling, I have doubt in saying that his conduct in the circumstances amounted to negligence. Negligence is a matter which depends on time, place and circumstances. The bus was proceeding along a country road on which there was ample room for the motor car to pass at a safe distance from the bus. It is true that there is evidence that the plaintiff could have seen the lights of the on-coming car. But it was clearly reasonable for the plaintiff to assume that the car would not collide with the bus or graze its right side where the plaintiff was sitting. The law would not impose a perfect standard of conduct on the plaintiff. It expects him to behave with a reasonable regard for his own safety. I cannot see that the evidence shows that he failed to attain to this standard and I do not think much assistance for the decision of this case is to be derived from decisions under different circumstances where the passenger was riding in a public vehicle in the congested and more dangerous areas of a crowded city.

The appeal should be allowed.

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JUDGMENT McTIERNAN J.

I have read the judgment of the Acting Chief Justice and I agree with it.

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Judgment. Williams, J.

In my opinion there was no evidence of contributory negligence to go to the jury. Having regard to the slight damage done to both vehicles, the collision could be described as a severe graze, but the relevant point of impact is shown by the scratch on the bus and the dents on the rear pillars of the panels of the front and back door of the car on the driving side. If the plaintiff's arm was hanging over the side and his hand got crushed by this impact, there would probably have been some skin or blood or other human substance on one or both of the vehicles at one or more of these points. The only direct evidence is that the plaintiff had his elbow resting on the windowsill of the bus, and it looks as if the top portion of the body of the car in passing came into contact with his elbow and caused the resulting damage. As the onus of proof of contributory negligence is on the defendant and the direct evidence is all in the plaintiff's favour the unsupported theories of Dr.Teece are too conjectural to afford evidence on which the jury could affirmatively find that there was contributory negligence. It does not seem to me that it is possible to say what the jury were hesitating about during the second retirement. They may have come to the conclusion the defendant's negligence did contribute to the accident and then have gone to discuss whether the plaintiff had been guilty of contributory negligence.

The appeal should be allowed.