

IN THE HIGH COURT OF AUSTRALIA.

P U S S

V.

THE COMMONWEALTH OF AUSTRALIA

REASONS FOR JUDGMENT.

Judgment delivered at **MELBOURNE**
on **WEDNESDAY, 18TH OCTOBER, 1944.**

FUSS

v.

THE COMMONWEALTH OF AUSTRALIA.

REASONS FOR JUDGMENT.

LATHAM C.J.
RICH J.
STARKE J.
McTIERNAN J.
WILLIAMS J.

FUSS

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REASONS FOR JUDGMENT.

LATHAM C.J.

The appellant in this case was a passenger on the pillion of a motor cycle between which and a truck belonging to the Commonwealth and driven by its servant a collision took place. Sec. 131 of the Road Traffic Act (S.A.) 1934-1942 imposed on the rider of the motor cycle a duty to give way to the truck so that the truck could continue on its course at the speed at which it was travelling. The rider of the motor cycle did not give way. He did not stop or decrease his speed so that the motor truck could pass in front of him. He was plainly guilty of negligence, but that negligence does not disentitle the plaintiff as passenger to a remedy if the defendant, through its servant, were guilty of negligence which caused or was part of the cause of the accident in which the plaintiff was injured.

The effect of sec. 131 of the Act is not that the driver to whom another driver is bound to give way is entitled to drive at an excessive speed and to pay no attention whatever to traffic entering from the left-hand side of the road. In this case there is evidence which was accepted by the learned judge that the speed of the truck was not excessive; it was about perhaps a little more than 25 miles per hour. Sec. 131 does not entitle a driver to whom other drivers should give way to assume in all circumstances that other persons will act as required by the section. He is entitled to assume and to act upon the assumption that they will so act unless he has warning that they are not going to do so. In this case the question which arises is whether the driver of the truck ought to have seen that the motor cyclist was not going to stop or was going to enter Paynham Road in such a manner as to cause a danger of a collision. In this case there is evidence that /

that it could only have been at the last moment, in a travelling distance of a few feet, that there could have been any such warning. Almost any slowing down by the cyclist would have prevented the collision which in fact took place.

The evidence which was in substance accepted by the learned judge shows that the driver of the truck on the road (quoting from p. 34 of the transcript) did not realise that there was any danger before Captain Lincoln (his passenger) said "Look out". He gave evidence that to a certain extent he relied upon the rule, that is, the give way rule (which is the rule in sec. 131): - "I did not rely entirely on that rule. On the angle we were on it was hard at the time for me to see what the cyclist was going to do I was watching him as well as I was able to see, and until Captain Lincoln called out my watching him did not cause me to appreciate any danger." Captain Lincoln also gave evidence that as soon as he saw there was danger he called out "Look out" to the driver and the driver did his best at the last moment. The learned Judge accepted that evidence and he said that it was manifest that the whole thing must have happened very quickly. "I think that the interval allowed for the realization and action must have been almost infinitesimal." He concluded therefore that there was no evidence that the driver of the truck had failed to take reasonable care and use reasonable skill.

The only suggestion that is made as to negligence on the part of the driver of the defendant's truck is that there was a failure to look out - that the driver failed to realise what the motor cyclist was going to do. In my opinion there was ample evidence which justified the finding of the learned Judge that there was no such negligence on the part of the driver, and, therefore, in my opinion, the decision was right and the appeal should be dismissed.

Order.

The order of the Court is: "Appeal dismissed with costs."

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Rich J: I agree.

Starks J: I agree with the opinion of the Chief Justice of South Australia.

McTiernan J: I agree with the judgment of the learned Chief Justice of this Court.

Williams J: I also agree with the judgment of the learned Chief Justice of this Court; and I may add that I also agree in all substantial respects with the judgment of the learned Chief Justice of the Supreme Court of South Australia.
