

ORIGINAL

IN THE HIGH COURT OF AUSTRALIA.

H A R R I S

V.

THE COMMONWEALTH OF AUSTRALIA

REASONS FOR JUDGMENT.

Delivered at SYDNEY

on FRIDAY, 30th NOVEMBER, 1945.

HARRIS

v.

THE COMMONWEALTH OF AUSTRALIA.

JUDGMENT.

McTIERNAN J.

HARRIS

v.

THE COMMONWEALTH OF AUSTRALIA.

JUDGMENT.

McTIERNAN J.

The case arises out of a claim made by the plaintiff under the National Security (Claims against the Commonwealth in relation to Visiting Forces) Regulations. It is in form an action against the Commonwealth, because of the provisions of reg. 4(1). This subregulation defines the rights of a claimant: reg. 4(3) defines the rights and liabilities of the Commonwealth. It is a necessary condition of the right under reg. 4 that the plaintiff has, or deems himself to have, a just claim or demand against a member of a visiting force or any person acting for or on behalf of a visiting force.

The statement of claim alleges negligence on the part only of a driver of an army truck, although, the claim before action alleges negligence on the part of the driver and of such members of the United States Forces who exercised care and control of that vehicle. At the outset of the trial Counsel for the plaintiff said he relied upon a claim against the driver in respect of the driver's negligence for the purposes of reg. 4. The case was conducted on that basis. Counsel for the Commonwealth admitted that the driver was a member of the United States Forces.

At the conclusion of the plaintiff's case Mr. Shand (Counsel for the Commonwealth) submitted that the plaintiff failed to establish such a case as to call for an answer. Argument on this submission was reserved as a matter of convenience until the medical witnesses for the Commonwealth had given their evidence.

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The facts proved are that the plaintiff was waiting at the aerodrome at Townsville at 3am. on 25th April 1944 to be driven to an aeroplane by which he was to be flown to Milne Bay in order to carry out a contract into which he had entered with the United States Army to work at that port as a painter and docker. He was directed by some person speaking through an amplifier to get into a truck. When he got into the truck it was already occupied by other persons directed to get into it before him. There was no room for him except at one side and he had no support except from the side board, which was loose. He rode in that place "in a more or less crouched position". If the truck had a tail board it was down. There is no evidence that the member of the Forces who drove the truck had any duty other than to drive it. There is no evidence that he took any part in directing the plaintiff or any of the persons waiting at the aerodrome to board the truck.

The evidence about the occurrence of the accident is short. That given by the plaintiff in answer to questions asked by Mr. Pyle, his Counsel, can be conveniently set out.

"Q: Was there anything to support you? A: Only the side of the truck and that was loose because there were no pins in it. Q: When you started off towards the plane - across the aerodrome? A: Yes, we stopped several times prior to the accident. Q: Ultimately you got near the plane? A: Yes. Q: Then what happened? A: We started and stopped a bit on the way. We went round corners and we could not see where we were going: it was dark and we could not see whether we were going to turn to the right or the left. Q: Were you thrown off the truck? A: At a sharp turn: Q: Can you give me an estimate of the speed of the truck then? A: I have no idea. We were thrown to the ground." Mr. Shand asked the plaintiff but two questions. These and the plaintiff's answers are: "You said with regard to the accident that after you had started the driver had accelerated and then began to turn around corners? A: As far as I know, yes, it was dark. Q: Apparently as far as you know he was in the process of turning the last corner, as far as you were concerned, that you

were thrown out? A: Yes." The evidence of the two witnesses called for the plaintiff about the occurrence of the accident is also very short. The witness Littlemore was asked the following questions and gave the following answers: "Q: How did the truck driver cross the aerodrome to the aeroplane, and how did the plaintiff fall out? A: I was on the truck, sitting right up (the plaintiff) at the front on the same side as Mr. Harris, who was right on the back of it. I noticed that the side board was very loose when he got on. Q: Was the back board put up? A: No. When we were going along the truck took a couple of slight turns. It was going at a pretty fair speed, and I yelled out to Mr. Harris 'You had better hold on tight there Frank or you will go of'. I noticed he was in a pretty precarious sort of position. Just after that the lorry took a very sharp swing to the left and I heard him go off - I could not see him very well. They stopped the waggon and we went back and he was bleeding a lot from the head and one thing and another." The other witness, Bond, said that his estimate of the speed of the truck was twenty or twentyfive miles per hour. He said that at the time the plaintiff fell out the truck "swerved sharply to the left". The witness further said that this swerve threw the man next to the witness and the witness off their balance. The witness denied that the truck accelerated before "it swung smartly to the left". He also said it was very dark and that you could not even see where you were going.

The driver of the truck owed a duty while driving it to take reasonable care for the plaintiff's safety while he was a passenger in it. All the circumstances appearing from the evidence have to be taken into account in deciding whether there is prima facie proof that the driver neglected that duty. He was driving a truck full of military and other personnel engaged in the service of the Army, across an aerodrome, under war-time conditions, on a dark night, across a ground not described in the evidence, to some place not specified by the evidence, where the

passengers /

passengers were to board an aeroplane. There is no evidence that the driver had any control in the matter of arranging the passengers in the truck. It is not unusual for a truck to be turned sharply to the left or right in the course of driving it. The fact that a vehicle is turned in that way is not in itself evidence of negligence. The question whether it is proof of negligence depends upon all the circumstances. Here it would not be reasonable to say that the sharp turn to the left could not be incidental to driving the truck on the occasion in question. The only evidence of the speed at which the truck was travelling at the time the plaintiff fell out is a conjecture by a witness who said between twenty and twentyfive miles an hour. It would not be reasonable to suppose that the driver knew that if he turned the truck sharply at the speed at which it was travelling, there was a likelihood that any passenger would be thrown out. I see no basis for the suggestion that he ought to have anticipated such an accident and made the turn more slowly or made a wider turn. There is evidence that he did not accelerate before making the turn. He made other turns, less sharp it is true, at that speed without any untoward results. The evidence could not support an inference that the driver knew that the plaintiff's situation in the truck was so insecure that if the truck turned "sharply" or "smartly" there would be danger that the plaintiff would be thrown out. Furthermore, as I have said, there is no evidence about the scope or nature of the driver's duties generally in relation to the truck and the passengers which provides any basis for holding that the driver ought to have been aware of the plaintiff's insecure position in the truck.

In my opinion Mr. Shand's submission should succeed. I think that the plaintiff failed to establish by his evidence such a case as to call for an answer from the defendant. I direct judgment of non suit to be entered for the Commonwealth with costs.