IN THE HIGH COURT OF AUSTRALIA

WESTERN ASSURANCE COMPANY

V.

CSINTALAN.

REASONS FOR JUDGMENT

Judgment delivered at SYDNEY

on MONDAY, 6th December, 1948.

H. E. Daw, Gov. Print., Melb.

C.12280/45

WESTERN ASSURANCE COMPANY

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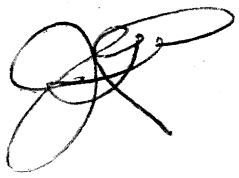
ORDER.

Appeal dismissed with costs.



WESTERN ASSURANCE COMPANY

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CSINTALAN

REASONS FOR JUDGMENT. LATHAM C.J.

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REASONS FOR JUDGMENT. LATHAM C.J.

This is an appeal from the Full Court of the Supreme Court of New South Wales refusing an application for a new trial in an action in which Frank William Csintalan was the plaintiff and the Western Assurance Company the defendant. The plaintiff claimed damages for injuries alleged to be caused by the negligence of one Henderson. The company was sued as the insurer of Henderson under the provisions of the Motor Vehicles (Third Party Insurance) Act 1942, sec. 15(2), Henderson having been killed in the accident upon which the plaintiff based his claim. The learned trial judge, Owen J., was of opinion that the evidence for the plaintiff was very meagre, but he allowed the case to go to the jury. The Full Court was of opinion that the case was very close to the border, but with some hesitation it was held that there was sufficient evidence to justify an inference on the part of the jury that it was more probable than not that some negligence on the part of the deceased Henderson either caused or substantially contributed to the accident which injured the plaintiff. The Full Court was also of opinion that the verdict was not so much against the weight of evidence as to justify interference with it.

The plaintiff gave evidence on 26th April 1946 that he and some friends had met at the Como Hotel, where he had six or seven small glasses of beer during a period of about three hours. Henderson was in the party. Henderson left the hotel before the plaintiff. They both rode motor cycles. The plaintiff said that he left the hotel about 3 o'clock, went round a curve into a straight part of Tivoli Esplanade leading from Como to Oyster Bay, and that he travelled at /

at about 25 miles an hour on his correct side of the road. He heard something behind him, which he thought was the noise of a motor vehicle, and then remembered no more until he regained consciousness in hospital. Mr. H.D. Roger drove along the road at 3.25, saw the plaintiff lying unconscious on the left side of the road under his cycle, which was on its left side and pointing in a direction opposite to that in which the plaintiff gave evidence that he was riding. Beyond the plaintiff's cycle (that is, in the Oyster Bay direction) and on the edge of the right-hand side of the road he saw the body of Henderson, who was dead. Some 33 feet away from the plaintiff's cycle and on the right-hand side of the road, Henderson's cycle was lying on its side. There were scratches on the road beginning about 12 feet away from the position in which Henderson's cycle was lying and running in the direction of the plaintiff's cycle. The evidence of Roger and of police officers was that there were no skid marks on or about the place where the plaintiff's cycle was found. The front lamp of the plaintiff's cycle was crushed in such a way that it was evident that it had come into violent contact with something, presumably the road, there was a very marked dent in the rim of the front wheel of the cycle, and the front tyre had blown out. It was admitted by the plaintiff that he had signed a statement describing the accident in which he said that he intended to put on his brake as he came round the curve into Tivoli Esplanade, but sought to do so with his left foot. On the cycle which he was then riding he should have applied the brake with the right foot. The statement contained the following:-

> "I suddenly realized that the footbrake was not on the left hand side of the cycle and before I could reach the brake on the right hand side of the cycle I was into the bend, my machine must have skidded and I was thrown from the cycle, I have no clear recollection of even attempting to slow the cycle down at the bend, and I did not at any time see any other vehicle or persons coming towards me.
>
> I am of the opinion that I applied the brakes, that is the hand and foot brakes, very strongly, causing the cycle to skid, and throw me off while I was negotiating the bend."

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The plaintiff gave evidence, supported to some extent by his mother and a male nurse, that on the day when he made the statement, 8th May 1946, he was not in a state to think coherently and to understand what was being said to him by the police officer who took the statement. The jury was entitled to accept this evidence. For the purpose of determining whether there was evidence to support the plaintiff's claim the case should be dealt with on the basis that the jury accepted the explanation of the statement which was sworn to by the plaintiff.

When a plaintiff claims damages for negligence against a defendant the onus is on the plaintiff to give evidence of the negligence upon which he relies. If the evidence for him is consistent with the absence of negligence on the part of the defendant and with the presence of such negligence, his action fails. A jury is not at liberty where the balance is completely even and there is no greater probability in favour of negligence than against negligence, no question of credibility of conflicting witnesses being involved, merely to select a view which favours the plaintiff out of several hypotheses all standing upon the same footing of probability. I refer to the following statement of the law in Laws of England, 2nd Edn., Vol. 23, p. 669, which is justified by the cases there cited -

> "If the plaintiff only establishes facts which are equally consistent with the true cause of the accident being his own or the defendant's negligence, he cannot succeed, nor can he recover when the cause of the damage is left in doubt or is attributable with equal reason to some cause other than the defendant's negligence."

In my opinion the evidence for the plaintiff (with the omission for the reasons stated of the written statement signed by the plaintiff) is equally consistent with Henderson having been negligent, with the plaintiff having been negligent, and with the happening of an accident without any negligence on the part of either party. There was evidence upon which the jury could find that Henderson's cycle ran into the plaintiff's cycle so that Henderson was thrown to the other side of the road, his cycle continuing on until it fell on its side. There may have been any one of several

negligent /

negligent acts or omissions on the part of either plaintiff or defendant which would explain the accident. Henderson may have been following the plaintiff, and may have been travelling too fast or without looking out properly. The plaintiff may have applied his brakes suddenly when Henderson was close behind him, so that Henderson could not avoid running into him. There may have been a blow-out of the plaintiff's front tyre, with or without an application of the brakes, as a result of which the plaintiff was thrown to the ground and the cycle somersaulted and turned round before Henderson arrived on the scene, and Henderson may then have run into the plaintiff and his cycle. Henderson may have been immediately behind the plaintiff when the plaintiff suddenly swerved for some reason or other. All these explanations appear to me to be on the same basis of probability. There is, in my opinion, no evidence upon which a jury can find how the accident occurred, and therefore there is no evidence of negligence on the part of Henderson, though, as I have said, it is possible that there was such negligence. In my opinion the appeal should be allowed, the order of the Full Court discharged, the verdict and judgment for the plaintiff set aside, and judgment should be entered for the defendant.

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JUDGMENT. RICH J.

The question in this appeal is whether there was a case to be properly submitted to the jury and were there facts from which the jury might legitimately infer that the accident was caused by the negligence of Henderson. It is not for us to conjecture or speculate whether that is the right conclusion. It is the province of the jury not only to ascertain the facts but to draw their own inferences from the facts thus ascertained. The Judges of the Supreme Court did not consider that they were justified in saying that the verdict of the jury was so much against the weight of the evidence as to justify their interference. I respectfully concur in this view and consider that the appeal should be dismissed.

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JUDGEMENT STARKE J.

The respondent sued the appellant in the Supreme Court of New south Wales as the insurer under the Motor Vehicles (Third Party Insurance) Act 1942 of one Henderson, for that Henderson in his lifetime negligently drove his motor cycle on a public road against the motor cycle of the respondent whereby the respondent was seriously injured and sustained damage.

A verdict was found for the respondent for £2,000 and judgement was entered accordingly. A motion to set aside the verdict and judgement and to enter judgement for the appellant or for a new trial was dismissed.

An appeal is now brought to this Court.

The question is whether the evidence given at the trial is sufficient to sustain the verdict.

The evidence is very meagre and the case is, as Jordan C.J. said in the Supreme Court very close to the border. But I agree with the Supreme Court that there is just sufficient evidence to sustain it.

The respondent was riding his motor cycle in a southerly direction along Tivoli Esplanade Como, on his proper side at a speed of some 25 to 30 miles per hour. He had just rounded a bend in the Esplanade. He had turned into a straight portion of the roadway and it was clear of traffic coming from the opposite direction. But he heard something behind him and it appears from the cross examination that it was the noise from a motor.

His next recollection was being in hospital.

His motor cycle was found lying on the road facing in the opposite direction to that in which he was riding with his foot under the front wheel of his cycle.

The rim of the front wheel was buckled for about one third of its circumference with the spokes bent. The rear part of the rim appeared to have been violently struck, the mudguard of the front wheel was also bent towards the left, the front tyre and tube were blown out, and the head lamp was badly crushed as if it had been flattened and squashed on the road.

Now how did this happen?

Henderson was also found lying dead practically on the edge of the western side of the roadway against a natural stone or rock face rising four feet from the ground and his motor cycle was lying some 16 to 17 feet further along the roadway with furrow or indentation on the roadway going twelve feet back from where it was lying. Henderson's body bore in a south-westerly direction some 17 feet from the position in which the respondent and his motor cycle were found and Henderson's motor cycle bore also in a south-westerly direction some 33 feet from that position.

The engine of one of the motor cycles was quite hot soon after they were found on the roadway but the evidence does not disclose which engine it was.

Now on this evidence the jury it seems to me was entitled to conclude that the respondent was riding on his right side of the roadway at a reasonable speed. And also that his motor cycle was violently struck a heavy blow on the rear part of the rim of the front wheel from the off or right side by some motor vehicle overtaking him.

An engineer who gave evidence said it looked as though the front wheel of the B.S.A. bicycle (the respondent's motor bicycle) when in a position turned slightly left had been hit very abruptly on the rear part of the rim of the front

wheel from the off side - the right side-showing that the steering of the bicycle was slightly offset to the left. That would tend to swing the rear part of the rim to the right and in that position it was violently hit causing it to buckle some inches.

The nature of the damage to the respondent's cycle and the position of the respondent and his cycle when found and also the position of Henderson's body and his cycle when found support a finding that the overtaking motor vehicle was proceeding at considerable speed.

And the collision supports a finding that the speed of the overtaking motor vehicle coming round the bend of the road was toofast, and that the driver was not keeping a proper lookout.

But what person and motor vehicle could this have been but Henderson and his motor cycle? He is the only known person on the spot.

The jury might therefore legitimately conclude that he was responsible for the collision and the injuries to the respondent.

The appellant relied upon a statement made by the respondent in hospital as inconsistent with his case, but I have not set it forth, for the jury may well have thought that the statement was an attempt to explain the accident without knowing that Henderson's dead body and his motor cycle had been found on the roadway in proximity to his own motor cycle.

For these reasons I would dismiss the appeal.

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DIXON J.

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JUDGMENT DIXON J.

This is an appeal from an order of the Full Court of the Supreme Court of New South Wales refusing a motion on the part of the defendant to set aside a verdict found by the jury for the plaintiff and to enter a verdict for the defendant or to direct a new trial.

The defendant is an insurer and is sued under the provisions of the Motor Vehicles (Third Party Insurance) Act 1942, in respect of the alleged negligence of a deceased motor cyclist against whose liability to third parties the defendant insured. The deceased person so insured was named Henderson. He was killed in an accident that occurred on Saturday, 27th April 1946 on a winding road called Tivoli Esplanade leading from Como to Oyster Bay. The site of the accident was about a mile from Como. The plaintiff, also a motor cyclist, was very severely injured and rendered unconscious at the same place and on the same day. He alleges that his injuries were the result of the dead man's negligence.

The action was tried before Owen J. At the close of the plaintiff's case the defendant's counsel objected that there was no evidence of the plaintiff's cause of action sufficient to be left to the jury. His Honour overruled the objection and took the opinion of the jury, who found a verdict for the plaintiff for £2,000. The Full Court, while regarding the case as very close to the border line, decided with some hesitation that there was sufficient evidence to found an inference that some negligence on the part of the deceased

Henderson either caused or substantially contributed to an accident injuring the plaintiff.

The case is singular in the complete absence of any direct evidence of the actual event itself. The plaintiff's story as told in the witness box is brief and stops short of the fact or event causing his injuries. He says that he had spent some time at the hotel at Como with some friends, including Henderson, who had set out on his motor cycle about half an hour before the plaintiff left the hotel. The plaintiff left the hotel on his motor cycle at about 3 o'clock. He rode at a speed of about 25 miles an hour along Tivoli Esplanade, with which he was very familiar. He climbed a hill and went down the other side, where the road winds. He reached a place where there is a bend to the right, then about 100 yards of straight road and then another bend to the right. The direction is southerly. The road consists of a strip of bitumen sixteen to eighteen feet wide and five or six feet of grass and gravel on each side. As he went round the curve to the right into the straight piece of road, his speed was twenty-five miles an hour. He was riding on his correct side midway between the crown of the road and the edge of the bitumen. He saw nothing in front of him. He had just got into the straight piece when he heard some noise behind him from a motor and then he knew no more. He found himself in hospital, where he remained for a very long time. The story is taken up by a witness who, about twenty-five minutes later, drove along the same road and in the same direction. When he came round the curve into the straight piece of road he found on the side of the road the plaintiff lying unconscious under his motor cycle. On the right hand side of the bitumen on the edge of the grass about thirty-three or thirty-five feet from the plaintiff's motor cycle lay Henderson's motor cycle facing down the road, that is south. On the right hand side on the grass and against

a low wall that flanked the road lay Henderson's dead body. It lay about sixteen feet or a little more behind his motor cycle. Diagonally to the plaintiff's motor cycle the distance from Henderson's dead body was about seventeen feet. The plaintiff's motor cycle was on its left side but facing north, the direction from which it had come. Extending diagonally backwards from Henderson's bicycle for about twelve feet were lines cutting into and scratching the bitumen as if his bicycle had travelled on its side over that distance. According to the sketch plan put in evidence the lines, if projected backwards, would have passed through the point where the plaintiff's bicycle lay. Some of the foregoing distances were measured by police who came on the scene. They found hair and blood marks on the wall against which Henderson's body lay. They were two feet above the ground, suggesting that his head had struck the wall at that level. The plaintiff's motor cycle was inspected by an Engineer who gave evidence of its condition. No evidence was given about the state of Henderson's motor cycle. The chief features of the injuries to the plaintiff's motor cycle were to the front wheel and mudguard and to the lamp and head of the machine. The rim of the wheel for about a third of its circumference was buckled in and the spokes bent, the tube being blown out. The mudguard was driven over to the left. The head lamp had been crushed in and driven against the suspension and the attachments had been crushed in. There were no injuries to the rear of the machine. The lamp and head of the bicycle suggested that it hit the road, possibly by turning over, not sideways, but upon its head. With reference to the front wheel the engineer was allowed, over objection, to express the opinion that it looked as though the front wheel of the bicycle when in a position turned slightly left had been hit very abruptly on the near part of the rim of the front wheel from the off side.

The possibility of some part of Henderson's machine

overtaking the plaintiff's and striking the rear part of the plaintiff's wheel in this way seems very remote indeed. It would mean (1) that the plaintiff's wheel would have been turned so much to the left that his cycle would have run off in that direction; (2) that Henderson's machine escaped hitting the plaintiff's right leg which was not hurt and yet hit the back of his wheel; and (3) that Henderson's speed was so much greater than the plaintiff's that a blow from some projecting part of his cycle had sufficient force to drive in the rotating rim of the plaintiff's wheel.

Though in his evidence the plaintiff offered no explanation of the accident to himself he signed a statement produced by the police which did explain the accident. It appears that the plaintiff owned other motor cycles and that he had possessed the one in question for about five months. His statement said in effect that as he approached the curve he put his left foot in position to use the foot brake, forgetting that on this machine the footbrake was on the right; that before he could put his right foot upon the brake he was into the bend, his machine must have skidded and he was thrown from the cycle; that he had no clear recollection of even attempting to slow the cycle down at the bend; that he was of opinion that he had applied the hand and foot brakes very strongly, causing the cycle to skid and throw him off while negotiating the bend; that he must have been confused at the time when he attempted to operate the brake on the left side; and that he had not seen the deceased anywhere on the road prior to the accident. The statement is dated at the hospital on 8th May 1946, that is twelve days after the accident, and it is, except for the signature, in typewriting. The plaintiff disclaims the contents of the statement, and says that he has no recollection of saying what is ascribed to him or of the events that are stated as having happened. The constable says that he originally took it in longhand from the plaintiff's own account,

that he sent the longhand in and that it was not he who obtained the signature, which the plaintiff acknowledged as his, to the typescript. It was of course a question for the jury what weight they attached to the statement as proof of the facts stated. The weight they attributed to it must have depended on the credence they gave to the policeman, on the one side, and, on the other side, to the evidence of the witnesses who spoke of the confused state of the plaintiff's mind at the period at which the statement is said to have been taken by the constable.

But neither the jury in finding the facts nor the Court in considering the sufficiency of evidence can leave out of account the possibility of the explanation offered in the statement for the happening of the accident representing its real cause. It would mean of course that Henderson following immediately upon the plaintiff had been upset either by striking or coming into contact with the plaintiff's overturned cycle or in seeking to avoid it.

The plaintiff's case is presented as depending upon a reasonable inference that it was open to the jury to adopt. It begins with the proposition that the plaintiff gave sufficient proof that his cycle was proceeding regularly on the proper side of the road at a moderate speed and upon a straight course. His case takes as the next step the fact to which he disposes, namely, that he heard the sound of a motor engine immediately behind. Thirdly there is the disaster to both motor cyclists at the same time and place. Fourthly the injuries to his cycle are consistent with its having been struck by Henderson at the rear of the back wheel. The inference from this it is said is that as the accident could not have been the result of anything the plaintiff did, it must have been due to the motor cycle of Henderson coming in contact with the plaintiff's machine, and as Henderson's was the overtaking vehicle prima facie it was that vehicle's part to keep its distance which it could not have

done. The great initial difficulty in this case of the plaintiff is that the plaintiff says and must say that for some appreciable interval of time before the accident, however brief, he is unable to state what occurred. If his mind recorded it, he must know whether Henderson's bicycle did come into contact with his, whether he skidded himself or how otherwise he was precipitated to the ground. His position is that, as is said so often to happen with concussion, his mind does not record what happened for a space immediately before the crash. If his speed was only 25 miles an hour he was covering over twelve yards a second, so the interval must, according to his account, have been very brief. Otherwise the site of the accident would have been further up the road from the curve. But in that interval about which his mind is blank the thing took place which caused the accident. There is no more reason for believing that in the space of time he continued in a straight line on the right hand side of the road, than to suppose that, lying over to his right, as he must have done to round the curve, he failed to straighten up and so swung to his right in the path of Henderson, or that he skidded, or that he put on too hard the hand brake on his front wheel and so turned the machine over. There is a number of hypotheses, each as satisfactory or as unsatisfactory as the others, by which, consistently with the proved facts, the accident may be explained. Henderson may have overtaken the plaintiff and come in contact with his motorcycle. It may have been because Henderson deliberately and inadvertently came too close. It may have been because the plaintiff swerved or continued his curve too long or because, owing to braking, he skidded. On the other hand he plaintiff may have come to grief before Henderson's cycle touched his and Henderson may have been thrown because he ran into the plaintiff's fallen or falling motor cycle. Or he may have been brought down in trying to avoid it. No explanation of Henderson's presence has been

given. How did he, who left half an hour before, come to be in the rear of the plaintiff? Yet the skid marks show he was travelling in the same direction.

Look at the facts as you may, the more you examine them the lesspossible it becomes to assign to them an intelligible meaning. They may mean anything. They are susceptible of so many explanations and they suggest no one of them as definitely more probable than the others.

I find myself unable to escape the conclusion that the circumstances do not warrant a conclusion that the accident was occasioned by fault on the part of Henderson.

In my opinion the appeal should be allowed, the order of the Full Court should be discharged and in lieu thereof a verdict should be entered for the defendant.

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JUDGMENT

WILLIAMS J.

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JUDGMENT WILLIAMS J.

With some hesitation I have reached the conclusion that there is evidence on which the jury could reasonably find a verdict for the plaintiff. There is the evidence of the plaintiff that he was riding his motor bicycle at about 25 miles an hour on his correct side of the road, that he heard a motor behind him, and that he remembered nothing more. There is also the evidence of Roger that he found the plaintiff lying unconscious under his motor bicycle on the left side of the road, Henderson lying dead 17 feet away against a wall to the right of the road and Henderson's motor bicycle lying 33 feet away on the right of the road, there being skid marks indicating that Henderson had been riding in the same direction as the plaintiff. There is also the evidence of Joy, the consulting engineer, that the injury to the front wheel of the plaintiff's machine could have been caused by being hit very abruptly on the rear part of the front rim.

On this evidence I am of opinion that it was open to the jury to conclude that Henderson had ridden into the plaintiff's bicycle from behind, and that in view of the plaintiff's evidence that he was, immediately prior to the accident, riding his machine at a reasonable speed on the right side of the road, it was open to the jury to hold that the collision was due to Henderson's negligence. If, immediately prior to his fall, the plaintiff had been so proceeding, it is improbable that he would have been thrown from his motor bicycle otherwise than by a blow from behind. The plaintiff may, of course,

have been thrown from his bicycle, and Henderson may have come along later and been thrown from his bicycle by running into the plaintiff's machine which was then lying on the road or he may have skidded trying to avoid it. But it is unlikely that Henderson would not have been able, like Roger who was driving a utility motor truck, to avoid the plaintiff's machine, and it is therefore more probable that he collided with the plaintiff while both machines were in motion. It is evident that the jury must have accepted the plaintiff's sworn evidence, in spite of its complete variance with the statement which he had previously made to the police, but the jury were entitled to do so and the verdict could not be said to be perverse for this reason.

For these reasons I would dismiss the appeal.