№ 53 of 1949 (10

IN THE HIGH COURT OF AUSTRALIA

BARBOUR

*V.*

MELBOURNE AND METROPOLITAN TRAMWAYS BOARD

ORIGINAL

# REASONS FOR JUDGMENT

*Judgment delivered at* Melbourne,

*on* Wednesday, 22nd February, 1950.

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

C.12280/45

BARBOUR

v.

MELBOURNE AND METROPOLITAN TRAMWAYS BOARD.

ORDER.

Appeal allowed with costs. Order of Full Court of Supreme Court discharged and in lieu thereof appeal to Full Court dismissed with costs and verdict of jury and judgment of Mr. Justice Barry restored.

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JUDGMENT (ORAL).

DIXON J.

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JUDGMENT (ORAL) DIXON J.

This is an appeal from a judgment and order of the Full Court of the Supreme Court of Victoria. The order sets aside the verdict in favour of the plaintiff and enters judgment for the defendant. The action is an action of negligence for personal injuries. The defendant is the Melbourne and Metropolitan Tramways Board. The plaintiff is a lady who suffered severe injuries from a back wheel of a motor bus passing over her body. This occurred at a place which is described as the intersection of Elgin Street with Lygon Street, but it is also the site of the entrance into Lygon Street of Keppell Street. The exact place where the injuries took place cannot be precisely fixed but it is very close to the kerb line of Lygon Street on the northerly side a little to the east of Lygon Street.

The accident occurred on 28th February 1947, nearly three years ago, at ten minutes to eight in the morning. The plaintiff was riding a bicycle down Keppell Street and entered the junction of that street with Lygon Street. Keppell Street runs into Lygon Street at an angle of about 45 degrees. It runs into Lygon Street rather than into Elgin Street, but actually the southerly side of Keppell Street makes an acute angle with the corner of Elgin Street. The plaintiff rode down Keppell Street, as I have said. An electric tram line curves round from Elgin Street to Lygon Street. She went over this tram line and as, or shortly after, she did so she observed that a bus was stationary at or about a bundy clock which was situated on the westerly side of Lygon Street south of Elgin Street. She went on and presumably

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rode her bicycle in somewhat of an arc until she straightened up, going down Lygon Street past the corner. According to her evidence (which has been much discussed and which I shall only state very shortly) as she did this she looked to her right, that is to say along Elgin Street to the west. She then looked to her left, that is along Elgin Street to the east. In neither direction did she see any traffic that mattered, and she advanced to cross the intersection of Elgin Street and Lygon Street, going south down Lygon Street. She then saw the bus which had in the meantime come round from a stationary position and was going into the easterly side of Elgin Street. The bus was a short distance away from her (estimates of the number of feet differ) and she made desperate efforts to avoid it. But she failed to do so and it ran over her. As she had been coming down Keppell Street another bicyclist, a man whom she did not know, was riding on her right-hand side a trifle in advance of her machine, that is to say her front wheel was about at his gear wheel. It was shown that the bus had, while she was making this journey, travelled from its stationary position and had swung round in a rather flat arc to go up Lygon Street. According to the traffic code it should have gone directly north for a greater distance and swung at a point which, if it had made an ideally correct turn, would have been just about the turn of the tram line on the tram line, so that it would have turned as nearly as may be close to a prolongation of the kerbing of Elgin Street. The bus driver did not see either of the bicyclists until he was close upon them. Indeed he did not see the plaintiff until, as he described it, her bicycle was going in one direction and she was hurtling through the air. It may well be that these picturesque descriptions were discounted by the jury and that she did not hurtle but sprawled upon the ground. On that situation the case was submitted to the jury on an issue of negligence on the part of the Tramway Board and of contributory negligence on the part of the plaintiff. We have not the advantage of the learned judge's summing

up and do not know precisely how he presented the case to the jury. The jury found a verdict for the plaintiff for substantial damages. A motion for a new trial or reversal of judgment was made to the Full Court. The Full Court were not unanimous in their opinion. The Chief Justice, Sir Edmund Herring, and Mr. Justice Martin took the view substantially that the facts necessarily implied contributory negligence on the part of the plaintiff and notwithstanding the general verdict in her favour by the jury judgment should be entered against her. Mr. Justice Fullagar dissented from this view. His opinion was that there was a number of explanations or hypotheses, one of which he dealt with more specifically, which the jury were entitled to adopt and which would authorise them to aquit the plaintiff of contributory negligence. The appeal comes from that judgment.

The question is of the power of the jury to interpret both the evidence and the facts. By which I mean that it was for them to say what the witnesses meant to testify, and what the real and substantial effect of their testimony was and then, having settled the facts, to say what quality of care or want of care they exhibited on the part of the respective parties.

Mr. Campbell, in clearly and strongly presenting the case for the Tramway Board, adopted the view that the jury were quite at liberty if they so chose (and they did choose) to find the driver of the bus guilty of negligence. That, I think, is clearly right. The items of negligence which I think were plainly open to the jury were disobedience of the traffic code in going far too much towards the centre of the road and turning in too flat an arc, and for his failure to observe the on-coming cyclist. The speed of the bus has been variously estimated and of course it is an important factor. The actual time which elapsed in getting into a position exposing the plaintiff to danger naturally depends upon the two factors of its course and speed, and the two things are

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related. Taking that course it might perhaps have been less dangerous had he gone at a lower speed. His actual speed was probably 16 to 17 miles an hour, if the evidence is to be accepted, - but matters of speed are a contingency much in the hands of the jury.

The case really depends on what conduct must be imputed to the plaintiff and whether that conduct could be regarded when settled by the jury as not implying a want of due care. Her version involves a proper look towards the west up Elgin Street for traffic coming from that direction and a correspondingly proper look towards the east to see if traffic was coming from that direction. Necessarily her glance must have swept round, but she says that from the time when she noticed the stationary bus she did not notice it or see it any further until she found it in a position exposing her to imminent danger. It is on her failure to see the bus that the case against her rests. If we were a tribunal of fact we might take a different view from that which the jury have taken, or perhaps if we had examined the matter on her oral evidence we might have arrived at the same conclusion. But we are not a tribunal of fact and we have to consider whether it is reasonably open to the jury to say no to the issue whether she was guilty of contributory negligence.

To my mind the jury were at liberty to take the view I shall state of what she actually did and saw and thought. They were entitled to say that she came in from Keppell Street in a manner which only broke the traffic code in a theoretical way by failing to stop at the yellow line and that that did not much matter in the consideration of this accident. They were entitled to say that the bus had been observed by her and that she had formed a judgment that it was not a piece of traffic which she was called upon to avoid. But she then looked in the direction from which traffic which she was bound to avoid might come and also in the opposite

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direction from which traffic, perhaps owing a duty to her, might come and in doing this she obeyed the ordinary dictates of conduct of an integer of traffic. The jury might then say that her failure to perceive the omnibus was simply due to the fact that she looked in the direction where traffic might be expected and did not look or fix her attention in sweeping her glance round upon the place from where it was actually coming. There again the place where it was when her glance swept from one side to the other is an important matter and is a matter which the jury would be at liberty to estimate variously because it is a matter involving a close estimate of speed, times and relative situation. If they took that view they might say that although there was some difficulty in knowing why exactly she did not see it, yet in fact she herself did not see it. They must have believed her in saying that she glanced in two directions and they might attribute the fact to the particular position in which she thought the bus was, and say that she had behaved with due care in coming to the crossing. There is still another view, that which Mr. Justice Fullagar rather put. It is that while she knew, treating the knowledge as a matter arising from a process of reasoning and recollection, that this particular bus took a course which made it necessary for it to turn into Elgin Street, nevertheless that, so to speak, it was a matter about which she did not reason and it did not make a vivid impression on her mind when she saw it at the bus stop, and that what she did was to look at the proper place whence traffic might come, including the place from which any bus which took a proper turn might be expected to come, and on that ground an explanation was open of her failure to see the bus, which implied no negligence. That appears to me to be equally open to the jury.

I have so far in discussing the case disregarded the fact that contributory negligence is an issue of which proof lies upon the defendant. That is, however, I think, not an immaterial circumstance. It is indeed impossible under the common law system for a judgment to

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be entered against a jury's verdict when that verdict haspassed against a person on whom the burden of proof lies of a particular issue. It was possible, however, for a common law court armed with no further statutory powers to set aside such a verdict on the ground that it was too unsatisfactory and to order a new trial. In the present case the Full Court took a further step which is generally considered to be open in a proper case under Order 58 Rule 4 of entering judgment. That is a statutory power which has been discussed in both this country and still more in England. It is a power which is to be exercised with care and only in extreme cases. I am not myself aware of many cases in which it has been done when the issue involved is one where the burden is upon the party who succeeds in inducing the court to enter such a judgment. In the present case I think that the learned judges who used that rule entered into a discussion of the facts of the case which trespassed upon the province of the jury. In a street accident case a jury is particularly competent perhaps to form a judgment upon the varying factors which involve an assessment of the facts and a decision upon their quality; that is to say whether they implied or did not imply negligence of one or other or both of the parties to the accident. The interpretation of a witnesses's evidence is for them and for my part, speaking only for myself, I deprecate the view that in dealing with testimony juries are bound to accept this or that particular piece of testimony or the evidence of this or that particular witness. Their whole verdict is subject to the general rule that it can be set aside if it is unreasonable, but that is a final conclusion which the court must come to on a survey of the whole of the materials without going so far as to say that this particular step or that particular step in the acceptance or rejection of the testimony of witnesses is not open to the jury.

However those observations have only a rather remote relation to the conclusion which I myself have formed. I think

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in the case before us hypotheses were fairly open to the jury which would enable them to say that there was no contributory negligence causing the accident on the part of the plaintiff. That means that I disagree with the contention of Mr. Campbell that the jury were not at liberty to say that the defendant's negligence was the sole cause of the accident and ought to have said that the plaintiff's negligence was the cause of the accident.

I think that the appeal should be allowed, the judgment below discharged and that the appellant should have the costs of the proceedings here and below.

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JUDGMENT
(ORAL)

McTIERNAN J.

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(ORAL)

McTIERNAN J.

I agree that the appeal should be allowed; and I agree entirely with the reasons which have been given by my brother Dixon and do not think it necessary to add anything.

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I also agree and have nothing to add.

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JUDGMENT. (ORAL).

WEBB J.

I agree.