MACKAY & COMPANY

v.

BARKER

JUDGMENT (ORAL)

DIXON J.
FULLAGAR J.
KITTO J.

5|1951

7.9.1951

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v.

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JUDGMENT (ORAL). DIXON J.

This is an appeal from a judgment of Virtue J. The action was one in which the plaintiff sought damages for the negligence of the defendant's servant in driving a truck which carried some empty trays of soft drink bottles packed on the truck. The plaintiff drove a Ford caravan along Guildford Road and pulled up opposite the end of a tram loop. His purpose in pulling up was to visit a house opposite. He parked his vehicle on the south-easterly side of the road close to the kerb. The road runs north-east and south-west. There is a tramline upon the road which is upon the northerly side of the road, being a single line, but, as I have said, at this point there was a loop. The north-easterly end of the loop was almost at the point where the Ford caravan was parked. The date was 10th February and the hour was about nine-thirty in the evening. At that time a tram was travelling along the single line which ran upon the north-westerly side of the road and it was travelling away from Perth towards the north-east. At the same time the defendant's truck was travelling along the south-easterly side of the road in a south-westerly direction. The plaintiff alighted from his caravan with a view of crossing the road, but he observed the oncoming truck and he stood with his back to the caravan close up against it. He also observed the tram coming from the opposite direction. He said in his evidence that he appreciated the fact that the tram and the truck would pass one another at the point where his caravan was parked, that is, I assume, if they maintained their respective courses and speeds. It is not quite clear at what speed the truck was proceeding at the time it hove into view, but it did diminish its speed until it proceeded to pass the caravan at about seven or eight miles an hour. The space which would be left between the

caravan and the tram was not great and a good deal depends upon the dimensions of the road and of the vehicles. The plaintiff, however, appears to have judged that there was sufficient room and, standing with his back against the caravan, he motioned the truck to come on. The truck came forward and, according to the plaintiff, one of the overhanging trays or boxes of bottles hit him on the right shoulder and pushed him over on to his left side, with the consequence that his legs or ankles went under the wheel of the oncoming truck and he was severely injured. He says that in order to avoid injury as the truck came on he slid down with his back close to the caravan and protruded his knees to enable himself to do it. Notwithstanding that he was struck on his right shoulder. That account has apparently been accepted.

Now, the dimensions of the vehicles which, as I have said, are important, show that, first of all, the roadway between the edge of the rail and the kerb would be twenty-one feet. The tram had an overhang of two feet six inches, which would mean that the roadway would be eighteen feet six inches from the kerb to the overhang of the tram. But the parked vehicle occupied six feet six inches, with the result that between the overhang of the tram and the side of the parked vehicle there would be twelve feet for the truck to go through. The truck itself, considered apart from its loading, occupied a space of seven feet two inches. What is regarded as a precise estimate of the overhang of the load is given, which would account for another three inches on each side, making the width of the loaded truck seven feet eight inches, and that would give four feet four inches to spare, two feet two inches on either side had the truck been able to pass precisely in the middle between the two vehicles, the tram and the parked caravan. Now it cannot be clear how much space the plaintiff's body occupied, but if his story is correct that he stood with his back close to the caravan and slid down, bending his knees, without putting his shoulders or his head forward, it is probably safe to say, as the learned Judge, Virtue J., appears to have said, that it occupied about eight inches. On the basis of the load striking his shoulder

and the load being no more away from the side of the caravan than eight inches, it would mean that the loaded truck left a space of three feet ten inches from the side of the tram on the other side. Now on that state of facts the plaintiff made a case which as it may be briefly stated was that the driver of the truck, a man named Rogers, took a perilous course in attempting to go through such a narrow space, not a course that he was unable to accomplish, but one that would require care, precision and greater skill apparently than in the end he proved capable of exhibiting. Secondly it seems to have been made as a primary ground of negligence that in fact Rogers swerved his vehicle, doubtless to avoid the tram. One can easily understand from the point of view of the plaintiff seeing the truck coming down it would look as if it was bearing in upon him. At all events, he gave evidence that it did swerve in upon him. Virtue J., however, was of opinion that it did not swerve and that that part of the plaintiff's case failed. That does not mean that His Honour found with great definiteness that it did not swerve, but it was not established that it did swerve in. Consistently with that view it may quite well be true that Rogers was not making a precisely accurate parallel course with the tram but was making a course slightly diagonal, with the diagonal going southerly. But about that of course we can do no more than speculate. Virtue J. found for the plaintiff on the ground that the driver Rogers took a dangerous course in attempting to go through. I think that that view should be supported and that with a space of that description at that time of night in the state of lighting it was a dangerous course to attempt to go through between the advancing tram and the stationary vehicle in the sense that it required a considerable degree of exactness and misjudgment might, as indeed it did, lead to disaster.

An alternative view of the case goes to what Rogers actually did. Supposing the space was regarded as enough, then what he did was to bear too closely upon the vehicle. Now as to that the figures which I have given seem to show that he did indeed go closer to the vehicle than the tram and this caused the injury to

the plaintiff. The learned judge, however, accepted Rogers' statement that his anxiety was to keep as close to the tram as possible and that he did endeavour to keep close enough to the tram to avoid accident on the other side. Whatever he attempted to do it seems to me to be clear enough that he went too close to the parked vehicle, so that on either view he should be held guilty of that want of due care which the law demands of a driver in that situation.

But the defendant made a further answer to that case. He said that by waving Rogers on the plaintiff himself was guilty of want of due care and was guilty of contributory negligence. I think that the answer to that contention is that the plaintiff was merely indicating, first, that he was not going to cross the road and that he was going to wait where he was until the vehicle went through, and again, indicating or implying that the passage between the two vehicles could be negotiated and that in so motioning he was not in the same position to judge as the driver of the vehicle, nor did he have the same responsibility and that he was not culpable and guilty of a want of due care for his own safety.

Alternatively the defendant maintains that motioning forward by the hand was an act exposing the plaintiff to a further defence, namely that it showed that he assumed the risk which was involved in the motor truck attempting to go through between the two vehicles. Before a plaintiff can be found voluntarily to have assumed a risk, the court must see what the risk was. The court must be reasonably satisfied that the plaintiff appreciated the risk and, further, that the plaintiff consented to undertake it. In the present case the plaintiff was looking up towards the oncoming vehicle, doubtless with headlights, aware of a tram coming in the opposite direction, and was, as I have said, indicating that he did not propose to cross the road. He proposed to wait until the other vehicle went through. He could not be understood as indicating that he was prepared to take any risk which was involved in a better appreciation of the narrowness of the passage between the two, the want of skill of the driver or his inability to negotiate the passage. The risks which

are involved in such a course are those which depend upon an appreciation of the dimensions of the thing which has to go through, the space which it has to go through and the skill and judgment of the person who has to do the task, and I think the learned judge was perfectly right in refusing to find that the plaintiff undertook the risk involved in a failure in that attempt, let alone a risk of a want of due care. For those reasons I am of opinion that the appeal should be dismissed.

Fullagar J.: I agree.

Kitto J.: I agree.

ORDER.

Appeal dismissed with costs.