

The Municipal Tramways
Trust

v.

The Fire Brigades Board

REASONS FOR JUDGMENT.

Judgment delivered at Adelaide
on 24 9. 51

THE MUNICIPAL TRAMWAYS TRUST

v.

THE FIRE BRIGADES BOARD.

JUDGMENT.

DIXON J.
WILLIAMS J.
KITTO J.

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This is an appeal from an order of the Supreme Court of South Australia (Napier C.J.), allowing an appeal from a judgment of the Local Court of Adelaide. The judgment of the Local Court was given in an action of negligence and was for the defendant. By the order under appeal the Supreme Court set aside that judgment and entered judgment for the plaintiff for the sum of £396:0:5 with costs.

The action arose out of a collision which took place on the morning of 22nd October 1948. The colliding vehicles were a fire reel of the respondent Board, which was the plaintiff in the action, and a tram car belonging to the appellant Trust. The fire reel was a motor-driven appliance which apparently included two fire extinguishers, an extension ladder and some other equipment. The accident took place in Kensington Road where it is intersected by George Street and the continuation of George Street under the name of Giles Street. The fire reel, which was manned by two men, one driving and the other sitting on his left, was on its way to a fire, and, having emerged from George Street, was crossing Kensington Road in a southerly direction. The tram car was travelling on the other side of Kensington Road in a westerly direction towards the city. The vehicles met in the middle of the intersection. The fire reel was nineteen feet in length and was hit on the left-hand side rear mudguard, a distance uncertainly estimated as not less than 3 feet or more than 6 feet from its rear bumper bar. It was overturned. The action was brought to recover the cost of repair.

The defence to the action included a plea of contributory negligence on the part of the driver of the reel. The learned judge of the Local Court found that there was negligence on the part of the motorman of the tram car. But he found that there was contributory negligence on the part of the driver of the fire reel, and on that ground he entered judgment for the defendant Trust. Napier C.J. upheld the finding of negligence on the part of the driver of the tram car but found himself unable to agree in the conclusion that the driver of the fire reel had been guilty of contributory negligence.

Both fire fighting vehicles and tram cars occupy exceptional positions under the Road Traffic Act 1944-1950. Under sec. 131(1), when any two ordinary vehicles are approaching the junction or intersection of two or more roads the driver of the vehicle who has the other vehicle on his right must, if there is a reasonable possibility that they might arrive at the same point simultaneously or a dangerous situation might otherwise be created, either decrease the speed of his vehicle or stop his vehicle in order to allow the vehicle on his right to continue on its course in front of his vehicle without change of speed. But sec. 119(1) especially excludes tram cars from the definition of vehicle. Consequently a tram car is not under an obligation to give way to a vehicle on its right at an intersection. Sec. 131(2) goes further and provides that when a vehicle and a tram car are approaching a junction or an intersection of two or more roads in such circumstances that there is a reasonable possibility that they might arrive at the same point simultaneously or that a dangerous situation might otherwise be created, the driver of the vehicle shall decrease the speed of his vehicle or stop his vehicle so as to allow the tram car to pass in front of his vehicle without change of speed. But sec. 156A(2) then comes to the relief of vehicles of special classes, including motor vehicles.

used by the Fire Brigade Board or by a fire brigade, while being driven to any place in answer to a call for the services of a fire brigade or in use at a fire. They are relieved from the obligations of a number of sections in the Act, including sec. 131. This means that there is no statutory necessity for a fire brigade vehicle to give way at an intersection to a tram car or any other vehicle.

It is unnecessary for the purposes of our decision to discuss the evidence in detail. A very close examination of the circumstances of the accident was made by the learned judge in the Local Court and his findings on the issue of primary negligence have been accepted in substance by Napier C.J. and are not challenged upon this appeal.

In our view the question upon the appeal comes down to a question of contributory negligence which may be stated very briefly. As the tram car approached the intersection the motorman failed, according to the findings, to keep a proper look out for traffic in George Street on his right-hand; that is to say, he did not look soon enough towards George Street. The tram was of a bogie pattern and of an old-fashioned description and made a very great noise. The fire reel as it approached the intersection used the siren and the horn. These are said to give a very loud signal but owing to the noise of the tram the motorman of that vehicle did not hear them. In what distance the tram could have pulled up is not very clearly shown but tests established that it could not have been less than 88 feet. In fact it did not come to a standstill until 67 feet past the point of collision.

Two items of contributory negligence were relied upon by the defendant Trust. First, it was said, the driver of the fire reel did not look soon enough to his left, that is in the direction of the approaching tram. Secondly, it was said, when he

at length saw the approaching tram he adopted the wrong measures to avoid a collision. Naturally and properly the driver as he approached the intersection was concerned primarily with the traffic on his right travelling in an easterly direction from the city. He had not a clear vision across the corner of George Street and Kensington Road on his right and could not see up that street towards the west until he had approached very close to the fence alignment. It was not until he could see in that direction that he could be reasonably expected to turn his attention to his left-hand side. In dealing with the allegation of contributory negligence that he failed to look to his left sufficiently early, the learned judge of the Local Court found it necessary to put on one side much of the evidence of the two firemen who manned the fire reel, because that evidence obviously placed the tram car an impossible distance to the east when they first saw it. But his judgment seems to mean that he found that the driver of the fire reel was not wanting in reasonable care because of the point at which he first looked to his left, that is to say in the direction of the approaching tram. The learned judge took the view, however, that on seeing the approaching tram the driver took a course involving negligence.

His Honour said that there were three possible courses open to the driver: first, to try to cross ahead of the tram by accelerating; second, to try to stop before reaching the southern tram track; and third, to swerve to his right, applying his brakes. The first was the course which the driver in fact attempted. According to the evidence of both firemen, as they approached Kensington Road the speed of the vehicle was reduced. As they got into Kensington Road it was accelerated and the acceleration was increased on seeing the tram. A swerve to the right was attempted, the idea of the driver being that he would thus pass the tram. The learned judge was of opinion that if the driver had chosen the second course he probably would not have succeeded in stopping the vehicle before it reached the southern tram track so that a collision would in that event have taken place. But his Honour took the view that had the driver chosen the third course

and attempted to apply his brakes and swerve to the right he might have avoided the tram. A good deal depends on the distance of the tram from the fire reel when the driver first saw it. The learned judge of the Local Court estimated that distance at 53 feet back from the point of collision or about 23 feet from the eastern fence line of George Street. His Honour said: "...when he had seen the tram I think that he should have anticipated the risk of collision, and taken the course most likely to avert it. Instead of that he took the course involving the greatest amount of risk, and in that I think that he was negligent." In reversing this decision Napier C.J. acted upon the view that the driver was called upon to exercise a judgment in what amounted to an emergency, and that at worst he was guilty of an error of judgment. The Chief Justice felt some difficulty upon the point whether the driver of the reel was guilty of negligence in failing to see the tram before he did and in not realising that it was carrying on across the intersection. But His Honour gave reasons, which it is unnecessary for us to set out again, for the conclusion that in all the circumstances he should not hold the driver guilty of negligence, although if the learned judge had based his finding of contributory negligence upon the failure of the driver to watch out to his left the Chief Justice would not have been prepared to disturb his finding. His Honour added that the difficulty he saw upon the evidence was that it was not sufficient for the defendant Trust to prove that the driver of the fire reel should have seen the tram before he did. It had also to prove that, seeing the tram, the driver should have realised that it was not going to slacken speed, and that if he had realised this he could still have avoided the collision by acting reasonably. But the Chief Justice took the view that the learned judge of the Local Court had exonerated the driver of the fire reel up to the point at which the reel was actually entering the intersection and that upon the evidence as a whole such a conclusion was fair and just.

We agree in the conclusions of the Chief Justice. We think that the findings of the learned judge of the Local Court should be sustained up to the point at which he found that the driver of the fire reel had adopted the wrong course. At that point we think that the learned judge demanded more from the driver than the exercise of reasonable care. As the siren and the horn were both being sounded, the driver was entitled to suppose that the traffic would be aware of the approach from some quarter of a fire reel or other privileged vehicle. In making an instant judgment as to what to do the driver could hardly suppose that the tram was unaware of the presence of the fire reel upon the road. He could reasonably expect that the motorman would see the reel and would either stop or slow up so as to allow him to pass. Even if he should have considered the possibility of the tram coming straight on without slackening its speed, he could be by no means certain that, by attempting to swerve to the right and applying his brakes, a collision could be avoided, whereas the possibility of his being able to pass in front of the tram was a very real one, and an attempt to do so might well provide his best chance of avoiding an accident. This is shown by the fact that he was struck not more than 6 feet, and possibly much less than 6 feet, from his rear-most point, so that he almost escaped. The driver made a decision which, even if mistaken, was not unreasonable in the circumstances, and it follows that what he did in the emergency would not suffice to establish the defence of contributory negligence.

In our opinion the appeal should be dismissed with costs.