No 27 of 1952 (8

IN THE HIGH COURT OF AUSTRALIA

HUGHES

v.

DEEGAN

ORIGINAL

REASONS FOR JUDGMENT

Judgment delivered at SYDNEY

on FRIDAY, 14TH. NOVEMBER, 1952.

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

C.12280/45

HUGHES

v.

DEEGAN

O R D E R

Appeal dismissed with costs.

HUGHES v. DEEGAN

JUDGMENT :

DIXON C.J.
WILLIAMS J.
FULLAGAR J.

HUGHES v. DEEGAN

JUDGMENT :

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This is an appeal by a defendant from a judgment given by the Supreme Court of Tasmania for the plaintiff in an action for damages for negligence causing personal injuries. The judgment awarded the plaintiff £2,554.16.0 and costs. The defendant is a cartage contractor and the plaintiff was one of his drivers. The negligence of which the plaintiff complained is that of another driver employed by the defendant, named Nunn. In Tasmania the defence of common employment has been abolished by statute. No change has been made by legislation in the common law rule concerning contributory negligence as a defence to an action of negligence.

The case for the plaintiff is that as he was standing at night beside the lorry under his charge on the roadside where it had been drawn up he was negligently run down by the lorry driven by Nunn who drove past his vehicle on the right hand side of it.

The accident occurred on the night of 5th November 1948 on the road from Beauty Point to Launceston at a place about 150 yards on the Launceston side of the Old Loira Post Office, a roadside post office which is passed about three miles before Exeter on the journey to Launceston. Two lorries belonging to the defendant left Beauty Point that day bound for Launceston. They were loaded with cases of fruit. The plaintiff drove one of them and Nunn drove the other. Each driver had with him a companion sitting beside him. The lorries were large and of much the same dimensions, constructed with a cab and a flat tray for the load. The plaintiff's vehicle was a little longer than Nunn's. The lorries each weighed over 2¾ tons and on the occasion in

question carried a load of between six and seven tons. The fruit cases were piled on the tray of each lorry and the load was lashed down and covered with a tarpaulin. The plaintiff had some doubt about the security of his load and arranged for that reason that he should go ahead of Nunn. At Beaconsfield which is some seven miles before the Old Loira Post Office they had tea together and drinks. They remained there some time. They resumed their journey about half past nine or ten, the plaintiff preceding Nunn. The plaintiff described the night as dark and cool with no rain or mist, and said that he had no occasion to use the screen wiper. But other evidence suggests that there was a slight drizzle and Nunn said that he used his screen wiper. Apparently as you approach the Old Loira Post Office from Beaconsfiled you go up a hill from which the road then descends. The hill is enough to obscure the lights of an approaching vehicle from any one fifty yards or more down the hill on the Exeter side. At a distance down this hill variously estimated, but which was probably 120 to 150 yards, the plaintiff pulled up his lorry, stopped his engine, and after rolling a cigarette, alighted. He said in evidence that his purpose was to look at his load. He slammed the cab door and turned to the left to go to the rear of the lorry. He could remember no more. In answering an interrogatory that was put in he said that in consequence of his injuries he could not then remember whether he looked to the rear after he reached the ground from the cab. In evidence he said that he had looked in the rear vision mirror before getting down.

Nunn's story is that when he came over the hill he saw the tail light of a vehicle 150 to 200 yards down the hill. His companion was asleep beside him. He drove down from the crest of the hill at between 15 and 20 miles per hour. He had his lights on the dip. When he was about thirty yards from the vehicle he recognized it as the plaintiff's lorry. He was slowing down to pass it. He went over to his right so that his off side wheels entered the table drain about 10 or 15 yards behind the stationary vehicle. He had taken his foot from the accelerator and placed it lightly on the brake. He entered the table drain at 12 miles per hour. His attention was on the off

side of the lorry where his wheel in fact grazed the bank at the side of the road. He felt nothing and heard nothing and did not see the plaintiff. Having passed the lorry Nunn drove his vehicle ahead for thirty yards directing it to the other side of the road. He stopped and cameback, as he said to obtain a cigarette from the plaintiff. He found the plaintiff lying on the road four or five feet in front of his lorry. He reached him at the same time as the man riding in the cab with the plaintiff. The injuries sustained by the plaintiff were very serious. They included a fracture of the right thigh, multiple fractures of the pelvis bones and a fracture of the sacroiliac joint.

Investigations established the position on the road of the plaintiff's lorry and the course taken by Nunn to pass it. The road consists of a bitumen surface 16 feet wide with gravel at each edge and a table drain. The latter was about four inches lower than the gravel. The gravel and the table drain on the right hand side of the lorry gave about three or possibly four feet from the edge of the bitumen. The outside wheel marks of Nunn's lorry went the full distance over from the bitumen and the side of the bank showed where the outside edge of the wheel had grazed it. These wheels had been driven along the table drain for some twenty yards beginning at least ten feet behind the rear of the standing lorry. The marks were practically opposite the stationary lorry and showed how Nunn's vehicle had come out at an angle and reached its correct side about fifteen yards ahead of the stationary lorry. There was a yellow or white centre line marked on the bitumen and the front off wheels of the plaintiff's lorry stood on this. The rear wheels of both vehicles were dual. The rear off wheels of the plaintiff's lorry were slightly over the centre line marked on the bitumen. It was stated in evidence that the tyres were each eight inches with a gap between them of one inch. The inner tyre was $3\frac{1}{2}$ inches over the line. The tray extended an ineh and a half to two inches beyond the wheels and the load extended an inch or so further. It would therefore appear that the edge of the load was two feet over the line. The door of the cabin was two feet six inches

wide. The rear vision mirror, which was attached by an arm to the front of the lorry, stood out two feet. Nunn's load extended about an inch on each side over the tray of the lorry which was 7 feet 4 inches wide. The width across the wheels at the back was 6 feet 11 inches. The distance between the plaintiff's load line or his rear vision mirror and the edge of the table drain or the bank cannot be fixed with exactness, but it was not more than ten feet. Assuming it to have been ten feet there would have been a distance between the load lines of two feet nine inches as Nunn's lorry passed. The rear vision mirror was untouched and, notwithstanding some evidence that a cross member on the driver's side of the plaintiff's lorry was freshly broken, no injury to either lorry seems to have been done in the course of the accident, unless a small dent and a graze like a bootmark on the top of the front off mudguard of the plaintiff's lorry and a scratch on top of the bonnet could be associated with it. The position of the plaintiff's body in front of his vehicle is difficult to account for. A police officer who arrived at the scene before the plaintiff was moved said that he was six to eight feet in front of the left front wheel lying on the edge of the bitumen with his feet across the road at somewhat of an angle and his left shoulder two and a half to three feet from the left side of the standing lorry. It is suggested that he was precipitated into this position across the mudguard and bonnet of his vehicle. IN his evidence the plaintiff said that he opened the cab door to its full extent, got out, stepped backward perhaps three feet, slammed the door and in doing so went closer to the lorry so as to be within a foot of it and then turned or made to turn left. He estimated the time this took as ten seconds, four of which only passed after he reached the ground.

On these facts Morris C.J. who tried the action, found that the injury to the plaintiff was caused by the negligence of Nunn and that the plaintiff had not been guilty of contributory negligence. His Honour appears further to have been of opinion that even if the plaintiff had been negligent

that is presumably in failing to see the lights of Nunn's lorry before or after alighting, Nunn had an opportunity of seeing him in sufficient time to avoid the accident. The learned Chief Justice took the view that Nunn coming to a stationary vehicle should have expected that someone might be on the road close to it and had he been vigilant ought to have seen the door open and the plaintiff step out of the cab; he was not entitled to devote his attention to the right hand side of the road. The plaintiff's failure to see Nunn's lights His Honour explained by the theory that the rear vision mirror had been thrown "out of focus", possibly by a rope during the loading of the lorry.

It is difficult to accept the view that there was no negligence on the part of the plaintiff. He knew that the road carried traffic and in a relative sense was "busy", a description he conceded in his cross-examination. Further he knew that Nunn was behind him and liable to overtake him. Nunn's lights were visible for 120 or 150 yards while his vehicle came down the hill. It is of course impossible to feel any confidence in a reconstruction of the accident which depends upon an estimate of the amount of time elapsing from the time the plaintiff exposed himself to danger and the moment he was struck. Indeed there is much in the circumstances difficult to reconcile with probabilities, not the least being the plaintiff's failure to hear the approaching lorry on a calm night on a country road. But it at least seems certain that a man descending from the cab of a stationary vehicle on the right hand side at night when and where an oncoming vehicle was to be expected took less than reasonable care of his own safety if he merely looked in the rear vision mirror before descending and did not look as he alighted or when he had done so. He had placed his own vehicle so far from the extreme left of the road as to leave less space than he might for an overtaking vehicle but yet enough for it to pass. That rather increased the need for care on his part in stepping down to the road.

These considerations make the case one of difficulty and some doubt. But there was ample ground disclosed by the evidence

for the conclusion that Nunn was guilty of negligence. His situation and that of the plaintiff were entirely different. He was in charge of a very heavy but fast moving vehicle rapidly approaching a vehicle at a standstill. He knew that belonging to tha stationary lorry were two men either or both of whom might be on the ground beside it or might be alighting from it. He decided to pass it, although the space available was little more than adequate and he must therefore go very close to it. He did so at a speed that might be considered incautiously fast. What that speed was must of course be open to doubt. But Nunn says that he entered the drain at 12 miles an hour. The position of the plaintiff's body and the fact that he pulled up his lorry 30 yards ahead of the plaintiff's vehicle may perhaps be regarded as supporting the view that his statement as to the speed was no underestimate.

Nunn was called upon by the situation of the plaintiff's lorry and the very possibility of one or both of the two occupants of that lorry being on the roadway to exercise care that he did not run them down or injure them in passing. He was in control of the instrument which could do the injury and he was not entitled to assume that there was no one there or that anybody who was alighting or had alighted would or would be able to avoid the danger. The fact may be taken to be that the plaintiff had descended from the cab of the lorry an appreciable time before he was struck. The door must have been closed and the movements he describes would take a few seconds. Nunn was not entitled to devote his attention to the right hand side of the lorry if that meant, as apparently it did, a failure to see who or what was on the road beside the stationary lorry. If Nunn had proceeded at a slower pace and had taken care to see whether anybody was on the road beside the plaintiff's lorry, the accident would not have occurred. In this Nunn was guilty of negligence. At a time when it was no longer possible for the plaintiff to extricate himself from a position, which he might not have been in perhaps but for his own want of care in failing earlier to see the lorry coming down the hill, Nunn, had he driven with proper care would not have struck him. The situation created by

the plaintiff's being on the ground was one which Nunn exercising due care should have anticipated and, but for the negligent manner in which he passed through the comparatively narrow space beside the lorry, he would not have converted it into one of disaster for the plaintiff.

These are grounds which support the conclusion of Morris C.J.

The appeal should therefore be dismissed.
