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IN THE HIGH COURT OF AUSTRALIA

Bowen

v.

Coghlan

REASONS FOR JUDGMENT

Mrde.

Judgment delivered at Sydney.

on 28-11-52

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

C.12280/45

B O W E N

V.

C O G H L A N

JUDGMENT

DIXON C.J.
WILLIAMS J.
WEBB J.
FULLAGAR J.
KITTO J.

B O W E N

V.

C O G H L A N

JUDGMENT

DIXON C.J. This is an appeal from an order of the Supreme Court of New South Wales refusing a plaintiff in two actions tried together a new trial, the verdict of the jury having passed for the defendant. The actions arose out of a very serious accident which took place on the Mitchell Highway as that highway approaches the Eulomogo Bridge from the east. Mr. Miller in a very careful argument on behalf of the appellant described to us in full the topographical features which have a bearing on the inferences to be drawn as to how the accident happened. The plaintiff was driving a car towards the west and he was travelling at a speed which is in dispute, but which he does not place at a very high rate, considering that it was a country road and a bitumen surface. He had come down hill and got on to level ground and was approaching the bridge. He suddenly struck the rear of the defendant's truck which was pulled up on the road. Advancing from the opposite direction was a car with headlights, and he says in evidence that these headlights dazzled him. The plaintiff's case was that the truck was pulled up far over towards the centre of the road and in an improper position, and that it had no tail-light. In support of that case, great reliance was placed upon markings which appeared clearly on the road showing the

skid marks of the plaintiff's own car. Those skid marks began at a distance of 48 feet from the point at which the rear of the plaintiff's car stood after the accident. They went for a distance which is not precisely stated but which appears to be between 23 feet and 25 feet in a slightly irregular curve towards the yellow line marking the centre of the road and, as appears not only from the plan but also from the photographs, at that point the strong markings which appeared on the road ceased. There is some dispute as to whether the markings went on, coming in more towards the left of the road. At that point the markings which so far are clearly traced seem to end, and no further marks appear on the photographs. In the accident the plaintiff himself was quite seriously injured and his wife was killed and there was another fatality. The actions which he brought were first under Lord Campbell's Act as executor for his wife and secondly on his own behalf. Contributory negligence was set up as a defence at the trial and was relied upon as an answer to both actions. The learned judge left to the jury the issues of negligence and of nuisance on the part of the defendant and of contributory negligence on the part of the plaintiff. As I have said the jury found their verdict for the defendant. The appeal to the Full Court was unsuccessful and the appeal is now brought to this Court. The plaintiff relied, in support of the appeal, on the ground that certain evidence to which I shall refer was inadmissible and upon the ground that the verdict was against the evidence and the weight of the evidence. Mr. Miller in presenting this case put first and foremost the markings on the ground as incontrovertible evidence from which certain deductions arose. The view which was presented was that the jury could not but accept the conclusion of fact that the car driven by the plaintiff at the time the accident happened had been

suddenly braked; had gone to the right from the point where these markings commenced to the centre of the road and had there hit the stationary truck. It was admitted that the stationary truck, wherever it was standing, was standing unbraked and in neutral. The suggestion is that the truck was driven forward by the impact into the position into which it was found when the vehicles came to a standstill, That position shows the truck well over on to the left-hand side of the road with its right-hand wheels almost off the bitumen and its left-hand wheels in the grass at the side of the gravel and straightened up parallel with the bitumen. The defendant in giving evidence as to where his truck stood before the accident said that he left it on the side of the road straightened up. He left it in the sense that he had just alighted from the truck a moment or two before the accident. The reason why he alighted was that he wanted to see the condition of his lights. It appears from the evidence of the driver of the approaching car that the truck's headlights had been dimming and then growing stronger. Evidence was given of an investigation made long after the accident of the wiring system of the truck, which, if it could be relied upon as evidence of the state of the wiring system at the time when the accident took place, might have accounted for that phenomenon. It was for the jury to assess the credibility of the defendant's account of where he had placed his truck and, of course, to determine the weight to be given to the position of the truck soon after the accident. The question whether the tail-light of the truck was on depended upon the reliability of certain other evidence and the inferences to be drawn from it. It must be remembered, however, that the question whether the tail-light was on, and indeed the question where the

truck had been left, is one upon which the burden of proof lies upon the plaintiff. Some miles back (less than 16 and more than 7) the truck had been seen to have its tail-light on and its lights burning. I shall not go into the evidence of the state of the wiring system as it was deposed to when examined a long time after the accident. It is enough to say that the evidence was directed to show that if the wiring system had been in the same condition at the time of the accident, it was possible that the light might go on or off, but that it was more probable that the tail-light did not show. Evidence was given for the defendant that on the night previous to the accident the lights were burning properly. That evidence might not have been admissible if it had not been for the evidence adduced on behalf of the plaintiff, for the purpose of showing that if the wiring was in the same condition at the time of the accident it was unlikely that the tail-light was burning. But it was, I think, clearly admissible to negative the case so sought to be made, that is to say to show that at all events on the previous night the lights had been burning satisfactorily for at least some period of time although the wiring was in the same condition. The evidence that they were burning some fifteen minutes or half an hour before was admissible not only on the same ground but on the ground that it made it more likely that they continued to burn, although not necessarily proving that that was so. In the circumstances, it appears to me that the jury were at liberty to draw what inference they thought proper as to the significance of the markings upon the road. It may be conceded that an argument may be based upon the marks of some weight. But on the other hand the jury had the definite evidence of the defendant himself; they had the condition of the vehicles at the

conclusion of the accident; they had some evidence from which they might have drawn a deduction as to speed supporting the probability of the plaintiff having driven at a higher speed than that admitted. On the whole, the jury may have reasonably come to the conclusion that the accident could not have happened as it did if the supposition put forward by the plaintiff were correct, namely that the truck stood well over on the roadway and aslant. It was for them, I think, to draw a conclusion as to the real cause of the accident. It was open for them to think that, the truck being in a not improper position and with its lights burning, the accident was wholly due to causes to be found in what the plaintiff did. He may have been inattentive; he may have been dazzled by the oncoming lights; he may have been going at an excessive speed. At least they may have thought that the accident was not due to negligence on the part of the defendant either in the place where he put his truck or in the lighting. On the other hand they may have thought that the tail-light was not burning, and they may have thought it was due to his negligence that it was not burning. Even if they may have come to that conclusion, nevertheless, I think it was still open to them to come to the conclusion that the accident was finally due to the negligence of the plaintiff himself.

From the Bench the question was raised whether contributory negligence was a defence to an action under the Compensation to Relatives Act, that is to say, contributory negligence not of the deceased but of the plaintiff suing for the statutory cause of action for damages representing the injury done by the death of the deceased, a cause of action depending on the existence in the deceased, had death not ensued, of a right to recover in respect of the wrongful act neglect

or default of the defendant. The actions were tried together without distinction and no point that the contributory negligence of the plaintiff was no defence to that under the Compensation to Relatives Act was taken. No such point was made at the trial and no such point was made in the Full Court; nor was it made in the notices of appeal to the Full Court or to this Court. If the point had been made, supposing it to be a good one, it might have called for a careful distinction between the two cases in the charge to the jury. If the trial of the two cases together had proceeded notwithstanding the point it would have been necessary for the learned judge to direct the jury to look at the plaintiff's conduct only for the purpose of determining what was the true cause of the accident in the one case and to explain the difference between that and treating it as contributory negligence forming one cause answering the defendant's negligence considered as another cause. It was not done and if it had been done perhaps it is not likely that the result in the action under the Compensation of Relatives Act would have been different. The question itself has been dealt with in the Supreme Court of Victoria by Mr. Justice Gavan Duffy in the case of Carstein v. Iocco, 1941 V.L.R. p. 245. If the matter ever does come up for review in this Court, it will be necessary to consider with his Honour's decision in that case the authorities cited by Dr. Glanville Williams in his book on "Joint Tort and Contributory Negligence" in paragraph 115 at p. 443, authorities which come from Canada and the United States. But we do not think the point is open to the appellant at this stage in this particular case, and we therefore do not propose to consider it. For these reasons, I am of opinion that the appeal should be dismissed.

WILLIAMS J. : I am of the same opinion.

WEBB J. : I agree.

FULLAGAR J. : I am of the same opinion. I only say myself that I would think it impossible to maintain the proposition that on the whole evidence it was not open to the jury to find for the defendant. In regard to the other matters I simply agree with what the Chief Justice has said.

KITTO J. : I am of the same opinion.

DIXON C.J. : The order will be appeal dismissed with costs.