IN THE HIGH COURT OF AUSTRALIA

READ

V.

MITCHELL

REASONS FOR JUDGMENT

Judgment delivered at Sydney

on 10th April, 1953.

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

C.12280/45

READ v. MITCHELL

ORDER

Appeal dismissed with costs.

(Additional costs incurred by reason of the transfer of this appeal from the Tasmania to the Principal Registry were reserved for the consideration of the Full Court but as the appeal was ultimately heard in Hobart no order need be made.)

READ v. MITCHELL

JUDGMENT.

DIXON C.J.
FULLAGAR J.
KITTO J.
TAYLOR J.

READ v. MITCHELL

JUDGMENT.

This is an appeal from a judgment of the Supreme Court of Tasmania by which the plaintiff respondent recovered from the defendant appellant £2082:12:0 damages in an action for personal injuries. The action was tried by the learned Chief Justice, Sir John Morris. The plaintiff sustained the personal injuries of which he complained in a collision on the road from Grove to Huonville. He was riding a motor cycle and he collided with another motor cycle ridden by a man named Woods and carrying a pillion rider. It was not the rider of the motor cycle with which the plaintiff collided who was made defendant in the action but the owner of a Ford A motor car which stood stationary on the highway and, as the plaintiff alleged, formed an obstruction which occasioned the accident. The time was about eight o'clock at night on 11th June 1949. The defendant's car was unlighted and it has been found that its position in that condition on the highway did in fact cause the collision between the two motor cycles. The position of the car was upon the left-hand side of the highway as you proceed south towards Huonville. It stood diagonally upon the bitumen and occupied a space of some seven feet six inches of the eastern or left-hand side of the highway. Its bonnet was facing south-west. The bitumen surface of the road is eighteen feet wide. The reason why the defendant's car stood unlighted in that condition was that some half hour previously it had collided with a utility truck. The utility truck, which was driven by a man named Kelleher, also stood stationary upon the road. It stood about fifty-two feet to the north of the

defendant's car. Its position was also diagonal with the centre line of the highway, but it occupied not so much of the bitumen and it faced in the other direction, that is north-east. Measured to its left-hand rear mudguard it occupied four feet of the bitumen. After the collision the defendant had gone off to a neighbouring police station leaving his car in the position described. Before doing so he had disconnected the wiring, presumably to avoid the possibility of a fire. The result was the car showed no lights. The night was a dark one, but the road was lighted by overhead lights at intervals of one hundred and fifty yards. To the south were the lights of Huonville. An overhead light hung some twelve yards on the Huonville or southern side of the defendant's car. At what distance and to what extent the defendant's and Kelleher's cars were visible to south-bound traffic which approached from the north was a matter in dispute.

The plaintiff respondent was proceeding from Grove to Huonville and as he approached the site of the collision his speed has been found to be a maximum of thirty miles an hour. His story, which has been accepted, is expressed by him in comparatively few words in the course of his evidence. He says: "As I reached the town of Huonville I dimmed my light at the case factory (a building to the north of the point of collision). I noticed the 30-mile an hour mark there and dimmed my lights about there. I kept as near as possible to the left side of the road at a speed of thirty miles an hour. I noticed the 30 mile an hour mark and I looked at the speedometer and noticed I was doing 30 m.p.h. I saw a utility (Kelleher's truck) which appeared to be in my path. I swerved around it to go past - then my headlights picked up a car across the road. I put my cycle into third gear and swerved to go round it. A motor cycle hit me just as I was going to go round. I noticed the

door of the utility and the tray directly in front of me. If I had kept on going I'd have run right into the door - the left hand door. I didn't have time to pick out any part of the car. As I was going round the car I could have reached out and touched the car with my left hand." In his cross-examination he said that when he first saw the utility he was about thirty feet from it, a distance somewhat less than but sufficiently corresponding with an estimate he gave by reference to the distance from the witness box where he stood to the door of the court. He said that when his light was dimmed it showed only that distance. He thought the utility had made a mistake in parking. He said that when he passed it he did so by about eighteen inches to two feet and he drew a sketch of the manner in which he passed it. This sketch shows him as travelling alongside the left-hand side of the road straight at the utility and then as swerving round in a curve and in again and then making another curve out to pass the defendant's stationary car. The sketch provided by the defendant as part of his argument demonstrated that if the plaintiff passed Kelleher's utility truck at a distance of two feet his line of vision south past the defendant's car would include the western side of the road so that at a distance of 182 feet from the defendant's car, or 234 feet from Kelleher's utility truck, he could have seen the light of a motor cyclist approaching from the south if it were no more than four feet six inches out from the westerly side of the bitumen.

The plaintiff in cross-examination said that he did not at any time see the motor cycle coming towards him. He admitted, however, that as he was at the back of the case factory he saw a light on the edge of Muonville near the picture theatre. He said that it did not appear to him to be moving. To him it was just a light. He was completely unaware of that cycle. The

light to which he refers is assumed to have been the headlamp of the approaching motor cycle. The picture theatre formed part of the town lights of Huonville at some considerable distance.

The Chief Justice found that the street lighting resulted in patches of light and darkness and not either continual light or continual darkness. His finding as to the visibility of the two stationary motor vehicles not unnaturally was expressed only with some indefiniteness. His Honour said that he thought that the lighting may well have been deceptive as far as the plaintiff was concerned notwithstanding that some of the witnesses saw some things very clearly and that by measurement the light patches were not small.

The defendant's case upon this appeal was put chiefly as one in which, on the facts as they appear in evidence and on the findings, the plaintiff ought to be found guilty of contributory negligence. But the defendant also disputed the finding that he had been guilty of negligence in leaving his car in the manner described.

It is convenient to begin with the latter question. After the collision with Kelleher's utility truck the defendant found that one of his front wheels had been torn off. It was therefore not possible to move his car without assistance, but there were a number of men at hand who had gathered to the scene and with their help it could have been done without much difficulty. After the collision between the motor cycles his car was in fact moved backwards from its position by eight men. The defendant, however, after the collision between his car and Kelleher's truck had definitely decided that he would leave his car in its position so that the police might see it. He was, of course, bound to report the accident to the police within

twenty-four hours (see sec. 33 of the Traffic Act 1925 of Tasmania) but he need not have gone to them instantly. If he felt that he ought to report to the police at once and get them to see the position of his car it would have been possible to seek the assistance of bystanders to warn advancing traffic, but this he did not do. It is said that an electric torch was available among the bystanders. In the state of lighting which existed to leave his car in the position in which it stood was to expose traffic to a danger and the road is one upon which at that hour traffic might well be expected. Although it is no doubt true that the situation was not entirely without difficulty for the defendant, it cannot be doubted that the learned Chief Justice was fully entitled to conclude that the defendant did not take due care to prevent a further accident occurring because of the obstruction which his car presented to traffic. His Honour was also clearly justified in finding that the collision between the two motor cycles was a direct consequence of the obstruction so created.

The question of the plaintiff's contributory negligence must be governed by the assessment made of the conditions which prevailed at the time of the collision and in particular the visibility first of Kelleher's truck and then of the defendant's car and the effect of these obstructions and of the necessity of avoiding them upon his view of, and his appreciation of, the approach of Woods' cycle. These are essentially matters of fact and they are questions of a class that can be better determined by a judge listening to oral evidence than by a court depending upon a written record.

It is desirable to set out some passages in the learned Chief Justice's reasons for judgment which show how his Honour determined the question:-

"Then, should the Plaintiff have seen it (the defendant's car) earlier than he did, or rather was the Plaintiff guilty of negligence in not seeing it? I find that the Plaintiff was travelling at a speed of thirty miles per hour from the time when he passed the road sign requiring a maximum speed of 30 miles per hour. He was within three feet of the edge of the bitumen on his left hand side. There was nothing about his speed or his managing his cycle or method of travelling to suggest that in any way he was not having proper regard to his own safety. He had a headlight on his motor cycle in good condition, the beam of which was dipped as he rode towards Huonville.

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The question is: was the Plaintiff negligent? To have one's attention distracted from what is ahead by the necessity to look after one's own safety by avoiding an obstruction is not negligence .....

It is true that Mr. Woods, the rider of the cycle with which he collided had ridden down to Huonville very shortly before and he had seen both the utility and the defendant's car without difficulty. But I think it by no means follows that the Plaintiff's failure to see the defendant's car earlier than he did amounts to negligence. Woods' position on the road - he said he was travelling on the centre - did not permit the utility to be an obstruction to him.

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In a case such as this where I find proper driving in all respects, when one remembers that no man wishes to injure himself; where I find an explanation of why his attention was distracted and when one remembers that it is not a case of driving into the obstruction but of seeing it in time to avoid it; when one regards the fact that because of ignorance of the obstruction to his side of the road the approaching light although seen may not have registered in his consciousness; I think one cannot say that negligence on the Plaintiff's part has been established."

In answer to this conclusion as to the absence of contributory negligence on the part of the plaintiff the defendant appellant relied upon the fact that his car stood, as already stated, twelve yards on the northern side of a suspended light so that it should have been visible against the background of this light. He also relied upon the further fact that the advancing motor cycle's light ought to have been visible for some distance and must have been visible if the plaintiff had looked along the line of sight laid open to him

by his swerve round Kelleher's utility, and upon the fact that his own headlights were dipped so that the necessity was increased for his keeping a look-out for obstructions or advancing lights. Counsel for the defendant appellant in effect contended that the case fell within the principle expressed by Lord du Parcq in Grant v. The Sun Shipping Co. Ltd. 1948 A.C. 549, at p. 567, in a passage quoted by Kitto J. in Alldridge v. Mulcahey, 81 C.L.R. 337, at p. 355, viz. "a prudent man will guard against the possible negligence of others when experience shows such negligence to be common".

The defendant appellant also sought to use in his favour the statement contained in the passage already quoted from the learned judge's reasons to the effect that because of the plaintiff's ignorance of the obstruction to his side of the road the approaching light, although seen, may not have registered in his consciousness. Accordingly, so it is said, the plaintiff's own want of alertness must be considered the cause of the accident. These considerations are in our opinion insufficient to warrant the conclusion that in the first place the failure of the plaintiff to see Kelleher's utility truck earlier must be ascribed to some want of due care on his part. Again, the measures which he took to avoid it show no want of due care. The learned Chief Justice was entitled to regard those measures as the real cause of the plaintiff's failure to see the approaching motor cycle earlier and as involving him in a difficulty with reference to the defendant's car. If the defendant's car had been absent from the road there is little doubt that he would have seen the approaching motor cycle and passed it without any trouble. It was the position of the defendant's car after he had gone round the utility truck and the necessity of avoiding it that led to his not seeing the approaching motor cycle driven by Woods.

Doubtless he did swerve in as his diagram describes, with the result that the defendant's car obscured his vision for a moment. It was the critical moment for in the very small fraction of time which elapsed the two motor cycles collided. The argument that according to Woods he did see the light of the plaintiff's cycle up the road at an early stage and that therefore there must have been intervisibility must fail because it affords no sufficient foundation for the conclusion that the plaintiff's failure, at the time when there was that intervisibility, to recognise that there was an approaching motor cycle was in itself contributory negligence. It was no doubt at the stage when he was opposite the case factory.

On the whole case we think that the question was entirely one of fact for the decision of the learned Chief Justice and that there is no sufficient ground for thinking that his Honour arrived at an erroneous conclusion. The appeal should be dismissed with costs.