ORIGINAL

IN THE HIGH COURT OF AUSTRALIA

KRAUSE

v.

WELBY

REASONS FOR JUDGMENT

Judgment delivered at Sydney

on Friday, 28th August, 1953

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

C.12280/45

KRAUSE

V.

WELBY

O R D E R

Appeal allowed with costs. Judgment below set aside. Order that the action be remitted to the Supreme Court to assess the damages suffered by the plaintiff as a result of the negligence of the defendant complained of in the statement of claim.

KRAUSE

V.

WELBY

JUDGMENT

WILLIAMS J.
WEBB J.
TAYLOR J.

KRAUSE

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JUDGMENT

WILLIAMS J.
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TAYLOR J.

This is an appeal by the plaintiff from a judgment of the Supreme Court of Queensland which Matthews J. ordered to be entered for the defendant in an action tried without a jury in which the appellant sued the defendant, the present respondent, for damages for personal injuries. The evidence shows that for some six months prior to the accident in which the appellant was injured the respondent resided with the appellant and her husband at their home in Dalby. On one side of the cottage in which they resided there was a drive-way leading from a pair of double gates on the front alignment to a garage erected towards the rear of the block of land upon which the cottage was erected. This garage was used by the respondent for the purpose of garaging his motor vehicle which was a utility truck some six feet in width. On the night upon which the accident happened the respondent had undertaken to drive the appellant to her daughter's home and she and the respondent left together by the front door of the cottage, the respondent thereafter proceeding to the garage in order to enter his truck and back it out along the drive-way and on to the street whilst the appellant went towards the front gates in order to open them. The appellant says that she had frequently opened the gates for the respondent and that on this occasion she told him

that she would perform this function. The appellant also said that if it was windy the gates would not remain open of their own accord and that on this occasion it was windy. Having opened the gates the appellant stood inside the gate which the truck, in proceeding through the gateway, would pass on its near side. According to her, she stood holding this gate open with her hand on and slightly over the middle of the top rail. The gateway itself was some ten feet in width and as the respondent backed the truck down the drive and approached the gateway she saw that the truck was, as she said, too far over to the left-hand side. Thereupon she called out to him and the truck stopped. It is doubtful on the evidence whether the respondent heard the appellant before stopping or whether he stopped because he himself had observed that the truck was too far to one side. When the truck stopped the rear of its near side was about two yards from the end of the gate which the appellant was holding. This gate, it should be said, could only be opened through an arc of about ninety degrees and the appellant held it open in this position. The position of the truck when it stopped was such that if it had continued back without any change of direction it would have struck the gate. The appellant continued to hold the gate and, according to her evidence, the truck again started suddenly, came back quickly and pinned her hand. Apparently the truck did not strike the end of the gate but first made contact with it about a foot in front of the appellant's hand.

The respondent was not called as a witness on the trial and the facts above set out constitute the substance of the appellant's evidence insofar as it relates to the circumstances in which her injury was caused. In these circumstances, the learned trial judge entered judgment for the respondent. His Honour was at least doubtful on the evidence whether he could hold that the defendant was guilty of any negligence but, in any event, he considered that the

plaintiff was "lacking in duty for her own safety when she kept her hand on the gate when she saw the truck moving back towards her." There was, he said, ample space for her to have removed herself some distance from the gate and he concluded that a reasonably prudent person would have taken this course when seeing the truck approaching the gate. His Honour took into consideration the fact that the appellant was an old lady and "perhaps not so susceptible and perhaps not so quick in reaction as a younger person might have been", but she impressed his Honour "as being a woman with very keen perception for her age" and he could see no reason why she did not, when she saw the truck coming towards her, at least remove her hand from the gateway. There was, he thought, ample time for her to have done so and in his opinion she "should have availed herself of the time from when the truck began to move until it hit the gate which was struck, according to her evidence, about a foot in front of where she had her hand."

On this appeal it was argued first of all that a finding that the respondent was negligent was not open. It was conceded that the respondent might have been successfully sued in respect of the damage to the appellant's gate but it was contended that the circumstances disclosed by the evidence did not give rise to any duty of care towards the appellant herself. The respondent, it was said, did not know of her presence in the vicinity of the gate and there was no reason, in the circumstances, why he should have foreseen that it was likely that she would be injured by his carelessness in striking the gate. In our opinion, this contention should be rejected. Probably it would not have been contended that such a duty did not exist if it had clearly appeared that the respondent knew that the appellant was holding the gate open. This fact was not proved by direct evidence but, in the absence of any denial by the respondent, no other inference

could reasonably be drawn from the evidence. There is evidence that he knew the appellant had gone to open the gates, that he had used the gateway for six months before the accident and he must have known that the night was windy and that the gates would not remain open when it was windy of their own accord. Accordingly the respondent must have known or should have known that the appellant was holding or was otherwise in close proximity to the gate which in the prevailing conditions required her attention, and he should reasonably have foreseen that carelessly striking the gate would be likely to cause injury to her. There was, we think, suffioient evidence to prove that the respondent was negligent.

But this would not in itself entitle the appellant to succeed for the learned trial judge expressly found contributory negligence on her part, and if this finding is not open to question the appeal must be dismissed. It is not easy to determine whether this finding should be allowed to stand. It is true that the appellant emphasised that the truck was backed so quickly into the gate that she did not have time to withdraw her hand before it was struck and it is equally true that the learned trial judge, upon the evidence, found that acting reasonably she could have removed her hand and avoided injury. Clearly, if the appellant's evidence on this point had been wholly acceptable, there could not have been a finding of contributory negligence but it is evident that the learned trial judge discounted her evidence to this extent, though he does not appear to have found her evidence unacceptable in other respects. But it follows that the issue of contributory negligence cannot be disposed of in favour of the appellant on the basis that the truck moved so quickly over the last eight or nine feet that she did not have time to withdraw her hand. It seems to us that she would have had time to withdraw her hand if she had commenced to act at the moment when the truck again started to move. But / at that

moment it would not necessarily have been apparent to the plaintiff that she was in imminent danger for there could still have been time and space for the truck to have changed its direction sufficiently to avoid the gate entirely. The probable result of the appellant removing her hand from the gate as soon as she saw the truck commence to move would have been that the truck would have collided with the gate. It was not inconsistent with a due regard for her own safety for the appellant to continue to hold the gate for a short period in order to endeavour to avoid such a collision and if she held the gate too long she would not be guilty of negligence but merely of an error of judgment. The onus was on the respondent to prove the issue of contributory negligence and such a finding was not, we think, justified on the evidence.

Accordingly we are of the opinion that the appeal should be allowed with costs, the judgment for the respondent set aside, the action remitted to the Supreme Court for assessment of damages and that judgment should be entered for the appellant for the amount assessed. The respondent must pay the costs of the first trial.