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IN THE HIGH COURT OF AUSTRALIA

Durward

V.

Crack & Ors

REASONS FOR JUDGMENT

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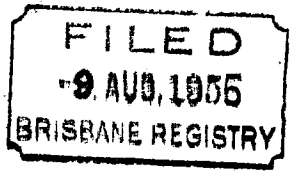

Judgment delivered at

on 5 August 1955

J. J Gourley, Govt. Print., Melb.

C.7163/51

DURWARD v. CRACK & ANOR.

ORDER

Appeal allowed with costs. Judgment of the Supreme Court discharged. In lieu thereof enter judgment in the action for the plaintiff for £500 damages and costs.

DURWARD v. CRACK & ANOR.

JUDGMENT (ORAL)

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

DURWARD v. CRACK & ANOR.

This is an appeal by a plaintiff from a judgment for the defendant in an action for damages for personal injuries. The judgment appealed from was given by Brown J. on 14th October 1954. The cause of action was negligence and the defence, besides traversing the allegation of negligence, set up a plea of contributory negligence. Brown J. found that there was negligence on the part of the defendant but he also found that there was contributory negligence on the part of the plaintiff. He contingently assessed the damages. The two questions are, first, whether the finding of contributory negligence is to be supported; and, secondly, whether the amount of damages contingently assessed is sufficient.

The plaintiff received his injuries in a collision between a motor cycle he was riding and a utility truck driven by the defendant. The accident occurred on 25th August 1952. The date is important because at that time the plea of negligence was a complete bar if made out. The accident occurred on Beaudesert Road at Rocklea. The utility truck driven by the defendant was travelling north at a place where there is a bridge. Shortly after the bridge is crossed going north there is the opening of a street called Muriel Avenue to the left and somewhat further on an opening to the right of a road called Compo Road. The defendant was driving on his left-hand side of Beaudesert Road. He crossed the bridge at a speed which is estimated by the finding at 15 miles an hour. The plaintiff was following him on his motor cycle and was behind the utility truck. He caught up during the course of the journey as they approached the bridge. Immediately before the accident the plaintiff was travelling at the same speed a short distance behind the defendant's utility truck. It was in fact the intention of the defendant to turn left into Muriel Avenue after he had crossed the bridge. But he mistakenly gave a right-hand turn signal which, as has been found, was clear and distinct. The plaintiff was led to

believe, naturally enough, that he was about to turn right. The street into which it might be supposed that he was going to turn right would be Compo Road, which was some distance ahead, about 90 yards, it is said, from the southern side of the bridge. The plaintiff drove his motor cycle alongside the defendant's truck on the left and, as it is found, was passing him at or about the intersection of Muriel Avenue. The defendant carried out his intention and turned left and the plaintiff's cycle struck the forward part of the truck somewhere on the left-hand mudguard. The plaintiff sustained a fracture of the right leg, both the tibia and the fibula.

Brown J. found that the defendant was guilty of negligence in giving an erroneous hand signal, i.e. what was in fact a right-hand turn signal and in then turning to the left. But his Honour considered that the plaintiff in what he did had infringed two traffic regulations, and he thought that that was sufficient evidence of contributory negligence to justify a finding that the accident had been caused, at all events in part, by the contributory negligence of the defendant so that the plaintiff was disqualified from recovering. The first regulation is 9(ii)(b), which (stated shortly) provides that the driver of a vehicle upon any road shall not overtake, pass or attempt to overtake and pass any other vehicle proceeding in the same direction upon a junction or at a nearer distance than thirty feet from a junction. Because the passing was taking place (of course it was not accomplished) about the mouth of Muriel Avenue in his Honour's opinion the plaintiff had clearly committed a breach of this regulation. The second regulation that his Honour thought had been infringed was reg. 9(3)(a). Stating it, as his Honour did, briefly, it is to the effect that the driver of a vehicle upon any road shall when overtaking any other vehicle pass on the right side of such vehicle, provided that such driver may pass on the left side of such other vehicle which is turning to the right or waiting to turn to the right. The view that his Honour took in relation to the

latter regulation was that the defendant's truck was not in fact turning to its right nor was it waiting to turn to its right when the plaintiff proceeded to pass on the left. Taking that view the learned Judge regarded the plaintiff as careless of his own safety and negligent in attempting to overtake and pass the utility when he did, even although he was misled by the defendant's erroneous hand signal, and on that ground he was disqualified because, as his Honour said, if the plaintiff had continued to keep his distance behind the utility at some 12 or 15 feet and had not attempted to pass the utility the collision would not have occurred.

In supporting this decision Mr. Draney has pointed out that if you take the measurements disclosed by the plan put in evidence and if you are satisfied that the defendant, and for that matter the plaintiff, were proceeding on the left-hand part of the bitumen so that no wheel of the defendant was over the centre of the crown of the road, there would be a very small margin of bitumen upon which the motor cycle must have passed. For my part I do not think that it is distinctly shown that the defendant was proceeding completely on the left-hand side with no part of his car over the invisible centre line of the road, but probably that does not matter very much. We find ourselves unable to concur with Brown J. in the view that the plaintiff was necessarily guilty of negligence in what he did. It is not necessary to consider closely whether it could be shown as a matter of exact language that in the circumstances the plaintiff did infringe upon either of these regulations. For, however that may be, in the circumstances it cannot be said, in our opinion, that he was guilty of contributory negligence in acting upon the hand signal in the manner in which he did. A reasonable driver or rider seeing the position and believing that the utility truck was about to turn to the right would or might have acted precisely as the plaintiff did. To hold that in doing as he did he was guilty of such unreasonable lack of care as to amount to contributory negligence appears to us to be erroneous.

As far as reg. 9(ii)(b) is concerned, it seems to have very little to do with the case. There was no other traffic in the actual vicinity; there was no harm done by proceeding across the mouth of the street alongside the utility in attempting to pass it. The whole difficulty arose from the utility truck turning to the left. So far as the other regulation, i.e. reg. 9(3)(a), is concerned, it is only by taking into consideration the actual fact that the vehicle did not propose to turn to its right and was not in fact in the act of turning to the right that the conclusion could be reached that the provision was broken. On the assumption of fact upon which the plaintiff was proceeding that the utility truck was in the process of turning to its right or just about to do so it is hard to see that any actual breach of that regulation could take place. And it was upon that assumption induced by the defendant that the plaintiff proceeded. For those reasons we think that the finding of contributory negligence ought not to stand and that negligence having been established the plaintiff is entitled to judgment against the defendant.

On the question of the sufficiency of damages there may be perhaps a little more difficulty. It is, of course, for the primary tribunal to assess damages and a court of appeal does not interfere with the assessment unless it appears to be unreasonable. There are special reasons why in the case of general damages the discretionary judgment which is formed in the first instance should stand unless the court of appeal is completely satisfied that it is outside the limits of what the facts of the case demand. In the present case a broken leg was sustained. The plaintiff was young. He went through the usual modern treatment for a broken leg. It was set. Three weeks after it was placed in plaster it became necessary to break it again and he suffered some pain in that respect but he was released from hospital very speedily and although he sustained, of course, a considerable amount of inconvenience and discomfort, there was comparatively little actual pain. The amount sued for was £500 only and there were special

damages of £276:7:6. His Honour, however, assessed the general damages for pain and suffering and inconvenience at £80 only. The majority of the Court is of opinion that this sum ought not to be allowed to stand as it is far too low for the injuries which the plaintiff suffered. We are of opinion that the amount for which the plaintiff sued should be recovered. The appeal will therefore be allowed, the judgment of the Supreme Court discharged and in lieu thereof there will be judgment for £500 damages and costs.