IN THE HIGH COURT OF AUSTRALIA

McDONALD

V.

WILLIAMSON AND ANOTHER

REASONS FOR JUDGMENT

ORIGINAL

Judgment delivered at MELBOURNE

on FRIDAY 4th November 1955

W. M. HOUSTON, Govt. Print., Melb.

C.1978/55

McDONALD

v.

WILLIAMSON & ANOR.

ORDER

Appeal allowed with costs. Judgment of the Supreme Court discharged. In lieu thereof enter judgment in the action for the plaintiff for £3920 with costs.

McDONALD

v.

WILLIAMSON & ANOR.

JUDGMENT

DIXON C.J.
McTIERNAN J.
WILLIAMS J.
FULLAGAR J.
KITTO J.

McDONALD

v.

WILLIAMSON & ANOR.

This is an appeal by leave from a judgment of the Supreme Court of the Northern Territory (Kriewaldt J.) in an action in which the appellant was plaintiff and the respondents were defendants. The case arose out of a collision between a motor car driven by the plaintiff and a motor truck driven by the first defendant and owned by the second defendant. The collision took place late at night - probably about 11.30pm. - on 27th November 1953 on the Stuart Highway, a short distance north of Darwin. The plaintiff was driving his car from the R.A.A.F. airport to his home, which is on the west side of the Stuart Highway between the airport and Darwin. The road consists of a bitumen strip about twenty-one feet wide bounded by a gravel strip on either side. When the plaintiff reached the vicinity of his home he extended his right arm from the window of the car, thus giving the normal signal that he was about to turn to his right. There was a special reason for giving this signal and giving it early, because a friend of the plaintiff was travelling behind him and intending to visit the plaintiff's home. While his arm was so extended, the truck, which was being driven by Williamson in the opposite direction, struck the plaintiff's car a glancing blow, and in doing so completely severed the plaintiff's arm near the shoulder. Notwithstanding this disabling injury, the plaintiff managed to drive the car across the road up to the front of his house. The learned trial judge was of opinion that negligence on the part of the defendant driver had been established, but that the plaintiff had been guilty of contributory negligence disentitling him to succeed, and judgment was accordingly given for the defendant.

On this appeal we have had the advantage of a very

clear and carefully reasoned judgment prepared by his Honour and, although we have, of course, read and considered the evidence, it will for the most part be necessary only to refer to his Honour's findings. There was a direct conflict of evidence on important matters of fact between the plaintiff and the defendant Williamson, and his Honour, for reasons which commend themselves to us, preferred the evidence of the plaintiff. The central point of the plaintiff's case and a point which bore directly, as we think, both on the question of Williamson's negligence and on the question of contributory negligence, was an allegation that the defendant's truck was very insufficiently lighted. The plaintiff's evidence on this point, though contradicted by Williamson, was to some extent corroborated by the evidence of Sergeant Hook of the Darwin police. It was said that the truck had no proper headlights burning and that the front corners of the tray, which was seven feet in width and which was most probably the part of the truck which caused the damage, carried no lights. His Honour said that he had "no hesitation in accepting the evidence of the plaintiff and in finding that at the time of the collision the only forward showing lights on the truck were two small dull lights".

His Honour then turned to the other important feature of the plaintiff's case, a feature which also, as we think, had a bearing both on the question of Williamson's negligence and on the question of contributory negligence. This feature related to the respective positions on the road of the two vehicles immediately before and at the moment of impact. Here again the plaintiff and Williamson were in conflict, and here again some corroboration for the plaintiff was forthcoming from Sergeant Hook. According to the plaintiff, he was at all material times on his correct side of the road, and he said that almost at the instant of impact he pulled his car a little further over to the left. According to Williamson, the truck was at all material times

on its correct side of the road. Sergeant Hook deposed that shortly after the accident he had found a quantity of broken glass and duco at the scene of the collision and that this was all on the extreme left of the bitumen, i.e. on the outer edge of the plaintiff's correct side of the road. His Honour accepted the evidence of the plaintiff and Sergeant Hook, and found that the collision occurred on Williamson's wrong side of the road. In the light of Sergeant Hook's evidence he inclined to the view that the "encroachment" was "substantial". He found that the plaintiff swerved slightly to the left after he saw the truck and before the vehicles collided, and that the truck did not make any alteration in its course until after the impact.

In the light of these findings it was inevitable that the learned judge should conclude, as he did, that "Williamson was guilty of negligence in two respects, namely that he drove a vehicle with inadequate lights, and that he drove it on the wrong side of the road". This conclusion made it necessary for his Honour to consider the defence of contributory negligence. There is no legislation requiring apportionment in such cases in force in the Northern Territory. The plaintiff was charged with contributory negligence in three respects: (1) failure to keep a proper lookout, (2) failure to retract his extended arm, and (3) driving on the wrong side of the road. The last of these three allegations was, of course, disposed of by a finding which had already been made, and his Honour proceeded to consider the other two allegations. With regard to the first of these, his view may be summed up by quoting the following extracts from his judgment: "After he saw the lights and realised that these came from a truck, he had only time for an instinctive swerve to the left. And even if the combined speed of the two

vehicles was as low as thirty-five miles per hour it would take only a fraction over a second for a gap of sixty feet to be closed. In effect the plaintiff admits that he did not see the truck until all opportunity to escape the accident had already vanished. .....I think the plaintiff should have seen the truck's dull lights sooner than he did ..... He could give no explanation as to why he did not see the truck earlier .... I therefore come to the conclusion that the plaintiff was guilty of contributory negligence in that he failed to keep a proper lookout."

With regard to the second allegation of contributory negligence the learned judge obviously felt great difficulty. He expressed his ultimate view by saying: "I regard the plaintiff's failure as negligence contributing to the damage but not as negligence contributing to the collision." This must, in our opinion, be regarded as a finding that the second allegation of contributory negligence, as well as the first, was established. It is clear that his Honour considered that the plaintiff was negligent in failing to withdraw his arm in time to avoid injury, and, if a plaintiff's negligence contributes to his injury in the sense of being a proximate cause of that injury, it is contributory negligence in the sense in which that term is used in the common law.

It is these findings of contributory negligence that the plaintiff challenges on this appeal. We are of opinion, with respect, that the challenge must succeed. The burden of proving contributory negligence is on the defendant, and we do not think that contributory negligence can be taken to have been established in this case.

In such a case as the present, where there are allegations of negligence and contributory negligence, the first task of judge or jury is to arrive, as nearly as the usually conflicting evidence permits, at the primary facts. When these have been found, it becomes necessary to characterise the conduct

of the plaintiff and the conduct of the defendant from the point of view of the standard - accepted but often difficult of application - of the reasonable man. Should this or that act or omission on the part of the plaintiff or on the part of the defendant be held to have been negligent? In dealing with this question the acts or omissions of one party often cannot be considered in isolation from the acts or omissions of the other. In particular, when negligence on the part of a defendant is established, the acts or omissions of the plaintiff must generally be judged in the light of the acts or omissions of the defendant.

Here the learned judge approached the case from the correct point of view, but did not, we think, attach sufficient importance to the bearing of the defendant Williamson's conduct on the question of contributory negligence. After a careful examination of the evidence he had been satisfied that Williamson was (1) driving with only two small dull lights showing in front, and (2) driving on his wrong side of the road. These things clearly amounted to negligent conduct, and his Honour so held. His findings against Williamson in these respects appear to us to be in all respects soundly based and beyond the possibility of challenge, nor did we understand them to be seriously challenged. But these findings, as we have already indicated, have a most important relation to the question of contributory negligence on the part of the plaintiff. It is in the light of these findings, and not in isolation from them, that the conduct of the plaintiff must be judged. We think that his Honour in considering the question of contributory negligence gave insufficient weight to the findings which he had already made..

We may take first the finding that the plaintiff was not keeping a proper lookout. The plaintiff's evidence as to his awareness of the presence of the truck in front of him was (as was perhaps to be expected) not entirely consistent. He said: "There is a little bit of a dip in the highway at that part.

I observed a truck coming up the hill, the rise. The next thing it was about twenty yards from me and then it hit me." Later he said: "It was right on top of me when I saw it .....I saw the headlights of the truck come right on top of me all in an instant." And finally: "I saw the vehicle twenty yards from me. He was right on top of me when I saw him." Such discrepancies, of course, do not necessarily affect in any degree the credibility of the plaintiff, and his Honour (rightly, we think)regarded him as having first realised the presence of the truck on the road when it was about twenty yards from him, and the basis of his finding of contributory negligence was that he ought to have seen it earlier and in time to avoid it. But the accepted evidence did not, in our opinion, warrant this affirmative finding adverse to the plaintiff on an issue on which the burden of proof was on the defendant, and this for two reasons. In the first place, the very defective lighting of the truck is quite sufficient, in our opinion, to account for the plaintiff's not having seen the truck until it was almost "on top of him". And, in the second place, the plaintiff was ex hypothesi on his correct side of the road, while the truck was at least partly on its wrong side of the road and was most probably well over on its wrong side. In these circumstances it is at least extremely doubtful whether, if the plaintiff had seen the truck two or three seconds before he did, he could have done anything effective to avoid the collision. Having regard to these two considerations, we are of opinion that a finding of contributory negligence on the ground of a failure to keep a proper lookout cannot be sustained.

Nor do we think that the finding of contributory negligence on the second ground can stand. The difficulty which his Honour obviously felt about this ground arises, we think, from the fact that it cannot really be regarded as a separate

ground for a finding of contributory negligence. It is rather a factor in the case which tends to support the view that the plaintiff was not keeping a proper lookout. A realisation of danger would, one would suppose, be followed instinctively and almost instantly by a retraction of the protruding arm. The omission to retract it suggests that the plaintiff was speaking the truth when he said that he did not see the truck until it was twenty yards away or "right on top of him". For practical purposes there is, as we think his Honour realised, no material difference between "twenty yards away" and "right on top of him". If, as we think, a finding of contributory negligence cannot in all the circumstances of this case be based on the plaintiff's not seeing the truck sooner than he did, no independent significance can, in our opinion, be attached to his not retracting his arm.

It is to be remembered that the material events in this case must have happened in an extremely short space of time. In one passage in his judgment, which we have quoted above, his Honour envisages the two vehicles approaching each other at a combined speed of thirty-five miles per hour. The plaintiff was found by him to have been travelling at about fifteen miles per hour, and this is a very reasonable finding, since the plaintiff was nearing the place where he would turn off the road. The passage to which we refer, therefore, attributes to the truck a speed of about twenty miles per hour. The nature of the injury inflicted and the general probabilities of the case strongly suggest to our minds that the truck was most probably travelling at a considerably higher speed than twenty miles per hour. The higher the speed, of course, the more culpable is Williamson's conduct, and the weaker is the ground for an inference of any negligence on the part of the plaintiff. But, in any case, on his Honour's primary findings, the driver of the truck was guilty

of gross negligence in travelling at night on his wrong side of the road with "only two small dull lights" (probably parking lights) showing. The correct view of this case is, in our opinion, that an emergency was suddenly created by this gross negligence and not by any neglect or default on the part of the plaintiff. Then, when once the emergency was created, a collision was inevitable.

We would only add that we think that the learned judge was right in allowing the amendment to the reply which raised what used to be called "the last opportunity rule", but was also right in his view that there was no room in this case for the application of any qualification of the general rule as to contributory negligence.

His Honour assessed the plaintiff's damages at £3920, and this figure was not challenged by the defendants before us.

The appeal should be allowed with costs, the judgment below should be discharged, and in lieu thereof there should be judgment for the plaintiff in the action for £3920 with costs.