(7)

ORIGINAL

IN THE HIGH COURT OF AUSTRALIA

McCARTHY

V.

McCARTHY

REASONS FOR JUDGMENT

(ORAL)

Judgment delivered at SYDNEY

on WEDNESDAY, 16th NOVEMBER 1955

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

C.7163/51

McCARTHY v. McCARTHY

JUDGMENT (ORAL)

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

McCARTHY v. McCARTHY

DIXON C.J.: This is an appeal from a decision of the Full Court of the Supreme Court of New South Wales, refusing a new trial in an action brought for personal injuries.

At the trial at which Brereton J. presided the jury found a verdict for the defendant. A new trial was moved for on a complaint of misdirection.

The circumstances that are relied upon as material may be the product of a typical case, but they are said to involve unusual incidents.

The accident, by reason of which the plaintiff suffered personal injuries, was the result of the purchase, by two brothers, who are the plaintiff and defendant, of a motor cycle. They were not experienced in the use of a motor cycle. Each obtained a permit to use the motor cycle.

On an occasion when, according to the plaintiff, he was in the side car, and his brother, the defendant, was driving the motor cycle, an accident occurred in which the plaintiff sustained injuries of a somewhat serious description.

The plaintiff proved the facts, by his personal evidence, and in the course of his evidence he described how the accident occurred, giving the details of what would amount to some mismanagement by the defendant of the vehicle.

The plaintiff called no further evidence and the defendant then gave evidence.

The defendant, in the course of his examination in chief, confirmed the plaintiff's version of the accident, and in the course of his cross-examination was very easily induced to confess, in effect, material facts amounting to the cause of action.

In the course of his address to the jury, the plaintiff's counsel, unfortunately, referred to the fact that the solicitor for the defendant was the State Crown Solicitor. He

ought not, of course, to have done so, but he made this reference in connection with the statement that there was no ill feeling between the two brothers.

When the Judge came to sum up after he had outlined the nature of the case and given a general direction to the jury to the effect that they were the masters of the facts and that they were not to act on his opinion if they did not agree with it, his Honour referred to this statement of the defendant's counsel and then, proceeding from that reference, made a number of observations, which I shall not read, but which are made the subject of objection by the plaintiff appellant.

The tenor of the statements may be said to manifest a certain degree of incredulity on the part of his Honour as to the reason why there had been so much readiness on the part of the defendant to concur in the plaintiff's version of the cause of action, and to imply that there was behind that readiness a reason which might make the jury somewhat distrustful of the case so that they should at least scrutinize it.

His Honour said that it might have seemed to the jury that the defendant showed no concern whatever at the prospect of the verdict of an award of damages being made against him, that he viewed the prospect not merely with equanimity but with relish.

His Honour referred to the possibility of that being explained by truthful penitence and fraternal disposition, or to the possibility of it being brotherly generosity and magnamimity. And his Honour suggested that perhaps that was a laudable impulse from which the defendant should be protected. I merely refer to those as characteristic of the passage in the summing up that is objected to. The effect of the passage, as a whole, however, is to leave to the jury the question whether they were prepared to accept the case made as a truthful case and as one on which they were satisfied to act. The effect was to leave it to them to consider the plaintiff's case as a question of fact, but subject to observations which would perhaps justify the jury in thinking that his Honour viewed the case with some degree of suspicion.

The issues left to the jury in the case were those of negligence and of volenti non fit injuria. That defence was based on the fact that the plaintiff fully understood that the defendant was not skilled in the management of a motor cycle and nevertheless took the risk of riding with him. There is no attack made upon the direction relating to volenti non fit injuria or relating to the facts upon which that defence could be supported. It is said, however, that the case was a thin one; a view of the evidence in which I cannot concur. There seems to me to be quite a strong case available to the jury on the evidence of volenti non fit.

The learned Judge also referred to the fact that both the plaintiff and the defendant might be thought by the jury to be engaged in managing the motor cycle together. His Honour said that the evidence of the plaintiff and of the defendant was that immediately before the accident occurred the plaintiff gave some advice or instruction to the defendant to the effect that he was going too fast, whereupon the defendant proceeded to change gear, which was what precipitated the accident, because he failed to get into the lower gear. And then his Honour added, "If you feel at the time of the accident, that this was a joint enterprise, that the parties were jointly in control of this cycle, then again the plaintiff would not be entitled to succeed and there would be a verdict for the defendant."

In the circumstances of this case we do not think that these directions warrant a new trial. The question of how the accident happened was one which had to be submitted to the jury. The situation was no doubt very evident to his Honour, and was made more evident to him by the learned counsel's reference to the Crown Solicitor being the solicitor instructing the defendant. It must have appeared to his Honour as a case which required the earnest attention of the jury before they could be certain, on the balance of probabilities, that a case was truly made of liability. That was a matter of which his Honour must judge on his own estimate of what was occurring at the trial. We cannot be in

the position in which his Honour stood to appreciate what was occurring at the trial. It is of course clear that, if the jury were dissatisfied with the evidence of the plaintiff and the defendant and were unable to arrive at the conclusion that there really was an act of negligence on the part of the defendant, they should find for the defendant, no matter what the defendant said about it in the witness box. There was, as I have said, adequate ground for the jury finding for the defendant on the ground of volenti non fit injuria. The direction in which his Honour used the not very happy expression "joint enterprise" is not very satisfactory, but when the whole case is looked at there is, I think, no ground for feeling that the inaccuracy of statement influenced the verdict. It is only logically possible that it did. It was a direction upon a matter of fact and a view of the facts might be taken which would justify it, relating as it did to the particular advice or instruction given by the plaintiff to the defendant at that particular instant.

We are not prepared to order a new trial on the ground that that direction was not as accurate as it might have been, and on the whole case we agree in the judgment of the Supreme Court and think the appeal should be dismissed.

WILLIAMS J.: I agree, and have nothing to add.

FULLAGAR J.: I agree.

KITTO J.: I agree.

TAYLOR J.: I agree.