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IN THE HIGH COURT OF AUSTRALIA.

Sims

v.

Higgins

REASONS FOR JUDGMENT.

Judgment delivered at .....

on 3 August 1954

H. J. Green, Govt. Print., Melb.

C.2774

Negative.

SIMMS v. HIGGINS

ORDER

Appeal dismissed with costs.

SIMMS v. HIGGINS

JUDGMENT (ORAL)

DIXON C.J.
FULLAGAR J.
KITTO J.

SIMMS v. HIGGINS

JUDGMENT (ORAL). DIXON C.J.

This is an appeal from a judgment of the Chief Justice of Queensland given in an action of negligence to recover damages for personal injuries. The judgment was for the defendant. The action was brought in very peculiar circumstances by a man, whom I shall describe as a passenger in a car, against the defendant, who was the driver of the car. The learned Chief Justice considered that the defendant was not guilty of negligence and he was of opinion that the plaintiff was guilty of contributory negligence. Having regard to the fact that the accident occurred after the recent Act came into force, it is possible that his Honour did not mean to put contributory negligence as a defence but that in the circumstances thought a finding should be made.

The circumstances of the accident which have led to the action are, as I have said, peculiar. The plaintiff and the defendant were two young men who were proceeding to Taroom in a 1930 Chevrolet utility truck. They had come from Toowoomba. When they were a considerable distance from Taroom it was discovered that the radiator of the truck was leaking. The plaintiff, who was the passenger, volunteered to feed the radiator with water. They had with them a cream or milk can containing four gallons of water. The plaintiff was a small and apparently agile young man. He took up his position on the left-hand side of the radiator in front of a spare tyre, managed to put the four gallons of water in a secure position, armed himself with a quart pot and proceeded to pour water into the radiator so that the car might go forward. When this operation began they were some 30 miles from Taroom. They renewed the supply of water at two points and managed to proceed for probably about 20 miles in this manner. The plaintiff did not fall off and probably he had

a secure enough position to manage to ride, in a manner that I think can justly be called precarious, in safety over the more bumpy parts of the road. Dusk came and at the last place where they renewed the supply of water it appears to have become almost dark. The plaintiff says that he remembers nothing more until he found himself in hospital. However, they must have proceeded some distance and no doubt it had become quite dark. They were proceeding upon a narrow bitumen carriage way when there appeared a number of horses, something like seven to a dozen, who crossed their path from right to left. The defendant, driving the utility, slackened his speed, which was probably not a very high speed, and let them pass. When they had passed he renewed his speed and was proceeding at twenty miles an hour, or perhaps a little more. Suddenly another horse came down towards them. The defendant saw it and his estimate was that it was twenty-two to twenty-five yards in front of him. It was in the beam of his headlights. He gives more than one account of what he did, but according to his evidence given at the trial he says this:

It was "About 22 or 25 yards - something like that.

> What did you do when you saw him? - I just veered to the middle of the road a bit. I naturally thought he would follow his mates off the road. It is general with a horse like that. Anyway, I kept on going and he kept coming towards me, and instead of veering off the road, when I got right beside the thing the lights must have dazzled him and he came in straight towards the headlights, and just before he got to the car he must have woke up and he went to shoot away, but it was too late. He could not get his hindquarters from in front of the car, and the front of my car caught his hindquarters.
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> It was on the left-hand side? -- Yes, it was on the left-hand side.
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> ..... I may have been going about 20 miles an hour ..... I swerved towards the middle of the road .... I just eased up as far as I can remember now .... I lifted my foot off the accelerator ...." I was going "about 15 miles an hour."

Then he is asked:-

> "From the time you saw the horse to the time of the impact, was it a long time? -- It was only a matter of a few seconds or so."

He said he had been looking ahead while driving. He did apply his brakes:-

> "I suppose it would be about the moment of impact that I applied the brakes, when I seen the horse was not going to do what I thought he was going to do. I applied the brakes then, but it was just too late."

The plaintiff was brushed off the radiator by the horse's hind-quarters and suffered quite serious injuries. He lost consciousness and that accounts for the statement that he remembered nothing until he awoke in the hospital.

The defendant's liability (if any) was of course covered by insurance and, indeed, it appears from the transcript that the writ was served upon the insurance company as required by the regulations under the Motor Vehicles Insurance Act 1936. The defendant at some stage interviewed the plaintiff's solicitors and made a statement. That statement favours the plaintiff's case somewhat more strongly than the passage that I have read. It is a long statement, but it is necessary only to read the part which relates to the time of impact. He says:-

> The horse "was cantering along on my lefthand side of the road. We were then just on the commencement of the bitumen strip. I had gone about a chain when the collision occurred. I thought that this horse would cross over the road to my left and follow the other horses which were then about a chain behind me on my left hand side. I therefore continued on and did not slacken my speed and did not dip my headlights, as I did not consider there was any necessity to do so. I steered my car to about the middle of the road i.e. towards my right so as to give more room for the horse to get across to my left, but as I did that the horse came straight towards the centre of my headlights. He appeared to be dazzled and he cantered straight in towards the front of the car, but when he got to within two or three feet of the front of the radiator he then swerved suddenly to his right to get away from the car. The front of the car ran into his hind quarters and he seemed to drag his hind legs across the mudguard where Sims (the plaintiff) was sitting and in doing so knocked Sims off or pulled him off from where he was sitting.
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> I first saw this horse when I was about a chain away from it. I would have been at least a chain away from it when I first saw it. I would have had ample time to have slackened the speed of the utility and also to have dimmed my lights, but I did not do either of these for the reason above-mentioned that I thought the horse would have gone across the road and I did not think there would be any trouble. Even after I saw the horse cantering towards the car he was on his right hand side of the road and I was on my left side and we were going directly along towards each other. I thought that he would have got off the road as the car got closer to him, and followed the other horses, but instead of that he seemed to be dazzled by the headlights and came straight into my utility ..... As soon as the horse hit the front of my utility, I applied my brakes hard and skidded the wheels and stopped my utility within about 5 yards. In doing that I pulled my vehicle over on to the left hand side of the road, so that when my vehicle came to a stop, the two left wheels of the utility were just off the bitumen."

Situated as the defendant was, with no chance of personal liability, an admission of that sort must be received with a considerable degree of caution, and common sense should lead us to treat his oral evidence given in the witness box as probably having a greater degree of correspondence with the facts, although there is no very great departure between the two accounts. Clearly enough when it was made it was intended to favour the plaintiff. He was not guarding himself against conceding more than the facts demanded as it is supposed a defendant will do when he is himself under a real threat of liability.

The learned Chief Justice took the view that the defendant's course of conduct exhibited no negligence. His Honour gave reasons which analysed the situation and the risks involved in alternative courses of action. It is not necessary to pursue the question of the risks involved in alternative courses of action. They are matters upon which probably the defendant did not reflect. He was guided by his instinctive reactions in the situation of the moment and the question really is whether what he did and failed to do is of a character which exhibited either such carelessness or a want of skill or competence in driving the car as would amount to negligence.

Mr. McCawley in an able argument pressed upon us that we should come to the conclusion that the delay of the defendant in taking some course while the horse was approaching is itself evidence of negligence in the sense in which I have described it, that a reasonable man of reasonable competence, quickness and capacity in handling a car would have taken some course which would have avoided the accident. He should, urged counsel, either have immediately put on his brakes, avoided the horse, put out his headlights or dimmed them, and thus responded to what he ought instinctively to have known was the habit of horses, and not run the risk of delaying so long as he apparently did in his response to the situation. This

argument has a great deal of weight and we have considered it with care. It is, however, a question of degree. It is undeniable that the horse suddenly appeared and that it was unexpected. It is undeniably a case in which, although it may not be described as one of great emergency, the driver had to act suddenly to avoid an unexpected danger. He could not but be embarrassed to a certain extent by the presence of the man on the radiator, although his presence may be a reason for added care, because certainly there was something more there to protect.

We consider that in such a matter of degree we are unable to disagree with the learned Chief Justice, who says that the defendant's action did not show a want of care amounting to negligence and that he acted as he thought proper. Putting it in other terms it amounts at most to an error of judgment on the part of the defendant in not doing the right thing; that is, on the assumption that the right thing was immediately either to extinguish or to dim his headlights. Nothing has been said in the course of argument about the use of the horn, but that may be another thing he might have done in an attempt to frighten the horse. It may be that he might have put his brakes on earlier or more immediately. The fact is that he saw the horse coming, altered his course a little and acted. We think that we are unable to say that the omission to act more decisively or quickly amounted in itself to a want of that skill and care which the situation demanded.

As to contributory negligence, we should not be disposed to think that there was any contributory negligence on the part of the plaintiff. But that is a matter into which we need not enter in the view which we have taken.

For the reasons I have given, we think the appeal must be dismissed.

FULLAGAR J.: I agree.

KITTO J.: I agree.